SEXUAL ORIENTATION ISSUES IN THE JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

VOLUME I

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Chapter I Adoption

Case of Fretté v. France [1]

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

Procedure

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

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

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

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

[1] Judgment Strasbourg 26 February 2002; Application no. 36515/97; final 26/05/2002

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

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

The facts

I. THE CIRCUMSTANCES OF THE CASE

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

10. In a decision of 3 May 1993 the Paris Social Services Department rejected the applicant's application for authorisation to adopt. The reasons given for the decision were that the applicant had "no stable maternal role model" to offer and had "difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child". The decision was taken on the basis of various inquiries leading, among other things, to a social services report of 2 March 1993, which included the following statements:

"... Mr Fretté seems to us to be a sensitive, thoughtful man who shows consideration for others. He discusses his emotional life and his homosexuality with a great deal of honesty and simplicity. He spoke to us of a number of relationships which have had a major impact on his life, particularly one with a male friend who has now died. It should be added that he is now the auxiliary guardian of this friend's child. ...

His humanistic, altruistic cast of mind prompts him to take an interest in the problems of the Third World. He sponsors two Tibetan children, one of whom is a baby.

He is able to talk sensibly and intelligently about the boy over whom he has guardianship. He is not personally responsible for the boy, who is in the care of his grandmother, but he plays a highly active part in his upbringing. His ideas about bringing up children are well thought out and imbued with a spirit of tolerance.

Mr Fretté has been thinking about adopting since 1985. He is aware that his homosexuality may be an obstacle to being granted authorisation to adopt because of the prevailing views of society.

In his opinion, his choice of emotional and sexual lifestyle has no bearing on his desire to bring up a child. His application is a personal undertaking not a militant gesture.

Since 1985 he has met many homosexual men with children.

He even once considered having a child with a female friend but the plan came to nothing because of a lack of maturity on both sides. This friend is nonetheless still very interested in Mr Fretté's plan to adopt and has even promised to act as a female role model for the child.

Mr Fretté's application to adopt a child is motivated by a desire to provide a child with affection and a proper upbringing. In his view the essential thing is to love and care for a child, adoption, for him, being no more than a social and legal procedure.

Mr Fretté has the support of the friends around him. It seems, however, that his family either do not know of his plans or have misgivings about them.

His desire for a child is genuine but he has difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child. For example, it was only when we visited his home that he realised how unsuitable his flat is for a child to live in. As a result he began considering the possibility of moving.

When questioned as to how he regarded his role in society as a single father he said he did not have an answer. He considers himself capable of managing the day-to-day life of a child and thinks that he will in due course find the answers to the questions about his homosexuality and the absence of an adoptive mother that will occur to the child as he or she grows up.

Mr Fretté is perfectly aware of the importance of telling the child about his parentage. He shows understanding towards women who are impelled to abandon their children. He refuses to have any fixed ideas about the characteristics of the child he would like to adopt.

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

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

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

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

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

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

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

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

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

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

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

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

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

In the light of the information in the case file, this question is elevated to a matter of principle. This case does not turn on its own facts because the documents in the case file leave me in no doubt that in many respects Mr F. has a genuine aptitude for bringing up children. The only thing that prompted the authorities to refuse authorisation was the fact that Mr F. was a

homosexual and therefore that he did not provide sufficient guarantees that he would offer a child a suitable home from a psychological, child-rearing and family point of view. However, nothing in the case file suggests in any way that Mr F. leads a dissolute life and neither is there any reference in it to any specific circumstance that might pose a threat to the child's interests. Accepting the lawfulness of the refusal of authorisation in the instant case would implicitly but necessarily doom to failure all applications for authorisation to adopt by homosexuals ...

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

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

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

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

Thirdly, an examination of the case-law of the ordinary courts with regard to granting custody of the children of divorced couples and the exercise of parental authority shows that the ordinary courts take a broadly pragmatic approach in this area and attempt to avoid the pitfalls of an overly categorical approach. Thus, they do not hesitate, where the specific circumstances of the case so require, to accord visiting rights to homosexual parents or even to grant them custody or the right to exercise parental authority. For example, in a case in which it was established that there were upheavals in the mother's household, that there was no evidence of any physical danger to the child in the father's household, that the father lived in a stable relationship with another man and that the child was thriving in his father's home, custody was granted to the father (Pau Court of Appeal, 25 April 1991, no. 91-40734).

Conversely, another court found that a father who had 'immoral homosexual relations incompatible with the exercise of parental authority' could not exercise that authority (Rennes Court of Appeal, 27 September 1989, no. 89-48660). Similarly, in a judgment in which it was found that, because of the father's homosexual practices, it would be particularly dangerous for the moral and physical well-being of his children to spend their holidays with him, it was held that there were serious grounds to justify refusing the father that right (First Civil Division of the Court of Cassation (Cass. civ. I), 13 January 1988, no. 86-17784). More recently the Court of Cassation granted a homosexual donor parental authority over a child born by artificial insemination to a mother who was herself involved in a homosexual relationship (Cass. civ. I, 9 March 1994, Mme L. c. M. L.; D 1995.197 note E. Monteiro; D 1995 summary 131, observations by D. Bourgault-Coudeyville). The courts do not therefore presume that because someone is a homosexual, he or she is disqualified from exercising parental rights. The discussion focuses mainly on the child's interests and the dangers that such circumstances may pose to the child's mental health.

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

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

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

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

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

fulfilling family environment because they have been deprived of their original family and have already suffered in the past. This makes it all the more important that they do not encounter any further problems within their adopted family. ...

There is no agreement on the answer to that question. If there is any consensus it lies instead in the growing awareness that the rights of the child set the limits of the right to have children and that the child's interests cannot always be reconciled with current developments. This being so, I believe that when dealing with such a sensitive question, whose implications are more ethical and sociological than legal, it is up to Parliament to take a stance on what amounts to a choice for society. The courts, for their part, should not be anticipating shifts in public opinion, but responding to them.

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

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

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

My final argument is that if you have any remaining scruples about the fact that in considering the legality of a refusal of authorisation you are ruling on a matter which it is

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

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

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

"In a decision of 3 May 1993, upheld by a further decision of 15 October 1993 in response to an application for reconsideration, the chairman of the Paris Council ... rejected Mr Fretté's application for authorisation to adopt a child on the ground that although the applicant's choice of lifestyle was to be respected, the type of home that he was likely to offer a child could pose substantial risks to the child's development. From the information in the case file, particularly the evidence gathered when Mr Fretté's application was being considered, it emerges that Mr Fretté, regard being had to his lifestyle and despite his undoubted personal qualities and aptitude for bringing up children, did not provide the requisite safeguards – from a child-rearing, psychological and family perspective – for adopting a child. The Paris Administrative Court was thus wrong, when setting aside the contested decisions, to rely on the argument that, in refusing the authorisation sought by Mr Fretté on the aforementioned ground, the chairman of the Paris Council had applied these provisions incorrectly.

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

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Regulations and information relating to the adoption procedure

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

Article 343

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

Article 343-1

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

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

Article 63

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

Article 100-3

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

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

Article 1

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

Article 4

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

Article 9

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

Article 11

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

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

B. Notification of hearings before the Conseil d'Etat

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

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

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

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

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

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

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

The law

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

26. The applicant alleged that the rejection of his application for authorisation to adopt had implicitly been based on his sexual orientation alone. He argued that that decision, taken in a

legal system which authorised the adoption of a child by a single, unmarried adoptive parent, effectively ruled out any possibility of adoption for a category of persons defined according to their sexual orientation, namely homosexuals and bisexuals, without taking any account of their individual personal qualities or aptitude for bringing up children.

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

The relevant parts of the Articles in question provide:

Article 14

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

Article 8

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

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

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

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

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

Pointing out that sexual orientation is "a most intimate part of an individual's private life" (see Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, ECHR 1999-VI), the applicant maintained that practically any difference in treatment based on sexual orientation amounted to interference in a homosexual's private life because it required him to choose between denying his sexual orientation or being penalised, unlike anybody else. The fact that the decisions taken by the French authorities with respect to the applicant's application for authorisation meant that anyone who revealed their homosexuality relinquished all possibility of adoption was particularly serious. An individual's private life was hardly respected if he was obliged to forgo a possibility available to any unmarried heterosexual in France, namely that of becoming a parent, if he wished to remain true to his sexual orientation. All the circumstances of which the applicant complained therefore fell within the ambit of Article 8

(see, mutatis mutandis, Thlimmenos v. Greece [GC], no. 34369/97, ECHR 2000 IV). The applicant added, in the alternative, that adoption was a prospective family life which could fall within the ambit of Article 8 of the Convention for the purposes of Article 14.

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

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

As to the reasons for refusing authorisation, the Government noted that neither the decision of 3 May 1993, which referred only to the absence of a stable maternal role model and the applicant's difficulties in assessing the day-to-day consequences of an adoption, nor that of 15 October 1993, which alluded only to his "choice of lifestyle", contained the slightest indication that they were taken solely on the basis of his sexual orientation. The same was true of the Administrative Court's judgment and the Conseil d'Etat's ruling, even though they differed in terms of the solution adopted. While there was no doubt that the expression "choice of lifestyle" did include sexual orientation, it did not refer to that aspect alone but also covered other factors that tended to indicate that the applicant was not equipped to offer a child a suitable home from a psychological, child-rearing and family perspective.

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

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

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

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

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

“notamment”) (see Engel and Others v. the Netherlands, judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72).

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

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

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

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

35. According to the applicant, the difference in treatment in the present case could not be based on an objective and reasonable justification. Pointing out that where sexual orientation was at issue, there was a need for particularly convincing and weighty reasons (see Lustig-Prean and Beckett v. the United Kingdom, nos. 31417/96 and 32377/96, 27 September 1999, and Smith and Grady and Salgueiro da Silva Mouta, cited above), he submitted that nothing could reasonably justify his being totally barred from adopting. Although the Government referred to the child's interests, what was at stake in the instant case was not a specific child's

interests but those of all the children in the world who might be in need of adoptive parents. The irrebuttable presumption that no homosexual provided sufficient guarantees to offer a suitable home to an adopted child which was the logical corollary of the reference to such an interest reflected a social prejudice and the irrational fear that children brought up by homosexuals would be "at greater risk of becoming homosexuals themselves or developing psychological problems" and the belief that they would also suffer at all events from other people's homophobic prejudices towards their adoptive parent. Through the assumption that homosexuals were less loving and attentive parents, social prejudice denied the common humanity of heterosexuals and homosexuals – although the latter had the same feelings and aptitudes. Numerous scientific studies had demonstrated the irrationality of that assumption and none had provided any evidence of the supposed "uncertainties that would affect the child's development" if he was adopted by a homosexual – uncertainties on which the Government's argument was based.

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

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

The applicant further noted that there was no consensus in democratic societies on the need for single homosexuals to be barred totally from adopting. In Canada all the federal entities allowed single people to adopt and none of them prohibited homosexuals from doing so. Only

one State in the United States had legislation that expressly prohibited persons who would otherwise be eligible to adopt from adopting a child if they were homosexuals, namely the State of Florida, which also prohibited certain forms of sexual behaviour in private between consenting adults, whether different sexes or the same sex. A large majority of the forty-three Council of Europe member States allowed adoption by unmarried individuals, if only under exceptional circumstances, and did not totally rule out in either their legislation or their case-law the possibility for homosexuals to adopt. The applicant had found as a result of his research that there were only two countries, France and Sweden, in which case-law had established such a prohibition in respect of adoption by single persons. He had also found that in January 2001 a Swedish government committee had recommended that legislation should be introduced to overturn the prohibition on adoption by homosexuals which had been instituted by a judgment of the Supreme Administrative Court of 1993.

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

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

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

The criteria applied for that purpose had been both objective and reasonable. The difference in treatment stemmed from the doubts that prevailed, in view of what was currently known about the subject, about the development of a child brought up by a homosexual and deprived of a dual maternal and paternal role model. There was no consensus about the potential impact of being adopted by an adult who openly affirmed his homosexuality on a child's psychological development and, more generally, his or her future life, and the question divided both experts on childhood and democratic societies as a whole.

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

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

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

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

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

40. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, among other authorities, Petrovic, cited above, pp. 587-88, § 38, and Rasmussen v. Denmark, judgment of 28 November 1984, Series A no. 87, p. 15, § 40).

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

2000-VII). This margin of appreciation should not, however, be interpreted as granting the State arbitrary power, and the authorities' decision remains subject to review by the Court for conformity with the requirements of Article 14 of the Convention.

42. As the Government submitted, at issue here are the competing interests of the applicant and children who are eligible for adoption. The mere fact that no specific child is identified when the application for authorisation is made does not necessarily imply that there is no competing interest. Adoption means "providing a child with a family, not a family with a child", and the State must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect. The Court points out in that connection that it has already found that where a family tie is established between a parent and a child, "particular importance must be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent" (see E.P. v. Italy, no. 31127/96, § 62, 16 November 1999, and Johansen v. Norway, judgment of 7 August 1996, Reports 1996-III, p. 1008, § 78). It must be observed that the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date. In addition, there are wide differences in national and international opinion, not to mention the fact that there are not enough children to adopt to satisfy demand. This being so, the national authorities, and particularly the Conseil d'Etat, which based its decision, inter alia, on the Government Commissioner's measured and detailed submissions, were legitimately and reasonably entitled to consider that the right to be able to adopt on which the applicant relied under Article 343-1 of the Civil Code was limited by the interests of children eligible for adoption, notwithstanding the applicant's legitimate aspirations and without calling his personal choices into question. If account is taken of the broad margin of appreciation to be left to States in this area and the need to protect children's best interests to achieve the desired balance, the refusal to authorise adoption did not infringe the principle of proportionality.

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

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

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

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

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

46. The Government pointed out that the rules governing contentious proceedings before the Conseil d'Etat provided that a list of cases for hearing had to be displayed at the registry in a place that was accessible to the public. Those rules stipulated, however, that the parties should be notified automatically, four days at least before the hearing, only if they had appointed a lawyer. All parties were entitled to appoint a lawyer up to the date of the hearing, applying for legal aid where necessary. As for parties who had not appointed a lawyer, they had to accept a duty of diligence, that is to ask to be notified in writing of the date of the hearing. In the instant case, the Government submitted that the applicant could not rely on the complaint that he had not been notified because nothing appeared to indicate that he had carried out the formality of asking the registry of the Conseil d'Etat to inform him of the date of the hearing.

The Government also pointed out that in some fields of the law, in an effort to be more liberal and provide broad access to the courts, the Conseil d'Etat's rules of procedure waived the

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

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

48. The Court further observes that in Kress (cited above, §§ 72, 73 and 76) it noted that in most cases the Government Commissioner's submissions were not committed to writing, that the Government Commissioner made his submissions for the first time orally at the public hearing of the case, and that the parties to the proceedings, the judges and the public all learned of their content and the recommendation made in them on that occasion. Nonetheless, lawyers who so wished could ask the Government Commissioner, before the hearing, to indicate the general tenor of his submissions. In addition, the parties were entitled to reply to the Government Commissioner's submissions by means of a memorandum for the deliberations. On the basis of the foregoing circumstances, the Court considered, in Kress, in which the applicant had been represented by a lawyer in the proceedings before the Conseil d'Etat, that the procedure described above had afforded the litigants sufficient safeguards and that no problem had arisen from the point of view of the right to a fair trial as regards compliance with the principle that proceedings should be adversarial.

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

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

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

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

A. Damage

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

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

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

B. Costs and expenses

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

(EUR 325.02) for the travel and subsistence expenses incurred in order to attend the hearing in Strasbourg.

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

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

C. Default interest

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

The Court's decision

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

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

3. Holds unanimously

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

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

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

Case of E.B. v. France [2]

Procedure

1. The case originated in an application (no. 43546/02) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a French national, Ms E.B. ("the applicant"), on 2 December 2002. The President of the Grand Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant alleged that at every stage of her application for authorisation to adopt she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules). On19 September 2006 a Chamber of that Section, composed of the following judges: Ireneu Cabral Barreto, President, Jean-Paul Costa, Rıza Türmen, Mindia Ugrekhelidze, Antonella Mularoni, Elisabet Fura-Sandström, Dragoljub Popović, judges, and Sally Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72). Prior to relinquishment the Chamber had received written comments submitted by Prof. R. Wintemute on behalf of four NGOs – Fédération internationale des Ligues des Droits de l'Homme (FIDH); European Region of the International Lesbian and Gay Association (ILGA–Europe); British Association for Adoption and Fostering (BAAF); and Association des Parents et futurs parents Gays et Lesbiens (APGL) – as third-party interveners (Rule 44 § 2). Those observations were included in the case file transmitted to the Grand Chamber.

4. The composition of the Grand Chamber was determined in accordance with the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

5. The applicant, but not the Government, filed written observations on the merits.

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 March 2007 (Rule 59 § 3).

[2] Application no. 43546/02 Judgment Strasbourg 22 January 2008

The facts

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1961 and lives in Lons-le-Saunier.

8. She has been a nursery school teacher since 1985 and, since 1990, has been in a stable relationship with a woman, Ms R., who is a psychologist.

9. On 26 February 1998 the applicant made an application to the Jura Social Services Department for authorisation to adopt a child. She wanted to investigate the possibility of international adoption, in particular in Asia, South America and Madagascar. She mentioned her sexual orientation and her relationship with her partner, Ms R.

10. In a report dated 11 August 1998 the socio-educational assistant and paediatric nurse noted the following points among others:

"Ms B. and Ms R. do not regard themselves as a couple, and Ms R., although concerned by her partner's application to adopt a child, does not feel committed by it.

Ms B. considers that she will have to play the role of mother and father, and her partner does not lay claim to any right vis-à-vis the child but will be at hand if necessary.

Ms B. is seeking to adopt following her decision not to have a child herself.

She would prefer to explain to a child that he or she has had a father and mother and that what she wants is the child's happiness than to tell the child that she does not want to live with a man.

Ms B. thinks of a father as a stable, reassuring and reliable figure. She proposes to provide a future adopted child with this father figure in the persons of her own father and her brother-in-law. But she also says that the child will be able to choose a surrogate father in his or her environment (a friend's relatives, a teacher, or a male friend ...).

CONCLUSION

"On account of her personality and her occupation, Ms B. is a good listener, is broad-minded and cultured, and is emotionally receptive. We also appreciated her clear-sighted approach to analysing problems and her child-raising and emotional capacities.

However, regard being had to her current lifestyle: unmarried and cohabiting with a female partner, we have not been able to assess her ability to provide a child with a family image revolving around a parental couple such as to afford safeguards for that child's stable and well-adjusted development.

Opinion reserved regarding authorisation to adopt a child."

11. On 28 August 1998, in her report on the interviews she had had with the applicant, the psychologist examining her application recommended in the following terms that authorisation be refused:

Ms [B.] has many personal qualities. She is enthusiastic and warm-hearted and comes across as very protective of others.

Her ideas about child-rearing appear very positive. Several question marks remain, however, regarding a number of factors pertaining to her background, the context in which the child will be cared for and her desire for a child.

Is she not seeking to avoid the "violence" of giving birth and genetic anxiety regarding a biological child?

Idealisation of a child and under-estimation of the difficulties inherent in providing one with a home: is she not fantasising about being able to fully mend a child's past?

How certain can we be that the child will find a stable and reliable paternal referent?

The possibilities of identification with a paternal role model are somewhat unclear. Let us not forget that children forge their identity with an image of both parents. Children need adults who will assume their parental function: if the parent is alone, what effects will that have on the child's development?

We do not wish to diminish Ms [B.]'s confidence in herself in any way, still less insinuate that she would be harmful to a child; what we are saying is that all the studies on parenthood show that a child needs both its parents.

Moreover, when asked whether she would have wanted to be brought up by only one of her parents, Ms B. answered no.

A number of grey areas remain, relating to the illusion of having a direct perception of her desire for a child: would it not be wiser to defer this request pending a more thorough analysis of the various – complex – aspects of the situation?...”

12. On 21 September 1998 a technical officer from the children's welfare service recommended that authorisation be refused, observing that the applicant had not given enough thought to the question of a paternal and male role model, and assumed that she could easily take on the role of father and mother herself, while mentioning a possible role for her father and/or brother-in-law, who lived a long way away, however, meaning that meetings with the child would be difficult. The officer also wondered about the presence of Ms R. in the applicant's life, noting that they refused to regard themselves as a couple and that Ms R. had not at any time been involved in the plan to adopt. The reasoning of the opinion ended as follows:

“I find myself faced with a lot of uncertainties about important matters concerning the psychological development of a child who has already experienced abandonment and a complete change of culture and language...”.

13. On 12 October 1998 the psychologist from the children's welfare service, who was a member of the adoption board, recommended that authorisation be refused on the ground that placing a child with the applicant would expose the child to a certain number of risks relating to the construction of his or her personality. He referred among other things to the fact that the applicant lived with a girlfriend but did not consider herself to be in a couple, which gave rise to an unclear or even an unspoken situation involving ambiguity and a risk that the child would have only a maternal role model. The psychologist went on to make the following comments:-

It is as though the reasons for wanting a child derived from a complicated personal background that has not been resolved with regard to the role as child-parent that [the applicant] appears to have had to play (vis-à-vis one of her sisters, protection of her parents), and were based on emotional difficulties. Has this given rise to a feeling of worthlessness or uselessness that she is trying to overcome by becoming a mother?

Unusual attitude towards men in that men are rejected.

In the extreme, how can rejection of the male figure not amount to rejection of the child's own image? (A child eligible for adoption has a biological father whose symbolic existence must be preserved, but will this be within [the applicant's] capabilities?) ...”

14. On 28 October 1998 the Adoption Board's representative from the Family Council for the association of children currently or formerly in State care recommended refusing authorisation to adopt in the following terms:-

“...From my personal experience of life with a foster family I am now, with the benefit of hindsight, in a position to assess the importance of a mixed couple (man and woman) in providing a child with a home.

The role of the “adoptive mother” and the “adoptive father” in the child's day-to-day upbringing are complementary, but different.

It is a balance that will be shaken by the child to a degree that may sometimes vary in intensity according to how he or she experiences the realisation and acceptance of the truth about his or her origins and history.

I therefore think it necessary, in the interests of the child, for there to be a solid balance between an “adoptive mother” and an “adoptive father” where adoption is being envisaged. ...”

15. On 4 November 1998 the Board's representative from the Family Council, present on behalf of the union of family associations for the département (UDAF), referring to the Convention on the Rights of the Child of 20 November 1989, recommended that authorisation be refused on the ground of the lack of a paternal referent and added:

“ ... It appears impossible to build a family and bring up a child without the full support of this partner [R.] for the plan. The psychologists' and welfare reports show her clear lack of interest in Ms [B.]'s plan ...

In the further alternative, the material conditions for providing a child with a suitable home are not met. It will be necessary to move house, solve the issue of how to divide expenses between both partners, whose plans differ at least in this respect.”

16. On 24 November 1998 the head of the children's welfare service also recommended that authorisation be refused, noting expressly that

“Ms [B.] lives with a female partner who does not appear to be a party to the plan. The role this partner would play in the adopted child's life is not clearly defined.

There does not appear to be room for a male referent who would actually be present in the child's life.

In these circumstances, there is a risk that the child would not find within this household the various family markers necessary to the development of his or her personality and well-being.”

17. In a letter of 26 November 1998 the decision of the president of the council for the département refusing authorisation to adopt was served on the applicant. The following reasons, among others, were given:

“... in examining any application for authorisation to adopt I have to consider the child's interests alone and ensure that all the relevant safeguards are in place.

Your plan to adopt reveals the lack of a paternal role model or referent capable of fostering the well-adjusted development of an adopted child.

Moreover, the place that your partner would occupy in the child's life is not sufficiently clear: although she does not appear to oppose your plan, neither does she seem to be involved, which would make it difficult for the child to find its bearings.

Accordingly, all the foregoing factors do not appear to ensure that an adopted child will have a sufficiently structured family framework in which to flourish. ...”

18. On 20 January 1999 the applicant asked the president of the council for the département to reconsider the decision refusing her authorisation to adopt.

19. The children's welfare service asked a clinical psychologist to prepare a psychological assessment. In her report of 7 March 1999, drawn up after an interview with the applicant, the psychologist concluded that “Ms B. ha[d] plenty to offer in providing a home for a child (patience-values-creativity-time)”, but considered that adoption was premature having regard to a number of problematic points (confusion between a non-directive and laissez-faire attitude, and ignorance of the effects of the introduction of a third person into the home set-up).

20. On 17 March 1999 the president of the council for the département of the Jura confirmed the refusal to grant the request for authorisation.

21. On 13 May 1999 the applicant applied to the Besançon Administrative Court seeking to have the administrative decisions of 26 November 1998 and 17 March 1999 set aside. She also contested the manner in which the screening process in respect of her request for authorisation had been conducted. She pointed out that many people involved in the process had not met her, including the psychologist from the adoption board.

22. In a judgment of 24 February 2000 the Administrative Court set aside the decisions of 26 November 1998 and 19 March 1999, ruling as follows:

"... the president of the council for the département of the Jura based his decision both on "the lack of a paternal role model or referent capable of fostering the well-adjusted development of an adopted child" and on "the place [her] partner would occupy in the child's life". The reasons cited are not in themselves capable of justifying a refusal to grant authorisation to adopt. The documents in the case file show that Ms B., who has undisputed personal qualities and an aptitude for bringing up children, and who is a nursery school teacher by profession and well integrated into her social environment, does offer sufficient guarantees – from a family, child-rearing and psychological perspective – that she would provide an adopted child with a suitable home. ... Ms B. is justified, in the circumstances of this case, in seeking to have the decisions refusing her authorisation set aside ..."

23. The département of the Jura appealed. The Nancy Administrative Court of Appeal, in a judgment of 21 December 2000, set aside the lower court's judgment. It found, first, that "B. maintain[ed] that she ha[d] not been sent a personality test, but [did] not allege that she [had] asked for the document and that her request [had been] refused" and that the 4th paragraph of Article 63 of the Family and Social Welfare Code "[did] not have the effect of precluding a report from being drawn up on the basis of a summary of the main points of other documents. Hence, the fact that a psychologist [had drawn] up a report just on the basis of information obtained by other people working on the case and without hearing submissions from the applicant [did] not invalidate the screening process carried out in respect of Ms B.'s application for authorisation to adopt ...".

24. The court went on to find that

"... the reasons for the decisions of 26 November 1998 and 17 March 1999, which were taken following an application for reconsideration of the decision of the president of the council for the département of the Jura rejecting the application for authorisation to adopt submitted by Ms B., are the absence of "identificational markers" due to the lack of a paternal role model or referent and the ambivalence of the commitment of each member of the household to the adoptive child. It can be seen from the documents in the file, and particularly the evidence gathered during the examination of Ms B.'s application, that having regard to the latter's lifestyle and despite her undoubted personal qualities and aptitude for bringing up children, she did not provide the requisite safeguards – from a family, child-rearing and psychological perspective – for adopting a child...;

... contrary to Ms B.'s contentions, the president of the council for the département did not refuse her authorisation on the basis of a position of principle regarding her choice of lifestyle. Accordingly, and in any event, the applicant is not justified in alleging a breach ... of the requirements of Articles 8 and 14 of the Convention...".

25. The applicant appealed on points of law. On 5 June 2002 the Conseil d'Etat dismissed her appeal in a judgment giving the following reasons:

"... Regarding the grounds for refusing Ms B. authorisation:

...

Firstly, the fact that a request for authorisation to adopt a child is submitted by a single person, as is permitted by Article 343-1 of the Civil Code, does not prevent the administrative authority from ascertaining, in terms of child-rearing and psychological factors that foster the development of the child's personality, whether the prospective adoptive parent can offer – in her circle of family and friends – a paternal "role model or referent" where the application is submitted by a woman ...; nor, where a single person seeking to adopt is in a stable relationship with another person, who will inevitably be required to contribute to providing the child with a suitable home for the purposes of the above-mentioned provisions, does this fact prevent the authority from determining – even if the relationship in question is not a legally binding one – whether the conduct or personality of the third person, considered on the basis of objective considerations, is conducive to providing a suitable home. Accordingly, the Administrative Court of Appeal did not err in law in considering that the two grounds on

which the application by Ms [B.] for authorisation as a single person was refused – namely, the "absence of identificational markers due to the lack of a paternal role model or referent" and "the ambivalence of the commitment of each member of the household to the adoptive child" – were capable of justifying, under the above-mentioned provisions of the decree of 1 September 1998, the refusal to grant authorisation;

Secondly, with regard to Ms [B.]'s assertion that, in referring to her "lifestyle" to justify the refusal to grant her authorisation to adopt, the Administrative Court of Appeal had implicitly referred to her sexual orientation, it can be seen from the documents submitted to the tribunals of fact that Ms [B.] was, at the time of the examination of her application, in a stable homosexual relationship. As that relationship had to be taken into consideration in the needs and interests of an adopted child, the court neither based its decision on a position of principle in view of the applicant's sexual orientation nor breached the combined requirements of Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; nor did it breach the provisions of Article L. 225-2 of the Criminal Code prohibiting sexual discrimination;

Thirdly, in considering that Ms [B.], "having regard to her lifestyle and despite her undoubted personal qualities and aptitude for bringing up children, did not provide the requisite safeguards – from a family, child-rearing and psychological perspective – for adopting a child", the Administrative Court of Appeal, which did not disregard the elements favourable to the applicant in the file submitted to it, did not distort the contents of the file;

It follows from the foregoing that Ms [B.] is not justified in seeking to have set aside the above-mentioned judgment, which contains adequate reasons ...".

II. RELEVANT LAW AND PRACTICE

A. Domestic law

1. The Civil Code

26. The relevant provisions at the material time read as follows:

Article 343

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

Article 343-1

"Adoption may also be applied for by any person over twenty-eight years of age. ..."

2. Family and Social Welfare Code

27. The relevant provisions at the material time read as follows:

Article 63

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

Authorisation shall be granted for five years, within nine months of the date of the application, by the president of the council for the relevant département after obtaining the opinion of a[n] [adoption] board. ..."

Article 100-3

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

3. Decree no. 98-771 of 1 September 1998 establishing the arrangements for appraising applications for authorisation to adopt a child in State care

28. The relevant provisions of the decree read as follows:

Article 1

"Any person wishing to obtain the authorisation contemplated in the first paragraph of Article 63 and Article 100-3 of the Family and Social Welfare Code must submit an application to that end to the president of the council for the département in which he or she resides. ..."

Article 4

“Before issuing authorisation, the president of the council for the relevant département must satisfy himself that the conditions in which the applicant is proposing to provide a child with a home meet the needs and interests of an adopted child from a family, child-rearing and psychological perspective.

To that end, he shall order inquiries into the applicant's circumstances ...”

Article 5

“The decision shall be taken by the president of the council for the relevant département after consulting the adoption board ...”

B. International Conventions

1. Draft European Convention on the Adoption of Children

29. The relevant provisions of this draft Convention, currently being examined by the Committee of Ministers of the Council of Europe, provide inter alia:

Article 7 – Conditions for adoption

“1. The law shall permit a child to be adopted:

a. by two persons of different sex

i. who are married to each other, or

ii. where such an institution exists, have entered into a registered partnership together;

b. by one person.

2. States are free to extend the scope of this convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this convention to different-sex couples and same-sex couples who are living together in a stable relationship.”

2. International Convention on the Rights of the Child

30. The relevant provisions of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 and which came into force on 2 September 1990 read as follows:

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

Article 4

"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."

Article 5

"States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

Article 20

“1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. 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.”

Article 21

“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. ...”

3. Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of International Adoption

31. The relevant provisions of the Hague Convention of 29 May 1993 provide:

Article 5

“An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State:

a) have determined that the prospective adoptive parents are eligible and suited to adopt;

b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and

c) have determined that the child is or will be authorized to enter and reside permanently in that State.”

Article 15

“1. If the Central Authority of the receiving State is satisfied that the applicants are eligible and suited to adopt, it shall prepare a report including information about their identity, eligibility and suitability to adopt, background, family and medical history, social environment, reasons for adoption, ability to undertake an intercountry adoption, as well as the characteristics of the children for whom they would be qualified to care.

2. It shall transmit the report to the Central Authority of the State of origin.”

The law

32. The applicant alleged that she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life. She relied on Article 14 of the Convention taken in conjunction with Article 8, which provide:

Article 8

“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

“The enjoyment of the rights and freedoms set forth in [the] 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.”

I. ADMISSIBILITY

A. Submissions of the parties

1. The applicant

33. The applicant stated that adoption by homosexuals fell into three quite distinct categories: first, it might be a single person seeking to adopt, in a member State where adoptions by single persons were permitted (even if only in exceptional cases), in which case any partner the individual might have acquired no parental rights as a result of the adoption (individual adoption); second, one member of a same-sex couple might seek to adopt the child of the other partner, so that both partners had parental rights vis-à-vis the child (second-parent adoption); and lastly, both members of a same-sex couple might seek to jointly adopt a child with no prior connection with either partner, so that both partners simultaneously acquired parental rights vis-à-vis the child (joint adoption). The applicant specified that she had applied for individual adoption, which was the simpler legal option.

34. She emphasised the importance of obtaining authorisation, which, in practice, was a precondition to adopting a child in France or abroad.

35. The applicant did not claim a right to adopt, which – irrespective of the sexual orientation of the prospective adoptive parent – did not exist. Nevertheless, she submitted that Article 14 of the Convention, taken in conjunction with Article 8, was applicable to the present case. Firstly, the opportunity or chance of applying for authorisation to adopt fell within the scope of Article 8 both with regard to "private life", since it concerned the creation of a new relationship with another individual, and "family life", since it was an attempt to create a family life with the child being adopted. Secondly, a person's sexual orientation, which was an aspect of their private life, accordingly fell within the scope of Article 8.

2. The Government

36. The Government contended that the application was inadmissible, since the complaint fell outside the scope of Article 8 of the Convention and, consequently, Article 14. In any event, unlike in Fretté (Fretté v. France, no. 36515/97, § 32, ECHR 2002-I), the refusal to grant the applicant authorisation had not been based, explicitly or implicitly, on the applicant's sexual orientation and could not therefore amount to direct or indirect discrimination based on her homosexuality.

37. The reason for refusing her authorisation had been dictated by the child's interests alone and had been based on two grounds: lack of a paternal referent and the ambivalence of the applicant's partner's commitment to her adoption plans.

38. With regard to the ground relating to the lack of a paternal referent, the Government pointed out that many professionals considered that a model of sexual difference was an important factor in a child's identity and that it was perfectly understandable that the social services of the département should take into consideration the lack of markers enabling a child to construct its identity with reference to a father figure. The Government cited decisions of the domestic courts in support of their submission that any other heterosexual applicant whose immediate circle of family and friends did not include a member of the opposite sex would have had their application refused on the same ground.

39. With regard to the second ground, the Government submitted at the outset that the lack of commitment on the part of the applicant's partner was an established fact. They observed that the applicant continued to deny the relevance of that fact, whereas it was legitimate to have regard to the conduct of a prospective adoptive parent's immediate circle of family and friends where there were plans to bring a child into the home. Irrespective of the lack of legal

consequences for the partner, the arrival of a child would change the balance of the receiving couple and the family unit, and an adopted child's previous history made it all the more important to assess the solidity of a couple's approach to any plan to adopt. Accordingly, apart from the fact that R. would necessarily be involved in the child's day-to-day life, her lack of involvement could be seen as a source of insecurity for the child with the risk that the child would find him or herself in competition with the applicant's partner for the applicant's time and affection. In the Government's submission, that ground could not be said to be related to the applicant's sexual orientation, as had been borne out by the decisions of the domestic courts.

40. In the Government's view, the circumstances of the present case were therefore very different from those in Fretté (cited above) and it should be stressed that the French administrative and judicial authorities had given paramount consideration to what lay in the best interests of the child. Those best interests were central to many international instruments binding on France. There was no right to a child or right to authorisation to adopt one. Adoption was a measure taken for the child's protection and was designed to provide him or her with a family. The sole purpose of the authorisation procedure was to identify from among the many candidates the person who could provide a child with the most suitable home in every respect. Accordingly, the desire for a child must not prevail over the child's interests.

B. The Court's assessment

41. The Court, noting that the applicant based her application on Article 14 of the Convention, taken in conjunction with Article 8, reiterates at the outset that the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt (see Fretté, cited above, § 32). Neither party contests this. The right to respect for “family life” does not safeguard the mere desire to found a family; it presupposes the existence of a family (see Marckx v. Belgium, judgment of 13 June 1979, Series A no. 31, § 31), or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (see Nylund v. Finland (dec.), no. 27110/95, ECHR 1999 VI), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (see Abdulaziz, Cabales and Balkandali v. the United Kingdom, judgment of 28 May 1985, Series A no. 94, § 62), or the relationship that arises from a lawful and genuine adoption (see Pini and Others v. Romania, nos. 78028/01 and 78030/01, § 148 , ECHR 2004 V).

42. Nor is a right to adopt provided for by domestic law or by other international instruments, such as the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, or the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of International Adoption (see paragraphs 30-31 above).

43. The Court has, however, previously held that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to establish and develop relationships with other human beings (see Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251 B, p. 33, § 29), the right to "personal development" (see Bensaid v. the United Kingdom, no. 44599/98, § 47, ECHR 2001 I) or the right to self-determination as such (see Pretty v. the United Kingdom, no. 2346/02, § 61, ECHR 2002 III). It encompasses elements such as names (see Burghartz v. Switzerland, judgment of 22 February 1994, Series A no. 280 B, p. 28, § 24), gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 (see, for example, Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and Laskey, Jaggard and Brown v. the United Kingdom, judgment of 19 February 1997, Reports of Judgments and Decisions 1997-I, p. 131, § 36), and the right to respect for both the decisions to have and not to have a child (see Evans v. the United Kingdom [GC], no. 6339/05, § 71, ECHR 2007 ...).

44. Admittedly, in the instant case the proceedings in question do not concern the adoption of a child as such, but an application for authorisation to adopt one subsequently. The case therefore raises the issue of the procedure for obtaining authorisation to adopt rather than adoption itself. However, the parties do not contest that in practice authorisation is a precondition for adopting a child.

45. It should also be noted that the applicant claimed to have been discriminated against on the ground of her avowed homosexuality, resulting in a violation of the provisions of Article 14 of the Convention taken in conjunction with Article 8.

46. The Court is not therefore called upon to rule whether the right to adopt, having regard, inter alia, to developments in the legislation in Europe and the fact that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, in particular, Johnston and Others v. Ireland, judgment of 18 December 1986, Series A no. 112,

pp. 24-25, § 53), should or should not fall within the ambit of Article 8 of the Convention taken alone.

47. With regard to Article 14, which was relied on in the present case, the Court reiterates that it only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, Sahin v. Germany [GC], no. 30943/96, § 85, ECHR 2003 VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention (see Abdulaziz, Cabales and Balkandali, cited above, § 71; Karlheinz Schmidt v. Germany, judgment of 18 July 1994, Series A no. 291 B, § 22; and Petrovic v. Austria, judgment of 27 March 1998, Reports 1998 II, § 22).

48. The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits), judgment of 23 July 1968, Series A no. 6, § 9; Abdulaziz, Cabales and Balkandali, cited above, § 78; and Stec and Others v. the United Kingdom (dec.) [GC], nos. 65731/01 and 65900/01, § 40, ECHR 2005 X).

49. The present case does not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person. Whilst Article 8 of the Convention is silent as to this question, the Court notes that French legislation expressly grants single persons the right to apply for authorisation to adopt and establishes a procedure to that end. Accordingly, the Court considers that the facts of this case undoubtedly fall within the ambit of Article 8 of the Convention. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 (see, mutatis mutandis, Case "relating to certain aspects of the laws on the use of languages in education in Belgium", cited above).

50. The applicant alleged in the present case that, in the exercise of her right under the domestic law, she had been discriminated against on the ground of her sexual orientation. The latter is a concept covered by Article 14 of the Convention (see Salgueiro da Silva Mouta v. Portugal, no. 33290/96, § 28, ECHR 1999-IX). The Court also points out that in Fretté v. France (cited above), to which the parties expressly referred, the applicant complained that the rejection of his application for authorisation to adopt had implicitly been based on his sexual orientation alone. The Chamber found that Article 14 of the Convention, taken in conjunction with Article 8, was applicable (§ 33).

51. Accordingly, Article 14 of the Convention, taken in conjunction with Article 8, is applicable in the present case.

52. In these circumstances the Court dismisses the preliminary objection raised by the Government. It also considers, in the light of the parties' submissions, that this complaint raises complex issues of fact and law which cannot be resolved at this stage in the examination of the application, but require examination on the merits. It follows that this complaint cannot be declared manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

A. Submissions of the parties

1. The applicant

53. The applicant maintained that the refusal to grant her authorisation to adopt had been based on her “lifestyle”, in other words her homosexuality. In her view, this was borne out by the screening of her application and the opinion of the adoption board. She also considered that part of the judgment delivered by the Conseil d'Etat was worded in the same terms as the judgment it had rendered in the case of Fretté (cited above), which showed that the Conseil d'Etat adopted a discriminatory approach.

54. With regard to the ground based on the lack of a paternal referent, she argued that while the majority of French psychoanalysts believed that a child needed a dual maternal and paternal referent, there was no empirical evidence for that belief and it had been disputed by

many other psychotherapists. Moreover, in the present case the Government had not shown that there was a practice of excluding single heterosexual women who did not have a male partner.

55. With regard to the argument based on her partner's place in and attitude to her plan to adopt, she submitted that this was an illegal ground. Articles 343 and 343-1 of the Civil Code provided that adoption was open to married couples and single persons: partners were not concerned and therefore were not a party to the adoption procedure and did not enjoy any legal status once the child was adopted. Having regard to her right to be subject to foreseeable legal rules, the applicant contested a ground for rejection of her application that had no basis in the law itself.

56. The applicant went on to stress that she and her partner had had a meeting with the social worker and that subsequently the various officials involved in screening her application for authorisation had never asked to meet her partner. Either steps should have been taken to interview her partner or this ground had in reality served as a pretext for rejecting her application purely on the basis of her sexual orientation.

57. The applicant submitted that the difference in treatment in her regard had no objective and reasonable justification. Particularly serious reasons were required to justify a difference in treatment based on sexual orientation. There were no such reasons in this case.

58. With regard to the division in the scientific community (Fretté, § 42), particularly serious reasons were required to justify a difference in treatment of homosexuals. The burden of proving the existence of any scientific reasons was on the Government and if they had failed to prove in Fretté and in the instant case that there was a consensus in the scientific community, this was because there was no known study on the subject.

59. The applicant disputed the existence of a “legitimate aim”, since children's health was not really in issue here and the Conseil d'Etat had not explained how the child's health might be endangered. She submitted that three risks were generally cited: first, the alleged risk of the child becoming homosexual, which, quite apart from the fact that there was nothing reprehensible about such an eventuality and that the majority of homosexuals had heterosexual parents, was a prejudiced notion; second, the child would be exposed to the risk of developing psychological problems: that risk had never been proved and recent studies showed that being raised in a homoparental family did not incline a child to any particular

disorder; besides that, the right to adopt that existed in some democratic countries showed that there was no risk for the child. Lastly, there was no long-term risk that the child would suffer on account of homophobic prejudices towards the parents and, in any event, the prejudices of a sexual majority did not constitute sufficient justification.

60. She pointed out that the practice of the administrative authorities was inconsistent in France, where some départements no longer refused authorisation to single homosexual applicants. She also stated that the civil courts allowed adoption by the same-sex partner of the original parent.

61. In Europe there had been a steady development in the law in favour of adoption by same-sex couples since the Fretté judgment (cited above, § 41), with some ten European States now allowing it. The applicant also referred to a European consensus in favour of making adoption available to single homosexuals in the member States of the Council of Europe which allowed adoption by single persons, other than France where decisions were made on a discretionary basis. The same was true outside Europe, where case-law developments were in favour of adoption by homosexuals in the interests of children needing a home.

62. Lastly, she disputed the argument that there were insufficient numbers of children eligible for adoption, to which the Court had adhered in its Fretté judgment (cited above, § 42), arguing that the number of children eligible for adoption in the world exceeded the number of prospective adoptive parents and that making a legal possibility available should not depend on the effective possibility of exercising the right in question.

2. The Government

63. The Government pointed out that authorisation to adopt was issued at local, and not national, level by the president of the council for the département after obtaining the opinion of an adoption board at département level. In 2005, 13,563 new applications had been submitted, of which barely 8 % had not been satisfied (with less than 6 % being refused authorisation and about 2 % being withdrawn). In 2006, 4,000 visas had been granted by the relevant authorities to foreign children being adopted. The Government stated that they could not provide statistics relating to the applicants' sexual orientation, as the collecting or processing of personal data about a person's sexual life were prohibited under French law.

64. The Government submitted, in the alternative, that the present case did not lend itself to a review of the Court's finding in the Fretté judgment (cited above), since present-day conditions had not sufficiently changed to justify a departure from precedent.

65. With regard to national laws, there was no European consensus on the subject, with only nine out of forty-six member States of the Council of Europe moving towards adoption by same-sex couples and some countries not making adoption available to single persons or allowing it under more restrictive conditions than in France. Moreover, that observation should be qualified by the nature of those laws and the conditions that had to be met.

66. The conclusion reached by the Court in Fretté regarding the division in the scientific community was still valid today. The Government justified the failure to produce studies identifying problems or differences in development in children raised by homosexual couples by the fact that the number of children raised by a homosexual couple was unknown and the estimated numbers highly variable. Besides the complexity of the various situations that might be encountered, the existing studies were insufficiently thorough because they were based on insufficiently large samples, failed to take a detached approach and did not indicate the profile of the single-parent families in question. Child psychiatrists or psychoanalysts defended different theories, with a majority arguing that a dual maternal and paternal referent in the home was necessary.

67. There were also still wide differences in public opinion since Fretté (cited above, § 42).

68. The Government confirmed that the reality was that applications to adopt outnumbered children eligible for adoption. Their international obligations, particularly Articles 5 and 15 of the Hague Convention, compelled them to select candidates on the basis of those best able to provide the child with a suitable home.

69. Lastly, they pointed out that none of the sixty or so countries from which French people adopted children authorised adoption by same-sex couples. International adoption might therefore remain a purely theoretical possibility for homosexuals despite the fact that their domestic law allowed it.

B. The Court's assessment

70. The Court observes that in Fretté v. France (cited above) the Chamber held that the decisions to reject the application for authorisation had pursued a legitimate aim, namely to

protect the health and rights of children who could be involved in an adoption procedure (§ 38). With regard to whether a difference in treatment was justified, and after observing that there was no common ground between the legal systems of the Contracting States, the Chamber found it quite natural that the national authorities should enjoy a wide margin of appreciation when they were asked to make rulings on such matters, subject to review by the Court (§ 41). Having regard to the competing interests of the applicant and children who were eligible for adoption, and to the paramountcy of the latter's best interests, it noted that the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents, that there were wide differences in national and international opinion and that there were not enough children to adopt to satisfy demand (§ 42). Taking account of the broad margin of appreciation to be left to States in this area and to the need to protect children's best interests to achieve the desired balance, the Chamber considered that the refusal to authorise adoption had not infringed the principle of proportionality and that, accordingly, the justification given by the Government appeared objective and reasonable and the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention (§§ 42 and 43).

71. The Court notes that the present case also concerns the question of how an application for authorisation to adopt submitted by a homosexual single person is dealt with; it nonetheless differs in a number of respects from the above-cited case of Fretté. The Court notes in particular that whilst the ground relating to the lack of a referent of the other sex features in both cases, the domestic administrative authorities did not – expressly at least – refer to E.B.'s "choice of lifestyle" (see Fretté, cited above, § 32). Furthermore, they also mentioned the applicant's qualities and her child-raising and emotional capacities, unlike in Fretté where the applicant was deemed to have had difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child (§§ 28 and 29). Moreover, in the instant case the domestic authorities had regard to the attitude of E.B.'s partner, with whom she had stated that she was in a stable and permanent relationship, which was a factor that had not featured in the application lodged by Mr Fretté.

72. In the instant case the Court notes that the domestic administrative authorities, and then the courts that heard the applicant's appeal, based their decision to reject her application for authorisation to adopt on two main grounds.

73. With regard to the ground relied on by the domestic authorities relating to the lack of a paternal or maternal referent in the household of a person seeking authorisation to adopt, the Court considers that this does not necessarily raise a problem in itself. However, in the circumstances of the present case it is permissible to question the merits of such a ground, the ultimate effect of which is to require the applicant to establish the presence of a referent of the other sex among her immediate circle of family and friends, thereby running the risk of rendering ineffective the right of single persons to apply for authorisation. The point is germane here because the case does not concern an application for authorisation to adopt by a – married or unmarried – couple, but by a single person. In the Court's view, that ground might therefore have led to an arbitrary refusal and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality.

74. The Court observes, moreover, that the Government, on whom the burden of proof lay (see, mutatis mutandis, Karner v. Austria, no. 40016/98, §§ 41-42, ECHR 2003 IX), were unable to produce statistical information on the frequency of reliance on that ground according to the – declared or known – sexual orientation of the persons applying for adoption, which alone could provide an accurate picture of administrative practice and establish the absence of discrimination when relying on that ground.

75. In the Court's view, the second ground relied on by the domestic authorities, based on the attitude of the applicant's partner, calls for a different approach. Although she was the long-standing and declared partner of the applicant, Ms R. did not feel committed by her partner's application to adopt. The authorities, which constantly remarked on this point – expressly and giving reasons – concluded that the applicant did not provide the requisite safeguards for adopting a child.

76. It should first be noted that, contrary to the applicant's submissions, the question of the attitude of her partner, with whom she stated that she was in a stable and lasting relationship, is not without interest or relevance in assessing her application. It is legitimate for the authorities to ensure that all safeguards are in place before a child is taken into a family. Accordingly, where a male or female applicant, although unmarried, has already set up home with a partner, that partner's attitude and the role he or she will necessarily play on a daily basis in the life of the child joining the home set-up require a full examination in the child's best interests. It would moreover be surprising, to say the least, if the relevant authorities, having been informed of the existence of a de facto couple, pretended to be unaware of that

fact when assessing the conditions in which the child would be given a home and his future life in that new home. The legal status of a person seeking to adopt is not incompatible with an examination of his or her actual situation and the subsequent finding of not one but two adults in the household.

77. The Court notes, moreover, that Article 4 of the Decree of 1 September 1998 (see paragraph 28 above) requires the president of the council for the relevant département to satisfy himself that the conditions in which the applicant is proposing to provide the child with a home meet the needs of an adopted child from a family, child-rearing and psychological perspective. The importance of these safeguards – of which the authorities must be satisfied before authorising a person to adopt a child – can also be seen in the relevant international instruments, be it the United Nations Convention on the Rights of the Child of 20 November 1989, the Hague Convention of 29 May 1993 or the draft European Convention on the Adoption of Children (see paragraphs 29-31 above).

78. In the Court's view, there is no evidence to establish that the ground in question was based on the applicant's sexual orientation. On the contrary, the Court considers that this ground, which has nothing to do with any consideration relating to the applicant's sexual orientation, is based on a simple analysis of the known, de facto situation and its consequences for the adoption of a child.

79. The applicant cannot therefore be deemed to have been discriminated against on the ground of her sexual orientation in that regard.

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

81. With regard to the administrative phase, the Court observes that the president of the council for the département did not base his decision exclusively or principally on the second ground, but on “all” the factors involved – that is, both grounds – without it being possible to consider that one of them was predominant or that one of them alone was sufficient to make him decide to refuse authorisation (see paragraph 17 above).

82. With regard to the judicial phase, the Nancy Administrative Court of Appeal noted that the decision was based on two grounds: the lack of a paternal referent and the ambivalence of

the commitment of each member of the household. It added that the documents in the file and the conclusions reached after examining the application showed that the applicant's lifestyle did not provide the requisite safeguards for adopting a child, but disputed that the president of the council for the département had refused authorisation on the basis of a position of principle regarding her choice of lifestyle, namely, her homosexuality (see paragraph 24 above).

83. Subsequently, the Conseil d'Etat held that the two grounds on which the applicant had been refused authorisation to adopt were in keeping with the statutory provisions. It also held that the reference to the applicant's "lifestyle" could be explained by the documents in the file submitted to the tribunals of fact, which showed that the applicant was, at the time of her application, in a stable homosexual relationship, but that this could not be construed as a decision based on a position of principle regarding her sexual orientation or as any form of discrimination (see paragraph 25 above).

84. The Court therefore notes that the administrative courts went to some lengths to rule that although regard had been had to the applicant's sexual orientation, it had not been the basis for the decision in question and had not been considered from a hostile position of principle.

85. However, in the Court's opinion the fact that the applicant's homosexuality featured to such an extent in the reasoning of the domestic authorities is significant. Besides their considerations regarding the applicant's "lifestyle", they above all confirmed the decision of the president of the council for the département. The Court points out that the latter reached his decision in the light of the opinion given by the adoption board whose various members had expressed themselves individually in writing, mainly recommending, with reasons in support of that recommendation, that the application be refused on the basis of the two grounds in question. It observes that the manner in which certain opinions were expressed was indeed revealing in that the applicant's homosexuality was a determining factor. In particular, the Court notes that in his opinion of 12 October 1998 the psychologist from the children's welfare service recommended that authorisation be refused, referring to, among other things, an "unusual attitude [on the part of the applicant] to men in that men are rejected" (see paragraph 13 above).

86. The Court observes that at times it was her status as a single person that was relied on as a ground for refusing the applicant authorisation to adopt, whereas the law makes express provision for the right of single persons to apply for authorisation to adopt. This emerges

particularly clearly from the conclusions of the psychologist who, in her report on her interviews with the applicant of 28 August 1998, stated, with express reference to the applicant's case and not as a general comment – since she prefaces her remark with the statement that she is not seeking to diminish the applicant's confidence in herself or to insinuate that she would be harmful to a child – that "all the studies on parenthood show that a child needs both its parents" (see paragraph 11 above). On 28 October 1998 the adoption board's representative from the Family Council for the association of children currently or formerly in State care recommended refusing authorisation on the ground that an adoptive family had to be composed "of a mixed couple (man and woman)" (see paragraph 14 above).

87. Regarding the systematic reference to the lack of a "paternal referent", the Court disputes not the desirability of addressing the issue, but the importance attached to it by the domestic authorities in the context of adoption by a single person. The fact that it is legitimate for this factor to be taken into account should not lead the Court to overlook the excessive reference to it in the circumstances of the present case.

88. Thus, notwithstanding the precautions taken by the Nancy Administrative Court of Appeal, and subsequently by the Conseil d'Etat, to justify taking account of the applicant's "lifestyle", the inescapable conclusion is that her sexual orientation was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings.

89. The Court considers that the reference to the applicant's homosexuality was, if not explicit, at least implicit. The influence of the applicant's avowed homosexuality on the assessment of her application has been established and, having regard to the foregoing, was a decisive factor leading to the decision to refuse her authorisation to adopt (see, mutatis mutandis, Salgueiro da Silva Mouta, cited above, § 35).

90. The applicant therefore suffered a difference in treatment. Regard must be had to the aim behind that difference in treatment and, if the aim was legitimate, to whether the different treatment was justified.

91. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a "legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised" (see, inter alia, Karlheinz Schmidt, cited above, §

24; Petrovic, cited above, § 30; and Salgueiro da Silva Mouta, cited above, § 29). Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8 (see, mutatis mutandis, Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, § 89, ECHR 1999-VI; Lustig-Prean and Beckett v. the United Kingdom, nos. 31417/96 and 32377/96, § 82, 27 September 1999; and S.L. v. Austria, no. 45330/99, § 37, ECHR 2003-I).

92. In that connection the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, inter alia, Johnston and Others, cited above, § 53).

93. In the Court's opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention (see Salgueiro da Silva Mouta, cited above, § 36).

94. The Court points out that French law allows single persons to adopt a child (see paragraph 49 above), thereby opening up the possibility of adoption by a single homosexual, which is not disputed. Against the background of the domestic legal provisions, it considers that the reasons put forward by the Government cannot be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation.

95. The Court notes, lastly, that the relevant provisions of the Civil Code are silent as to the necessity of a referent of the other sex, which would not, in any event, be dependent on the sexual orientation of the adoptive single parent. In this case, moreover, the applicant presented, in the terms of the judgment of the Conseil d'Etat, “undoubted personal qualities and an aptitude for bringing up children”, which were assuredly in the child's best interests, a key notion in the relevant international instruments (see paragraphs 29-31 above).

96. Having regard to the foregoing, the Court cannot but observe that, in rejecting the applicant's application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention (see Salgueiro da Silva Mouta, cited above, § 36).

97. Consequently, having regard to its finding under paragraph 80 above, the Court considers that the decision in question is incompatible with the provisions of Article 14 taken in conjunction with Article 8.

98. There has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

99. Article 41 of the Convention provides:

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

A. Damage

100. The applicant pointed out that without the authorisation that had been refused her it was legally impossible for her to adopt a foreign child and impossible in practice to adopt a French child. Even if the French Government were to act quickly to grant her the authorisation, the discriminatory delay would be between nine and ten years. That delay was not only a psychological strain and unfair, but also reduced her chances of being able to adopt a child one day on account of her age; she had been thirty-seven when she had applied to adopt and so would be forty-six at the youngest if authorisation were finally to be granted. Accordingly, she sought an award of 50,000 euros (EUR) for non-pecuniary damage.

101. The Government did not express a view.

102. The Court considers that the applicant must have suffered non-pecuniary damage that is not sufficiently compensated by a mere finding of a violation of Article 14 of the Convention taken together with Article 8. Accordingly, ruling on an equitable basis, the Court awards her EUR 10,000 in just satisfaction.

B. Costs and expenses

103. The applicant claimed EUR 14,352 in lawyer's fees from the introduction of the application until the outcome of the proceedings (sixty hours' work at the rate of EUR 200 per hour exclusive of VAT), plus EUR 176 for the travel and accommodation expenses incurred in attending the hearing before the Grand Chamber, that is, a total of EUR 14,528.

104. The Government did not express a view.

105. The Court observes that, according to the criteria laid down in its case-law, it must ascertain whether the costs and expenses claimed were actually and necessarily incurred and were reasonable as to quantum (see, among other authorities, Öztürk v. Turkey [GC], no. 22479/93, § 83, ECHR 1999-VI). Applying the said criteria to the present case, the Court considers reasonable the amount of EUR 14,528 claimed by the applicant and awards her that sum.

C. Default interest

106. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

The Court's decision

1. Declares unanimously the application admissible;

2. Holds by ten votes to seven that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

3. Holds by eleven votes to six

(a) that the respondent State is to pay the applicant, within three months, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage and EUR 14,528 (fourteen thousand five hundred and twenty-eight euros) for costs and expenses, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Case of Gas and Dubois v. France[3]

Procedure

1. The case originated in an application (no. 25951/07) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two French nationals, Ms Valérie Gas and Ms Nathalie Dubois ("the applicants"), on 15 June 2007.

2. The applicants were represented by Mr C. Mécary, a lawyer practising in Paris. The French Government ("the Government") were represented by their Agent, Mrs E. Belliard, Director of Legal Affairs, Ministry of Foreign Affairs.

3. The applicants alleged, in particular, that they had been discriminated against compared with heterosexual couples since no legal means existed in France allowing same-sex couples to have access to second-parent adoption. Relying on Article 14 of the Convention taken in conjunction with Article 8, they alleged that they had been subjected to discriminatory treatment based on their sexual orientation, in breach of their right to respect for their private and family life.

4. By a decision of 31 August 2010 the Court declared the application admissible. On 30 November 2010 the Chamber decided to hold a hearing on the merits of the case.

5. The applicants and the Government each filed further written observations on the merits (Rule 59 § 1 of the Rules of Court). In addition, third-party comments were received from the International Federation for Human Rights (FIDH), the International Commission of Jurists (ICJ), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the British Association for Adoption and Fostering (BAAF) and the Network of European LGBT Families Associations (NELFA), which had been given leave by the President to intervene. The parties replied to those comments (Rule 44 § 6). The organisations in question were also given leave to participate in the oral procedure.

[3] Application no. 25951/07 Judgment Strasbourg ; 15 March 2012

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 12 April 2011 (Rule 59 § 3).

The facts

I. THE CIRCUMSTANCES OF THE CASE

8. The applicants were born in 1961 and 1965 respectively and live in Clamart.

9. Ms Valérie Gas ("the first applicant") has cohabited since 1989 with Ms Nathalie Dubois ("the second applicant"). The latter gave birth in France on 21 September 2000 to a daughter, A., conceived in Belgium via anonymous donor insemination. A. does not have an established legal tie to her father, who acted as an anonymous donor in accordance with Belgian law. The child has lived all her life in the applicants' shared home. On 22 September 2000 her name was entered in the register of births, deaths and marriages held at Clamart town hall. She was formally recognised by her mother on 9 October 2000.

10. The two applicants subsequently entered into a civil partnership agreement which was registered on 15 April 2002 with the registry of the Vanves District Court.

11. On 3 March 2006 the first applicant applied to the Nanterre tribunal de grande instance for a simple adoption order in respect of her partner's daughter, after her partner had given her express consent before a notary.

12. On 12 April 2006 the public prosecutor lodged an objection against the first applicant's application, on the basis of Article 365 of the Civil Code (see paragraph 19 below).

13. In a judgment of 4 July 2006 the tribunal de grande instance observed that the statutory conditions for adoption were met and that it had been demonstrated that the applicants were actively and jointly involved in the child's upbringing, providing her with care and affection. However, the court rejected the application on the grounds that the requested adoption would have legal implications running counter to the applicants' intentions and the child's interests, by transferring parental responsibility to the adoptive parent and thus depriving the birth mother of her own rights in relation to the child.

14. The first applicant appealed against that decision and the second applicant intervened in the proceedings on her own initiative.

Before the Versailles Court of Appeal the applicants reaffirmed their wish, by means of the adoption, to provide a stable legal framework for the child which reflected her social reality. They argued that the loss of parental responsibility on the part of the child's mother could be remedied by means of a complete or partial delegation of parental responsibility, and submitted that other European countries permitted adoptions which created legal ties with a same-sex partner.

15. In a judgment of 21 December 2006 the Court of Appeal upheld the refusal of the application.

Like the first-instance court, the Court of Appeal noted that the statutory conditions for the adoption had been met and that it had been established that the first applicant was active in ensuring the child's emotional and material well-being. It nevertheless upheld the finding that the legal consequences of such adoption would not be in the child's interests, since the applicants would be unable to share parental responsibility as permitted by Article 365 of the Civil Code in the event of adoption by the spouse of the child's mother or father, and the adoption would therefore deprive Ms Dubois of all rights in relation to her child. The court further considered that simply delegating the exercise of parental responsibility at a later date would not suffice to eliminate the risks to the child resulting from her mother's loss of parental responsibility. Accordingly, in the court's view, the application merely accorded with the applicants' wish to have their joint parenting of the child recognised and legitimised.

16. On 21 February 2007 the applicants lodged an appeal on points of law, but did not pursue the proceedings before the Court of Cassation to their conclusion. On 20 September 2007 the President of the Court of Cassation issued an order declaring the right to appeal on points of law to be forfeit.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Adoption

17. There are two types of adoption in French law: full adoption and simple adoption.

1. Full adoption

18. A full adoption order can be made only while the child is still a minor and may be requested by a married couple or by one person. It creates a legal parent-child relationship which takes the place of the original relationship (if such existed). The child takes on the adoptive parent's surname. A new birth certificate is drawn up and the adoption is irrevocable (Articles 355 et seq. of the Civil Code).

2. Simple adoption

19. A simple adoption order, by contrast, does not sever the ties between the child and his or her original family, but creates an additional legal parent‑child relationship (Articles 360 et seq. of the Civil Code). The order can be made irrespective of the age of the person being adopted, including when he or she has reached the age of majority. The adoptive parent's surname is added to that of the adoptee. The latter retains some inheritance rights in his or her family of origin and acquires rights vis-à-vis the adoptive parent. Simple adoption gives rise to reciprocal obligations between adopter and adoptee, in particular a maintenance requirement. The biological parents are required to support the adopted person financially only if the adoptive parent is unable to do so.

Where the adoptee is a minor, simple adoption results in all the rights associated with parental responsibility being removed from the child's father or mother in favour of the adoptive parent. The legislation provides for one exception to this rule, namely where an individual adopts the child of his or her spouse. In this case, the husband and wife share parental responsibility. Hence:

Article 365 of the Civil Code

"All rights associated with parental responsibility shall be vested in the adoptive parent alone, including the right to consent to the marriage of the adoptee, unless the adoptive parent is married to the adoptee's mother or father. In this case, the adoptive parent and his or her spouse shall have joint parental responsibility, but the spouse shall continue to exercise it alone unless the couple make a joint declaration before the senior registrar of the tribunal de grande instance to the effect that parental responsibility is to be exercised jointly. ..."

Unlike a full adoption order, a simple adoption order may be revoked at the request of the adoptive parent, the adoptee or, where the latter is a minor, the public prosecutor.

Simple adoption is largely aimed, where minors are concerned, at compensating for the failings of the biological parent or parents. In practice, most cases of full adoption are overseas adoptions, while the great majority of simple adoption orders granted within families concern persons having reached the age of majority, and are often inheritance-related.

B. Parental responsibility

20. Parental responsibility is defined as the complete set of parents' rights and responsibilities towards their minor children. It is aimed at protecting children's "health, safety and morals, in order to ensure their education and development" (Article 371-1 of the Civil Code). In principle, once parentage has been established, the parents of a minor child automatically have parental responsibility, which can only be withdrawn on serious grounds. Parental responsibility ends when the child reaches the age of majority, normally at eighteen. A distinction is made between parental responsibility and the exercise of parental responsibility; the latter may be entrusted to just one parent for reasons relating to the child's best interests. The parent not exercising parental responsibility retains the right and the obligation to oversee the maintenance and upbringing of his or her children. He or she must be informed of important decisions concerning them and may not be deprived of contact rights and the right to overnight visits without compelling reasons.

21. It is possible to delegate parental responsibility to a third party (Articles 376 et seq. of the Civil Code). Since the enactment of the Law of 4 March 2002 on parental responsibility, Article 377 of the Civil Code, which governs the "standard" delegation of parental responsibility, provides that, where the circumstances so require, one or both parents may apply to the family judge to have the exercise of parental responsibility delegated to a third party (an individual, an approved institution or the child welfare services for the département concerned). The delegation of responsibility is not permanent and does not encompass the right to consent to adoption. In this context, parental responsibility may be transferred in whole or in part: parental responsibility continues to be vested in the parents, but its exercise is handed over to the third party.

22. Within the standard delegation procedure, the Law of 4 March 2002 introduced a more flexible delegation option based on the sharing of parental responsibility (Article 377-1 of the Civil Code). The order delegating parental responsibility may stipulate, "in the interests of the child's upbringing", that one or both parents are to share the exercise of their parental responsibility in whole or in part with the third party, thus retaining shared responsibility.

This measure makes it possible to regulate the relationship between the child, the separated couple and the third parties, whether they be grandparents, stepparents or live-in partners. Each parent retains parental responsibility and continues to exercise it. The delegation of responsibility does not entail any change of surname or the establishment of a legal parent-child relationship; it is temporary and ceases to have effect once the child reaches the age of majority.

C. Marriage and civil partnerships

23. In France, marriage is not available to same-sex couples (Article 144 of the Civil Code). This principle was reaffirmed by the Court of Cassation, which, in a judgment delivered on 13 March 2007, reiterated that "in French law, marriage is a union between a man and a woman".

24. A civil partnership is defined by Article 515-1 of the Civil Code as "a contract entered into by two individuals of full age, of opposite sex or of the same sex, for the purposes of organising their life together". Civil partnerships entail a number of obligations for those who enter into them, including the obligation to live as a couple and lend each other material and other support.

Civil partnerships also confer certain rights on the parties, which increased with the entry into force on 1 January 2007 of the Law of 23 June 2006 on the reform of the arrangements concerning inheritance and gifts. Hence, the partners constitute a single household for tax purposes; they are also treated in the same way as married couples for the purposes of exercising certain rights, particularly in relation to health and maternity insurance and life assurance. Some effects deriving from marriage remain inapplicable to civil partnerships. Among other things, the legislation does not give rise to any kinship or inheritance ties between the partners. In particular, the dissolution of the partnership does not entail judicial divorce proceedings but simply involves a joint declaration by both partners or a unilateral decision by one partner which is served on the other (Article 515‑7 of the Civil Code). Furthermore, civil partnerships have no implications as regards the provisions of the Civil Code concerning legal adoptive relationships and parental responsibility.

D. Assisted reproduction

25. Assisted reproduction, which refers to the techniques allowing in vitro fertilisation, embryo transfer and artificial insemination, is governed by Articles L. 2141-1 et seq. of the Public Health Code. Under Article L. 2141‑2 of the Code, assisted reproduction techniques are authorised in France for therapeutic purposes only, with a view to "remedying clinically diagnosed infertility" or "preventing transmission to the child or partner of a particularly serious disease". They are available to opposite-sex couples of reproductive age who are married or show proof of cohabiting.

26. In these circumstances, Article 311-20 of the Civil Code provides for legal recognition of paternity for the second parent in the following terms:

"Married or cohabiting couples who, in order to conceive, have recourse to medical assistance involving a third-party donor shall give their prior consent, in a manner that ensures confidentiality, before the judge or notary, who shall inform them of the implications of this act as regards the legal parent-child relationship.

Any man who, having given his consent to assisted reproduction, does not recognise the child born as a result shall incur liability vis-à vis the mother and the child.

A judicial declaration of paternity shall also be issued in his regard. The action shall be brought in conformity with the provisions of Articles 328 and 331."

E. Case-law

1. Refusal of applications for simple adoption of the minor child of an individual's civil partner

27. The Court of Cassation has issued several rulings on this subject. The first two judgments, delivered on 20 February 2007, concerned cases involving lesbian couples living in a civil partnership and raising children whose sole legal parent was their mother, as their paternity had not been legally established. In both cases the mother's partner had applied for a simple adoption order in respect of the children, with the consent of their mother. One of the applications was granted by the Bourges Court of Appeal on the grounds, in particular, that "the adoption [was] in the child's interests", while the other was rejected by the Paris Court of

Appeal. Referring to Article 365 of the Civil Code, the First Civil Division of the Court of Cassation quashed the first Court of Appeal judgment and declared it null and void, in the following terms:

"The adoption resulted in parental responsibility for the child being transferred, and in the biological mother, who planned to continue raising the child, being deprived of her rights. Accordingly, although Ms Y had consented to the adoption, the Court of Appeal, in granting the application, acted in breach of the above-mentioned provision;"

It upheld the second Court of Appeal judgment as follows:

"However, the Court of Appeal correctly observed that Ms Y..., the children's mother, would lose parental responsibility in relation to the children were they to be adopted by Ms X, although the couple were cohabiting. It noted that a delegation of parental responsibility could be requested only if the circumstances so required, which had been neither established nor alleged, and that in the present case the delegation or sharing of parental responsibility would, in the context of an adoption, be contradictory since the adoption of a minor was designed to attribute exclusive parental responsibility to the adoptive parent. Accordingly, the Court of Appeal, which, despite the allegations to the contrary, examined the issue, gave lawful grounds for its decision." (Two judgments of the First Civil Division, 20 February 2007, Bulletin Civil 2007 I, nos. 70 and 71).

The Court of Cassation subsequently reaffirmed this approach:

"Firstly, the child's (father or) mother would be deprived of parental responsibility in the event of the child's adoption, despite being perfectly fit to exercise that responsibility and having given no indication of wishing to reject it. Secondly, Article 365 of the Civil Code provides for the sharing of parental responsibility only in the event of adoption of the spouse's child; as the French legislation stands, spouses are persons joined by the bonds of marriage. Accordingly, the Court of Appeal, which did not rule in breach of any of the provisions of the European Convention on Human Rights, gave lawful grounds for its decision." (First Civil Division, 19 December 2007, Bulletin Civil 2007 I, no. 392; see also, to similar effect, the

judgment of the First Civil Division of 6 February 2008, unpublished, on appeal no. 07-12948).

28. The first two judgments, delivered on 20 February 2007, were published in the Court of Cassation Information Bulletin, on the Internet and in the Court of Cassation's annual report.

2. Delegation of parental responsibility

29. In a first leading judgment (Court of Cassation, First Civil Division, 24 February 2006, published in the Bulletin), the Court of Cassation granted an application by a same-sex couple living in a civil partnership who sought to take advantage of this option. The court ruled that Article 377-1 of the Civil Code "[did] not prevent a mother with sole parental responsibility from delegating the exercise of that responsibility in whole or in part to the woman with whom she live[d] in a stable and lasting relationship, where the circumstances so require[d] and the measure [was] compatible with the child's best interests". The Court of Cassation subsequently tightened up the conditions to be met for the granting of an application to delegate parental responsibility (Court of Cassation, First Civil Division, 8 July 2010, published in the Bulletin). While the conditions laid down remain the same (the circumstances have to require such a measure and it has to be compatible with the child's best interests), the Court of Cassation now requires applicants to demonstrate that the measure would improve the lives of the children concerned and is essential. This restrictive approach is now applied by the courts hearing such cases on the merits (Paris tribunal de grande instance, 5 November 2010).

3. Constitutional Council decision of 6 October 2010

30. In a case concerning facts similar to those in the present case, the applicants alleged a breach of the constitutional principle of equality and requested the Court of Cassation to transmit a request for a preliminary ruling on constitutionality to the Constitutional Council. The Court of Cassation granted the request.

31. In a decision of 6 October 2010 the Constitutional Council held that it was not its task to rule on the constitutionality of the impugned statutory provisions in the abstract, but rather in the light of the Court of Cassation's consistent interpretation. In the case under consideration, the constitutionality of Article 365 of the Civil Code therefore had to be assessed in the light of the fact that the latter had the effect of prohibiting in principle the adoption of a child by the individual's partner or cohabitant, as ruled by the Court of Cassation on 20 February 2007.

The Constitutional Council began by pointing out that the provisions of Article 365 did not hinder couples from cohabiting or entering into a civil partnership, any more than it prevented the biological parent from involving his or her partner or cohabitant in the child's upbringing. However, the Constitutional Council ruled that the right to family life as guaranteed by the Constitution did not confer a right to establish a legal adoptive relationship between the child and his or her parent's partner.

The Constitutional Council went on to observe that the legislature had deliberately chosen to confine the option of simple adoption to married couples and that it was not its place to substitute its own assessment for that of the legislature.

III. COUNCIL OF EUROPE TEXTS AND MATERIALS

A. European Convention on the Adoption of Children (revised)

32. This Convention was opened for signature on 27 November 2008 and entered into force on 1 September 2011. It has not been signed or ratified by France. Its relevant provisions read as follows:

"Article 7 – Conditions for adoption

1 The law shall permit a child to be adopted:

a by two persons of different sex

i who are married to each other, or

ii where such an institution exists, have entered into a registered partnership together;

b by one person.

2 States are free to extend the scope of this Convention to same sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship.

Article 11 – Effects of an adoption

1 Upon adoption a child shall become a full member of the family of the adopter(s) and shall have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established. The adopter(s) shall have parental responsibility for the child. The adoption shall terminate the legal relationship between the child and his or her father, mother and family of origin.

2 Nevertheless, the spouse or partner, whether registered or not, of the adopter shall retain his or her rights and obligations in respect of the adopted child if the latter is his or her child, unless the law otherwise provides.

4 States Parties may make provision for other forms of adoption having more limited effects than those stated in the preceding paragraphs of this article."

B. Committee of Ministers' Recommendation

33. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, recommends, inter alia, to member States:

"...

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live."

The law

34. The applicants alleged that they had been subjected to discriminatory treatment based on their sexual orientation, in breach of their right to respect for their private and family life. They relied on Article 14 of the Convention taken in conjunction with Article 8. These two Articles provide:

Article 8

"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

"The enjoyment of the rights and freedoms set forth in [the] 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."

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

35. As their main submission, the Government reiterated that Article 8 of the Convention was not applicable in the present case. Echoing the arguments already put forward during examination of the admissibility of the application, the Government referred to the Court's case-law according to which the existence or otherwise of family life, which was not confined to the legal framework of marriage, had to be assessed in each case. However, the Government stressed that, according to the Court's settled case-law, Article 8 did not guarantee any right to adoption or to the creation of a legal tie between an adult and a child who lived in the same family, still less a right to have a child. Since the Convention did not cover a right to adopt, the Government submitted that the applicants could not claim discrimination in the enjoyment of such a right, as Article 14 had no independent existence.

36. The applicants referred to the arguments put forward during examination of the admissibility of the case.

37. The Court notes that the applicants based their arguments on Article 14 of the Convention taken in conjunction with Article 8 and that the latter does not guarantee either the right to found a family or the right to adopt (see E.B. v. France [GC], no. 43546/02, § 41, 22 January 2008). This was not disputed by the parties. Nevertheless, the Court cannot but observe that examination of the applicants' specific case leads to the conclusion that they have a "family life" within the meaning of Article 8 of the Convention. Furthermore, sexual orientation falls within the personal sphere protected by Article 8. It follows that the facts of the case come "within the ambit" of at least one Article of the Convention, which may be taken in conjunction with Article 14, on which the applicants rely in the present case.

38. The Court refers in that regard to its decision of 31 August 2010 on the admissibility of the application, in which it found that Article 14 taken in conjunction with Article 8 was applicable in the present case.

39. The Court must therefore dismiss the Government's preliminary objection and will proceed to examine the merits of the complaint.

II. MERITS

A. The parties' submissions

1. The applicants

40. The applicants complained of the refusal of the first applicant's application to adopt her partner's daughter. They alleged that the reason given for that refusal, namely the legal consequences of such adoption, which would deprive the child's mother of parental responsibility, definitively ruled out adoption only for same-sex couples, who – unlike opposite-sex couples – could not marry and thereby take advantage of the provisions of Article 365 of the Civil Code. They submitted that the refusal to grant the first applicant a simple adoption order in respect of A. for reasons of principle had infringed their right to respect for their private and family life, in a discriminatory manner.

41. The applicants pointed out that A. had been conceived in Belgium via anonymous donor insemination. Although she had been raised from birth by both women, for legal purposes she had only one parent, namely the second applicant. The latter had passed on her surname to A., exercised sole parental responsibility and would leave her property to A. on her death. By contrast, from a legal viewpoint the first applicant had no obligations or rights vis-à-vis the child. The applicants explained that they had sought to remedy that situation by applying for a simple adoption order, which would have created a legal parent-child relationship in addition to the original relationship. A. would thus have had two parents in the eyes of the law, with the legal certainty that entailed. This had been refused them by the domestic courts.

42. The applicants therefore claimed that they had been subjected to discrimination based on their sexual orientation, since the French authorities prohibited same-sex couples, but not married couples, from obtaining a simple adoption order. They pointed out that same-sex marriage was still prohibited in France, as indicated by the Court of Cassation in a judgment of 13 March 2007.

This discriminatory difference in treatment also applied between same-sex couples who cohabited or had entered into a civil partnership and heterosexual couples in the same situation, since the latter could circumvent the strict requirements of Article 365 of the Civil Code by marrying, an option that was not available to same-sex couples. The applicants stressed that they were not seeking access to marriage in the instant case, but emphasised that the provisions of the Civil Code merely appeared to be neutral but in fact gave rise to indirect discrimination.

43. At the hearing, to illustrate their remarks, the applicants compared the situation of A. with that of another child, A.D. The latter had been conceived via anonymous donor insemination by a woman cohabiting with a man, Mr D. Although A.'s situation was in all respects

comparable to A.D.'s, their legal status differed, since by virtue of Article 311-20 of the Civil Code Mr D. had become the child's legal father without even having to apply for a simple adoption order (see paragraph 26 above). Hence, whether in relation to everyday life (school enrolment and monitoring of the child's progress in school) or more serious circumstances (a road traffic accident), A. could be accompanied only by her mother, whereas A.D. could be taken care of by Mr D. Moreover, in the event of the death of the child's birth mother, A. would become an orphan and could be placed in the care of a guardian or a foster family, whereas custody of A.D. would be entrusted to her legal father. The applicants inferred from this that the French legislation concerning simple adoption and anonymous donor insemination prevented the creation of a legal adoptive relationship between A. and the first applicant, which would have been possible had the latter been a man. While the applicants stressed that they did not wish to call into question the provisions of French law concerning access to anonymous donor insemination, they maintained that there was a difference in treatment under the law depending on whether a couple raising children was made up of two women cohabiting or in a civil partnership or of a woman and a man in the same situation.

44. As a further example the applicants referred to the scenario in which Mr D. died and A.D.'s mother met another man, Mr N., and decided to set up home with him or marry him. Mr N. could apply for a simple adoption order in respect of A.D., whereas the first applicant could not do the same in relation to A.

45. Two women who cohabited or had entered into a civil partnership, who could not marry, were therefore treated differently from a man and a woman who, if they married, could obtain permission for the mother's husband to adopt the child under a simple adoption order, with automatic sharing of parental responsibility.

46. In the applicants' view, this difference in treatment did not pursue any legitimate aim. In any event, the child's best interests required that he or she should have the legal protection of two parents rather than just one. Furthermore, according to the applicants, the delegation of parental responsibility on a shared basis (which they had not requested before the domestic courts) would not suffice. This related only to parental responsibility, was temporary and was not readily granted by the national courts since 8 July 2010 (see paragraph 29 above). They stressed that a simple adoption order, rather than delegation of parental responsibility on a shared basis, provided the best guarantee of the child's interests.

47. The applicants concluded that the refusal of the application for a simple adoption order amounted to both direct and indirect discrimination based on sexual orientation, in breach of the Convention. In their view, the French Government should propose amendments to the legislation to put an end to that discrimination.

2. The Government

48. The Government first provided a recap of the rules concerning adoption and delegation of parental authority in French law, and the background to them (see paragraphs 17-22 above). As to the present case, the Government had observed at the hearing that the applicants had not applied for the delegation of parental responsibility on a shared basis, although this could be justified in the circumstances (for instance, if the second applicant were to take a trip away from home).

49. Next, the Government submitted that Article 365 of the Civil Code did not give rise to any objective discrimination, since it applied in identical fashion to all unmarried couples, regardless of the composition of the couple. The sole exception provided for by the Article in question, applicable to an individual's spouse, had been introduced by the legislature with a view to safeguarding the child's interests. In the Government's submission, marriage remained an institution which ensured greater stability within couples than other types of union. Moreover, in the case of the break-up of a marriage, the family judge automatically became involved. Civil partnerships, on the other hand, afforded greater leeway with regard to entering into them and terminating them, and did not have any implications in terms of family law or the legal relationship between parents and children. In view of these considerations, the legislature had therefore sought to restrict the possibility of obtaining a simple adoption order, in order to provide a stable framework for children's care and upbringing.

50. The Government also rejected the applicants' argument that discrimination arose indirectly or as a knock-on effect from the fact that marriage in France was available only to heterosexual couples. They observed that, according to the Court's case-law, family life could exist outside the confines of marriage, just as it could exist without legal ties of parentage.

51. In any event, even if the Court were to find that there was a difference in treatment, the Government were of the view that it was justified and did not amount to discrimination,

whether the applicants' situation was compared with that of a married couple or with that of a heterosexual couple living in a civil partnership or cohabiting

52. At the hearing the Government stressed in particular that French law on the legal relationship between parents and children was based entirely on the model of sexual difference. In view of this approach, which was a choice made by society, the Government took the view that allowing a child to have ties of parentage with two women or two men was a fundamental reform which could only be undertaken by Parliament. The issue therefore had to be dealt with as a whole in the course of a democratic debate and not through tangential issues such as the sharing of parental responsibility in the context of simple adoption.

3. The third-party interveners

53. The International Federation for Human Rights (FIDH), the International Commission of Jurists (ICJ), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the British Association for Adoption and Fostering (BAAF) and the Network of European LGBT Families Associations (NELFA) submitted a joint intervention to the Court.

54. The organisations in question began by pointing out that there were three distinct situations in which lesbian or gay individuals adopted children: firstly, an unmarried individual might seek to adopt, in a member State where this was permitted (even just as an exception), on the understanding that any partner he or she might have would have no parental rights (individual adoption); secondly, one member of a same-sex couple might seek to adopt the child of the other partner, such that both partners had parental rights vis-à-vis the child (second-parent adoption); finally, both members of a same-sex couple might seek to jointly adopt a child with no connection with either of them, such that both partners simultaneously acquired parental rights vis-à-vis the child (joint adoption). In the case of E.B. v. France (cited above), the Court had ruled in favour of equal access to individual adoption for all persons, regardless of their sexual orientation. The instant case concerned second-parent adoption.

55. In 2011, ten out of the forty-seven Council of Europe member States allowed second-parent adoption, and other countries were considering amending their legislation to permit it. According to the third-party interveners, there therefore appeared to be a growing consensus

that, where a child was being raised within a stable same-sex couple, legal recognition of the second parent's status promoted the child's welfare and the protection of his or her best interests.

56. Other countries displayed similar trends in the legislation and case-law. Second-parent adoption was possible for same-sex couples in thirteen Canadian provinces, in at least sixteen of the fifty States of the US and in other countries such as Brazil, Uruguay, New Zealand and some parts of Australia.

57. Referring to the United Nations Convention on the Rights of the Child and the relevant case-law of the Court and of certain national courts (such as the United Kingdom's House of Lords and the South African Constitutional Court), the third-party interveners requested the Court to adopt the same approach, which in their view gave priority to the protection of the child's interests.

B. The Court's assessment

1. General principles

58. The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see Burden v. the United Kingdom [GC], no. 13378/05, § 60, ECHR 2008), including a different treatment in law (see Marckx v. Belgium, 13 June 1979, § 38, Series A no. 31).

59. On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see Karner v. Austria, no. 40016/98, § 37, ECHR 2003-IX; L. and V. v. Austria, nos. 39392/98 and 39829/98, § 45, ECHR 2003-I; Smith and Grady v. the United Kingdom,

nos. 33985/96 and 33986/96, § 90, ECHR 1999‑VI; and Schalk and Kopf v. Austria, no. 30141/04, §§ 96 and 97, ECHR 2010).

60. On the other hand, the margin of appreciation enjoyed by States in assessing whether and to what extent differences in otherwise similar situations justify a different treatment is usually wide when it comes to general measures of economic or social strategy (see, for example, Schalk and Kopf, cited above, § 97).

2. Application of these principles to the present case

61. The Court notes at the outset that the present case is to be distinguished from the case of E.B. v. France, cited above. The latter concerned the handling of an application for authorisation to adopt made by a single homosexual person. In that case, the Court pointed out that French law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual. Against the background of the domestic legal provisions, it considered that the reasons put forward by the Government could not be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation. The reasons for rejecting her application had therefore related to her personal situation and were found by the Court to be discriminatory (see E.B. v. France, cited above, § 94).

62. The Court notes that the position is different in the present case, in which the applicants complained of the refusal to grant a simple adoption order in respect of child A. In giving reasons for their decision the national courts found that, since a simple adoption order would result in the rights associated with parental responsibility being transferred to the adoptive parent, it was not in the child's best interests, given that the birth mother intended to continue raising the child. In so ruling, the courts applied the provisions of Article 365 of the Civil Code governing the exercise of parental responsibility in the event of simple adoption. As the applicants were not married they were not covered by the sole exception provided for by that provision.

63. With regard to anonymous donor insemination as provided for in French law, the Court notes that the applicants, without wishing to call into question the conditions in which this is made available, criticised the legal consequences and alleged an unjustified difference in treatment (see paragraph 43 above in fine). The Court observes at the outset that the

applicants did not challenge the legislation in question before the national courts. Above all, it notes that while French law provides that anonymous donor insemination is available only to heterosexual couples, it also states that it is to be made available for therapeutic purposes only, with a view in particular to remedying clinically diagnosed infertility or preventing the transmission of a particularly serious disease (see paragraphs 25 and 26 above). Hence, broadly speaking, anonymous donor insemination in France is confined to infertile heterosexual couples, a situation which is not comparable to that of the applicants. In the Court's view, therefore, the applicants cannot be said to be the victims of a difference in treatment arising out of the French legislation in this regard. The Court further notes that the legislation in question does not allow the creation of the legal adoptive relationship sought by the applicants.

64. The applicants maintained that the French courts' refusal to grant the first applicant a simple adoption order in respect of A. infringed their right to respect for their private and family life in a discriminatory manner. They alleged that, as a same-sex couple, they had been subjected to an unjustified difference in treatment compared with heterosexual couples, whether married or not.

65. The Court considers it necessary first to examine the applicants' legal situation compared with that of married couples. It notes that Article 365 of the Civil Code provides for the sharing of parental responsibility in cases where the adoptive parent is the spouse of the biological parent. The applicants cannot avail themselves of this possibility since they are prohibited under French law from marrying.

66. The Court observes at the outset that it has already ruled, in examining the case of Schalk and Kopf, cited above, that Article 12 of the Convention does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage (see Schalk and Kopf, cited above, §§ 49 to 64). Nor can a right to same-sex marriage be derived from Article 14 taken in conjunction with Article 8 (ibid., § 101). The Court has further held that, where a State chooses to provide same-sex couples with an alternative means of recognition, it enjoys a certain margin of appreciation as regards the exact status conferred (ibid., § 108).

67. The Court notes that in the instant case the applicants stated that they were not seeking access to marriage but alleged that, since their situation was relevantly similar to that of married couples, they had been subjected to a discriminatory difference in treatment.

68. The Court is not persuaded by this argument. It points out, as it has already held, that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences (see Burden, cited above, § 63, and Shackell v. the United Kingdom (dec.), no. 45851/99, 27 April 2000; see also Nylund v. Finland (dec.), no. 27110/95, ECHR 1999‑VI; Lindsay v. the United Kingdom (dec.), no. 11089/84, 11 November 1986; and Şerife Yiğit v. Turkey [GC], no. 3976/05, 2 November 2010). Accordingly, the Court considers that, for the purposes of second-parent adoption, the applicants' legal situation cannot be said to be comparable to that of a married couple.

69. Next, turning to the second part of the applicants' complaint, the Court must examine their situation compared with that of an unmarried heterosexual couple. The latter may, like the applicants, have entered into a civil partnership or may be cohabiting. In essence, the Court notes that any couple in a comparable legal situation by virtue of having entered into a civil partnership would likewise have their application for a simple adoption order refused (see paragraphs 19, 24 and 31 above). It does not therefore observe any difference in treatment based on the applicants' sexual orientation.

70. It is true that the applicants also alleged indirect discrimination based on the fact that it was impossible for them to marry, whereas heterosexual couples could circumvent Article 365 of the Civil Code by that means.

71. However, in that connection the Court can only refer to its previous findings (see paragraphs 66 to 68 above).

72. Lastly, in the alternative, the Court observes that it has previously acknowledged that the logic behind this approach to adoption, which entails the severing of the existing parental tie between the adopted person and his or her biological parent, is valid for minors (see, mutatis mutandis, Emonet and Others v. Switzerland, no. 39051/03, § 80, 13 December 2007). It considers that, in view of the background to and purpose of Article 365 of the Civil Code (see paragraph 19 above), which governs the exercise of parental responsibility in the event of simple adoption, there is no justification, on the sole basis of a challenge to the application of that provision, for authorising the creation of a dual legal parent-child relationship with A.

73. Accordingly, the Court concludes that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

The Court's decision

1. Dismisses unanimously the Government's preliminary objection;

2. Holds by six votes to one that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8;

Case of X and others v. Austria [4]

Procedure

1. The case originated in an application (no. 19010/07) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Austrian nationals ("the applicants"), on 24 April 2007. The President of the Grand Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr H. Graupner, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

3. The applicants alleged that they had been discriminated against in comparison with different-sex couples, as second-parent adoption was legally impossible for a same-sex couple.

[4] Application no. 19010/07 Judgment Strasbourg ; 19 February 2013

4. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). On 29 January 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1). A hearing was held by the First Section on 1 December 2011. On 5 June 2012 a Chamber of that Section composed of the following judges: Nina Vajić, Anatoly Kovler, Elisabeth Steiner, Khanlar Hajiyev, Julia Laffranque, Linos-Alexandre Sicilianos and Erik Møse, and also of Søren Nielsen, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber (Article 30 of the Convention), neither of the parties having objected to relinquishment within the time allowed (Rule 72).

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

6. The Government and the applicant each filed further written observations on the admissibility and merits.

7. In addition, joint third-party comments were received from Prof. R. Wintemute on behalf of the following six non-governmental organisations: Fédération internationale des ligues des droits de l'Homme (FIDH), the International Commission of Jurists (ICJ), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the British Association for Adoption and Fostering (BAAF), the Network of European LGBT Families Associations (NELFA) and the European Commission on Sexual Orientation Law (ECSOL), which had been granted leave by the President of the Grand Chamber to intervene in the written procedure. Further third-party comments were received from the European Centre for Law and Justice (ECLJ), the Attorney General for Northern Ireland, Amnesty International (AI) and Alliance Defending Freedom (ADF), who had each been given leave to intervene in the written procedure.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 3 October 2012 (Rule 59 § 3)

The facts

I. THE CIRCUMSTANCES OF THE CASE

9. The first and third applicants were born in 1967 and the second applicant was born in 1995.

10. The first applicant and the third applicant are two women living in a stable relationship. The second applicant is the third applicant's son and was born outside marriage. His father has recognised paternity and his mother had sole custody of him. The applicants have been living in a common household since the second applicant was about five years old and the first and third applicants care for him jointly.

11. On 17 February 2005 the first applicant and the second applicant, represented by his mother, concluded an agreement whereby the second applicant would be adopted by the first applicant. The applicants' intention was to create a legal relationship between the first and second applicants corresponding to the bond between them, without severing the relationship with the child's mother, the third applicant.

12. The applicants, aware that the wording of Article 182 § 2 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch) could be understood to exclude the adoption of the child of one partner in a same-sex couple by the other partner without the relationship with the biological parent being severed, requested the Constitutional Court to declare that provision unconstitutional as discriminating against them on account of their sexual orientation. In the case of heterosexual couples, Article 182 § 2 of the Civil Code allowed for second-parent adoption, that is to say, the adoption by one partner of the child of the other partner, without the latter's legal relationship with the child being affected.

13. On 14 June 2005 the Constitutional Court rejected the request as inadmissible under Article 140 of the Federal Constitution. It noted that the competent District Court, in deciding whether to approve the adoption agreement, would have to examine the question whether or not Article 182 § 2 of the Civil Code allowed second-parent adoption in the case of a same-sex couple. Should the District Court refuse to approve the adoption agreement, the applicants remained free to submit their arguments regarding the alleged unconstitutionality of that provision to the appellate courts, which in turn could bring the issue before the Constitutional Court if they shared the applicants' view.

14. Subsequently, on 26 September 2005, the applicants requested the District Court to approve the adoption agreement, to the effect that both the first and the third applicants would be the second applicant's parents. In their submissions they explained that the first and second applicants had developed close emotional ties and that the second applicant benefited from living in a household with two caring adults. Their aim was to obtain legal recognition of their de facto family unit. The first applicant would thus replace the second applicant's father. They noted that the second applicant's father had not consented to the adoption, without giving any reasons for his position. Furthermore, they alleged that he had displayed the utmost antagonism towards the family and that the court should therefore override his refusal to consent under Article 181 § 3 of the Civil Code, as the adoption was in the best interests of the second applicant. In support of their submissions, the applicants attached a report from the Youth Welfare Office which confirmed that the first and third applicants shared the day-to-day tasks involved in caring for the second applicant and the overall responsibility for his upbringing, and which concluded, while expressing doubts as to the legal position, that the award of joint custody would be desirable.

15. On 10 October 2005 the District Court refused to approve the adoption agreement, holding that Article 182 § 2 of the Civil Code did not provide for any form of adoption producing the effect desired by the applicants. Its reasoning reads as follows:

"Ms .., the third applicant, has sole custody of her minor son ..., who was born outside marriage. [She] shares a home in ... with her partner ... (the first applicant) and with ... (the second applicant).

An application to the courts made jointly on 12 October 2001 by the child's mother and her partner for partial transfer of custody of [the child] to the mother's partner, so that the two women could exercise joint custody, was dismissed with final effect.

Under the terms of the adoption agreement of 17 February 2005 for which approval is now sought, the first applicant, as the partner of [the child's] mother, agreed to adopt the child.

The applicants seek court approval of the adoption such that the relationship with the biological father and his relatives under family law would cease to exist while the relationship with the biological mother would remain fully intact. They request the courts to override the refusal of consent by the child's father.

The application, which is aimed de facto at securing joint custody for the biological mother and the adoptive mother – who lives in a same-sex relationship with her – fails on legal grounds.

Article 179 of the Civil Code provides for adoption either by one person or by a married couple. Only under certain strict conditions may a married person adopt a child on his or her own. Under the second sentence of Article 182 § 2 of the Civil Code, the legal relationship in family law -– above and beyond the legal kinship itself – ceases only in respect of the biological father (the biological mother) and his (her) relatives, if the child is adopted only by a man (or a woman). In so far as the relationship with the other parent remains intact subsequently (that is, after the adoption), the court declares it to have been severed in respect of the parent concerned, subject to his or her consent.

Article 182 of the Civil Code was last amended in 1960 (Federal Gazette 58/1960). On the basis of the unambiguous wording of this provision and the undoubted intentions of the legislature at that time it must be assumed that, in the event of adoption by one person, the legal relationship with the biological parent of the same sex as the adoptive parent ceases to exist, while the relationship with the parent of the opposite sex remains intact (see also Schlemmer in Schwimann, ABGB2 I § 182, point 3). Only in this scenario does the law allow the courts to declare the latter relationship – which is unaffected by the adoption per se – to have been severed.

The arrangement sought by the applicants, whereby [the child] would be adopted by a woman and the relationship with his biological father, but not with his biological mother, would cease, is therefore incompatible with the law. In the court's view, the interpretation of this legislative provision in conformity with the Constitution – which, needless to say, is required – does nothing to alter this finding.

It is correct to state that, according to the settled case-law of the European Court of Human Rights, issues concerning sexual orientation fall within the scope of protection of the right to private and family life (Article 8 ECHR). It is also true that, according to the Court's case-law, discrimination on the basis of sexual orientation is fundamentally incompatible with Articles 8 and 14 of the Convention. It should be noted, however, that the European Court has also consistently ruled that the Council of Europe member States are to be allowed a margin of appreciation in this regard, which is correspondingly broader the less common ground there is amongst member States' legal orders. In paragraph 41 of its judgment in Fretté v. France

(application no. 36515/97, 26 May 2002), the European Court expressly stated that, in the sphere of the right of homosexuals to adopt, member States had to be afforded a wide margin of appreciation as the issues concerned were subject to societal change and in a state of transition; however, this margin of appreciation was not to be interpreted as giving States carte blanche to exercise arbitrary power.

The issue whether a member State provides the possibility for two persons of the same sex to establish a legal relationship with a child on an equal footing is therefore a matter for the State itself to decide, subject to the limits laid down in Article 8 § 2 of the Convention. In the view of this court no such possibility exists under Austrian law as it currently stands, even when the law is interpreted, as it is required to be, in conformity with the Constitution. The arrangement sought by the applicants would require an amendment to the legislation; it could not be authorised by means of an ordinary court decision interpreting Article 182 of the Civil Code in a manner running counter to the unambiguous wording of that provision.

For these reasons the court dismisses the application for approval of the adoption agreement."

16. The applicants appealed. Referring to Articles 8 and 14 of the Convention, they argued that Article 182 § 2 of the Civil Code was discriminatory in that it led to an unjustified distinction between different-sex and same-sex couples. So-called second-parent adoption was possible for married or unmarried heterosexual couples but not for same-sex couples. The present case had to be distinguished from Fretté, which had dealt with adoption by a single homosexual. By contrast, the present case concerned a difference in treatment between different-sex and same-sex couples.

17. Having regard to the Court's judgment in Karner v. Austria (no. 40016/98, ECHR 2003-IX) the difference in treatment between unmarried heterosexual couples and same-sex couples was particularly problematic. Only a few European States allowed second-parent adoption in same-sex couples; the majority of States reserved second-parent adoption to married couples, and there was a consensus that unmarried different-sex couples and same-sex couples should not be treated differently. The difference complained of did not serve a legitimate aim: in particular, it was not necessary in order to protect the child's interests. There was research to show that children developed just as well in families with homosexual parents as in families with heterosexual parents. What was important was not the parents' sexual orientation but

their ability to provide a stable and caring family. The applicants requested the appellate court to quash the District Court's decision and to grant their request of 26 September 2005 or, alternatively, to refer the case back to the District Court for a fresh decision.

18. The Regional Court, without holding a hearing, dismissed the applicants' appeal on 21 February 2006. In its decision it described a number of related sets of proceedings (concerning visiting rights for the second applicant's father as well as his maintenance obligations, and the proceedings in which the first and third applicants had tried unsuccessfully to obtain joint custody of the second applicant). The Regional Court observed that it had doubts as to whether the third applicant could represent her son in the proceedings, as there was a potential conflict of interests. It went on to state as follows:

"Further examination of this issue is, however, objectively unnecessary, as, in the view of this court – as set out below – approval of the adoption agreement should in any event be refused in this case without the need for further investigation, and was indeed refused by the first-instance court, with the result that the effective representation of the child in the proceedings is not at issue.

As far back as the decision on the application for a partial transfer of custody of [the child] to [the mother's partner], the courts reviewing the case observed that, while Austrian family law contained no legal definition of the term 'parents', it was nevertheless abundantly clear from the provisions of Austrian family law as a whole that the legislature intended that a parental couple should consist, as a matter of principle, of two persons of opposite sex. The legislation therefore provided first and foremost for the biological parents to have custody, or the biological mother in the case of a child born outside marriage. Only where this was not possible did the law provide for other persons to be awarded custody of a child. If the biological parents (father and mother) were present, it was unnecessary to award custody to another person, even if, from a purely factual viewpoint, that person had a close relationship with the child (compare OGH, 7 Ob 144/02 f). The courts stressed that no discrimination against persons in same-sex partnerships could be inferred from this legal stance, but that the provisions of family law were based, in line with the biological reality, on the presence of a couple made up of parents of opposite gender.

In this court's view, these considerations also apply to the issue under examination here, namely the approval of the adoption of a minor child by the same-sex partner of one of the child's parents. Here also, it is unnecessary to create an additional 'legal parent' where both the child's opposite-sex parents are present. The aim is in no sense to discriminate against the same-sex partnership of the child's mother; however, where both the opposite-sex parents are present, there is simply no need for a provision enabling one of the parents to be replaced by the same-sex partner of the other.

The adoption of a minor child is fundamentally designed to create a relationship akin to that which exists between biological parents and their children. The file in the present case shows that the biological father has regular contact with his child, with the result that the child maintains a meaningful relationship with both his opposite-sex parents. In these circumstances, however, there is no need to replace either of the biological parents with the same-sex partner of the other parent by authorising the child's adoption.

The case-law concerning contact rights for parents also generally and indisputably recognises that, according to the available psychological and sociological findings, it is of particular importance for the child's subsequent development that adequate personal contact be maintained with the parent with whom he or she is not living (see, inter alia, EFSlg 100.205). Accordingly, the legislation goes so far as to confer a right on the child to have personal contact with the parent not living in the same household (see, inter alia, OGH, 3 Ob 254/03 z). It is likewise beyond dispute that, for a minor child to thrive, it is highly desirable that he or she should have a personal relationship with both – opposite-sex – parents, in other words, with both a female (mother) and a male (father) caregiver, and that efforts should be made to that end (compare, inter alia, EFSlg 89.668). At least a minimum degree of personal contact between the child and both parents is therefore greatly to be desired and is generally made a requirement in the interests of the child's healthy development (compare OGH, 7 Ob 234/99 h). These considerations also clearly militate against authorising the adoption of a child by the same-sex partner of one of the parents if that has the effect of severing the family-law relationship with the other parent.

As stated above, this legal position in no sense amounts to discrimination against people in same-sex partnerships. On this point the first-instance court, in the reasoning of the impugned decision, correctly pointed to the settled case-law of the European Court of Human Rights, according to which sexual orientation falls within the scope of protection of private and family life (Article 8 of the Convention), with the result that discrimination on the basis of sexual orientation is fundamentally incompatible with Articles 8 and 14 of the Convention. However, the first-instance court also correctly pointed out that national legal systems must be afforded a margin of appreciation in enacting legislation, a margin which is correspondingly broader where there is no clear consensus between member States' legal systems in the sphere in question. While noting that the margin of appreciation must not be interpreted as giving States carte blanche to make arbitrary decisions, the first-instance court observed that it must be construed very generously in the sphere of the right of homosexuals to adopt, as these were issues which were subject to societal change. In the context of this assessment, the Austrian legal system made no provision for the adoption of a child by the same-sex partner of one of the parents.

The appellants have adduced no convincing arguments to indicate that the provisions in force amount to discrimination against same-sex partners. Even in the case of heterosexual couples, the only legal relationship that may be severed when a partner's child is adopted is the relationship between the child and the parent of the same sex as the adoptive parent. In such cases the child therefore continues to have two opposite-sex parents and caregivers. This state of affairs, which is important for the child's development, does not however apply in the event of his or her adoption by the same-sex partner of one of the parents; there is therefore no evidence of an unjustified difference in treatment in this regard. Furthermore, in the judgment of the European Court of Human Rights cited by the appellants (see Karner v. Austria, 24 July 2003), the Court reiterated that a difference in treatment of people living in a same-sex relationship was to be considered discriminatory only if it had no objective and reasonable justification, that is if it did not pursue a legitimate aim, or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court would thus regard a difference in treatment as compatible with the Convention only where very weighty reasons had been put forward. Particularly compelling reasons therefore had to be advanced to justify any difference in treatment based on sexual orientation. However, the Court also explicitly acknowledged in this regard that protection of

the ‘traditional family’ was, in principle, a weighty and legitimate reason which might justify a difference in treatment by the national legislature. At the same time, it found that the aim of protecting the family in the traditional sense was rather abstract and that a broad variety of concrete measures could be used to implement it. Compelling reasons had to be given for excluding people living in homosexual relationships from the scope of application of certain legal provisions. In the case in question, which concerned the right of a deceased person’s same-sex partner to succeed to a tenancy, the Court found that no such reasons had been given.

Nevertheless, the judgment in question does not lend any support to the appellants’ arguments in the present case. On the basis of the right – recognised by the Court – to include measures in the national legal system to protect the ‘traditional family’, the stance taken in the Austrian legal system whereby, as a matter of principle and in accordance with biological reality, a minor child should have an opposite-sex couple as parents, has to be respected. Hence, in the view of this court, the decision by the legislature not to provide for a child to be adopted by the same-sex partner of one of the parents, with the result that the relationship with the opposite-sex parent is severed, unquestionably pursues a ‘legitimate aim’. Likewise, it cannot be said that ‘no reasonable relationship of proportionality’ exists between this aim and the means employed. This legal situation is not based – contrary to the appellants’ assertions – on ‘the prejudice of the heterosexual majority towards the homosexual minority’, but is merely designed to ensure that minor children have regular contact with both a female and a male parent while they are growing up. This aim must be respected in just the same way as the decision of the child’s mother to live in a same-sex partnership. Thus, there is no apparent justification for depriving the child of his family-law relationship with his parent of the other sex. However, that is precisely what the child’s mother and her partner sought in the present case and have continued to seek since the lodging of the appeal.

Accordingly, in view of these overall considerations, the present appeal should be dismissed.

The ruling on the admissibility of an appeal on points of law is based on sections 59(1)(2) and 62(1) of the Non-contentious Proceedings Act. While it is true that the Supreme Court already

issued one decision in the instant case, that decision concerned the lawfulness of the (partial) transfer of custody of the child to the mother's same-sex partner. As regards the issue now to be determined, however, namely whether the adoption of a child by the same-sex partner of one of the parents is lawful, no specific and express Supreme Court rulings exist on the subject to date, to the best of this court's knowledge. For that reason the present decision is of considerable importance in terms of the unity of the law, legal certainty and development of the law."

19. The applicants lodged an appeal on points of law with the Supreme Court. They submitted that Article 182 § 2 of the Civil Code as applied by the courts led to a difference in treatment between different-sex and same-sex couples in cases where one partner wished to adopt the other partner's biological child. While heterosexual couples (including unmarried ones) could establish an additional parent-child relationship between the child and its parent's partner, this was impossible for same-sex couples, as the same-sex partner would replace the biological parent. Thus, any meaningful kind of second-parent adoption was excluded. The Regional Court had sought to justify this difference in treatment by referring to the aims of protecting the family in the traditional sense and allowing the child to grow up with both a male and a female caregiver. However, the Regional Court had not shown that the exclusion of same-sex families from second-parent adoption was necessary to achieve that aim. Recent studies showed that same-sex couples were just as capable of raising children as different-sex couples. Moreover, the present case did not concern the question whether the second applicant should or should not grow up in a same-sex family. He was already part of a de facto same-sex family. The question therefore was whether it was justified to deny legal recognition to the relationship between him and the first applicant. It had not been shown to be necessary to distinguish between unmarried heterosexual and same-sex couples. Finally, the applicants maintained that in many European States second-parent adoption was reserved to married couples. They asserted that where a State chose, as Austria had, to allow second-parent adoption in unmarried couples, it was not free to make a distinction on the basis of sexual orientation.

20. On 27 September 2006 the Supreme Court dismissed the appeal on points of law lodged by the applicants. It held as follows:

"[The minor] is the biological child of the third applicant, Ms..., and of Mr ..., born on ... The child's mother has sole custody. She shares a home in ... with her partner (the first applicant) and with [the child]. The applicants applied for court approval of an adoption agreement entered into on 17 February 2005 by the first applicant and the minor child, represented by his mother, under the terms of which the first applicant agreed to adopt the child. However, the agreement provided for the first applicant to take the place not of the child's mother but of his biological father. The applicants sought court approval of the adoption such that the relationship with the biological father and his relatives under family law would cease to exist while the relationship with the child's biological mother would remain fully intact. They requested the courts to override the refusal of consent by the child's father.

The first-instance court refused the application, taking the view that Article 182 of the Civil Code reflected the legislature's clear intention that, in the case of adoption by one person, the legal relationship with the parent of the same sex as the adoptive parent should cease to exist and the relationship with the opposite-sex parent should be preserved. Only in this scenario, according to the first-instance court, did the law allow the courts to also declare the latter relationship, which was not affected by the adoption per se, to have been severed. In the view of the first-instance court, the arrangement sought by the applicants, whereby [the child] would be adopted by a woman and the legal relationship with his biological father but not with his biological mother would cease, was incompatible with the law. This interpretation was in conformity with the Constitution and in particular with Articles 8 and 14 of the European Convention on Human Rights. According to the case-law of the European Court of Human Rights, member States had a particularly wide margin of appreciation in the sphere of adoption by homosexuals, as these issues were subject to societal change and were in a state of transition. The question whether a member State provided the possibility for two persons of the same sex to create a legal relationship with a child on an equal footing was therefore a matter for the State itself to decide, subject to the limits laid down in Article 8 § 2 of the Convention. The arrangement sought by the applicants was not possible under Austrian law.

The appellate court upheld the decision of the first-instance court, taking the view that the law was clearly based on the premise that the term 'parents' necessarily referred to two persons of opposite sex. This was reflected in the law on custody, which as a matter of principle gave

priority to the biological parents over other persons. The same considerations applied in the sphere of adoption law. Here too the legislative provisions were based, in line with the biological reality, on the presence of a couple made up of parents of opposite gender. Where both the opposite-sex parents were present, there was no need for a provision enabling one of the parents to be replaced by the same-sex partner of the other; this did not reflect any wish to discriminate against same-sex partners. In the sphere of contact rights it was also recognised beyond dispute that, for a minor child to thrive, it was highly desirable that he or she should have a personal relationship with both – opposite-sex – parents, in other words with both a female (mother) and a male (father) caregiver. At least a minimum degree of personal contact between the child and both (biological) parents was to be desired and was generally made a requirement in the interests of the child's healthy development. These considerations too could be applied in relation to adoption. The appellate court also endorsed the first-instance court's view that there was no discrimination against same-sex partners from the standpoint of the case-law of the European Court of Human Rights. A difference in the treatment of persons living in a same-sex relationship was to be regarded as discriminatory only if it had no objective and reasonable justification, in other words, if the rule in question did not pursue a legitimate aim or if there was no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Differences in treatment were found to be compatible with the Convention where weighty reasons had been put forward. The Austrian legislature pursued one such legitimate aim in seeking to ensure that children, as they were growing up, had the regular contact with both a male and a female parent which their development required. That aim was to be accorded the same respect as the mother's decision to live in a same-sex partnership. There was no justification, however, for depriving a child of the relationship under family law with his or her parent of the other sex.

The appellate court ruled that leave to appeal on points of law should be granted since no case-law existed on the issue of the lawfulness of the adoption of a child by the same-sex partner of one of his or her biological parents.

The applicants' appeal on points of law is admissible for the reasons given by the appellate court. It is nevertheless unfounded.

Article 179 § 2 of the Civil Code provides that the adoption of a child by more than one person is permissible only where the adoptive parents are a married couple. Legal commentators have concluded from this that adoption by more than one person of the same sex (whether simultaneously or consecutively) is prohibited (see Schwimann in Schwimann, Civil Code § 179, point 6, and Hopf in Koziol/Bydlinksi/Bollenberger, § 179, point 2, both cited by the Vienna Regional Civil Court, 27 August 2001 – EFSlg 96.699).

The second sentence of Article 182 § 2 of the Civil Code governs the effects produced in the event of adoption by one adoptive parent. If the child is adopted only by an adoptive father (an adoptive mother), the ties of kinship cease only in respect of the biological father (the biological mother) and his (her) relatives. It is quite clear from the materials (ErlBem RV 107 BlgNR IX. GP, 21) that this provision should be construed to mean that the non-proprietary legal ties are severed only with the biological parent who is being replaced by an adoptive parent of the same gender. In explicit terms, this means that the child cannot, for instance, be deprived of his or her biological father if he or she is being adopted just by a woman (see also: Schwimann in Schwimann, op. cit., § 182, sub-paragraph 3; Stabentheiner in Rummel I § 182, sub‑paragraph 2).

Contrary to the applicants' assertion, this provision is not to be construed extensively in the way that they argue, nor does there exist an unintended legislative gap which therefore needs to be filled by analogy. According to the materials (op. cit., 11), the chief aim of adoption is to promote the well-being of the minor child (the protective principle). Adoption should constitute an appropriate means of entrusting to suitable and responsible individuals the care and upbringing of children who have no parents, those who come from broken homes or those whose parents, for whatever reason, are unable to provide their children with a proper upbringing or may not even want their children. However, this aim can be achieved only when the adoption allows the situation in a biological family to be recreated as far as possible.

The case-law (6 Ob 179/05z) also makes clear that the tie between the child and the adoptive parent is to be understood as a social and psychological relationship, akin to that between biological parents and their children. The model for the child-parent relationship in the context of adoption of minors is informed by the specific social and psychological ties that exist between parents and young people approaching adulthood. In addition to the socially typical ties of physical and personal proximity (shared household, care for the child's physical and psychological needs by its parents), these encompass emotional ties comparable to the love between parents and their children, and a specific role for the parents as mentors and role models.

Article 182 § 2 of the Civil Code imposes a general prohibition (that is, not just in the case of same-sex partners) on adoption by a man as long as the ties of kinship with the child's biological father still exist, and by a woman where such ties still exist with the biological mother. Under Article 182 § 2, therefore, a person who adopts a child on his or her own does not take the place of either parent at will, but only the place of the parent of the same sex. The adoption of the child by the female partner of the biological mother is therefore not legally possible.

Contrary to the applicants' view, this provision also survives the test of compatibility with the Constitution (fundamental rights perspective). In the case of Fretté v. France, the European Court of Human Rights was called upon to examine whether the authorities' refusal to authorise the adoption of a child by a homosexual man amounted to discrimination. In its judgment of 26 February 2002, the Court found that adoption meant 'providing a child with a family, not a family with a child'. According to the Court, it was the State's task to ensure that the persons chosen to adopt were those who could offer the child the most suitable home in every respect. Not least in view of the wide differences in national and international opinion concerning the possible consequences of a child being adopted by one or more homosexual parents, and bearing in mind the fact that there were not enough children to adopt to satisfy demand, States had to be allowed a broad margin of appreciation in this sphere. A refusal to authorise adoption by a homosexual would not be in breach of Article 14 of the Convention read in conjunction with Article 8 if it pursued a legitimate aim, namely the protection of the

child's best interests, and did not infringe the principle of proportionality between the means employed and the aim sought to be achieved.

The applicants have not demonstrated, nor is there any other evidence to suggest, that the provisions of Article 182 § 2 of the Austrian Civil Code overstep the margin of appreciation accorded by the European Court, or that they infringe the proportionality principle. The Supreme Court is therefore in no doubt as to the compatibility of this provision with the Constitution, which is called into question by the applicants.

In view of the legal impossibility of the adoption it is also not necessary to further examine whether the conditions for overriding the father's refusal to consent, as an exceptional measure under Article 181 § 3 of the Civil Code, have been met."

The judgment was served on the applicants' counsel on 24 October 2006.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Adoption

21. The Civil Code (Allgemeines Bürgerliches Gesetzbuch) contains the following definitions of "mother" and "father":

Article 137b reads as follows:

"The mother shall be the woman who has given birth to the child."

Article 138 provides:

"(1) The child's father shall be the man

1. who is married to the child's mother at the time of the child's birth or, being the mother's husband, died no earlier than three hundred days prior to the child's birth, or

2. who has recognised paternity, or

3. whose paternity has been established by a court."

22. The following provisions of the Civil Code on adoption are relevant in the present case.

Article 179, in so far as relevant, provides as follows:

"(1) Persons of full legal age and capacity ... may adopt. The adoption creates an adoptive parent-child relationship.

(2) The adoption of a child by more than one person, whether simultaneously or – as long as the adoptive relationship still exists – consecutively, shall be permitted only if the adoptive parents form a married couple. As a rule, spouses may only adopt a child jointly. An exception may be made where the child to be adopted is the spouse's biological child, where one spouse does not fulfil the requirement of having full legal age or the required difference in age with the adoptee, where one spouse's whereabouts have been unknown for at least a year, where the spouses have not been living in matrimonial community for at least three years or where there are similar and particularly serious grounds justifying adoption by only one spouse."

23. Pursuant to Article 179a of the Civil Code adoption requires a written agreement between the adoptive parent and the adoptive child (who, if a minor, will be represented by his or her legal representative) and the approval of that agreement by the competent court.

24. The court has to approve the agreement if it serves the child's interests and if a relationship corresponding to a biological parent-child relationship already exists or if such a relationship is intended to be created (Article 180a of the Civil Code).

25. Article 181 of the Civil Code, in the version in force at the material time, and in so far as relevant, provided as follows:

"(1) Approval may be granted only if the following persons agree to the adoption

1. the parents of the minor adopted child;

2. the spouse of the adoptive parent;

3. the spouse of the adopted child;

4. the adopted child from the age of fourteen;

(3) Where one of the persons referred to in points 1 to 3 of paragraph 1 refuses consent without justifiable grounds, the court shall override the refusal on an application from one of the parties."

26. According to the domestic courts' case-law, overriding a party's refusal to consent under Article 181 (3) of the Civil Code is an extraordinary measure that will only be envisaged where the interests of the child in the adoption clearly outweigh the interests of the biological parent, for instance in having contact with the child. It may also be envisaged if the refusal is not justified in moral terms, for example if the parent who is refusing consent has consistently displayed extreme antagonism towards the family or is guilty of flagrant neglect of his or her statutory obligations vis - à-vis the child such that the child's development has been jeopardised on a lasting basis or would have been jeopardised without third-party assistance.

27. Article 182 of the Civil Code regulates the effects of adoption. It provides as follows:

"(1) The same rights that arise as a consequence of legitimate descent shall be created at that time between the adoptive parent and his or her offspring on the one hand, and the adopted child and his or her offspring who are minors at the time the adoption takes effect on the other hand.

(2) If the child is adopted by a married couple, the legal relationship under family law – above and beyond the legal kinship itself (Article 40) – between the biological parents and their relatives on the one hand, and the adopted child and his or her offspring who are minors at the time the adoption takes effect on the other hand, shall cease at that time, apart from the exceptions referred to in Article 182a. If the child is adopted by just an adoptive father (an adoptive mother), the relationship shall cease only in respect of the biological father (the biological mother) and his (her) relatives; in so far as the legal relationship with the other parent remains intact after the adoption, the court shall declare it to have been severed, subject to the consent of the parent concerned. The relationship ceases to exist as of the date on which the statement of consent is given, but no earlier than the date on which the adoption takes effect."

As the Supreme Court's judgment in the present case demonstrates, this provision is understood as excluding the adoption of one partner's child by the other partner in a same-sex couple.

28. In the event of an adoption all family-law relationships apart from the legal kinship between the adopted child and his or her biological parent or parents cease to exist. That means in particular that the biological parents or parent lose all parental rights such as custody, visiting rights and rights of information and consultation (see below).

29. Following adoption only a subsidiary maintenance obligation remains on the part of the biological parent or parents vis-à-vis the child, pursuant to Article 182a of the Civil Code. A relationship also remains intact in inheritance law: pursuant to Article 182b the adopted child still has inheritance rights through his or her biological parents, while the biological parents and their descendants have subsidiary inheritance rights through the adopted child; the inheritance rights of the adoptive parents and their descendants take precedence over these right

30. It follows from the provisions of the Civil Code set out above that adoption under Austrian law is either joint adoption by a couple (this form being reserved to married couples), or adoption by one person. Persons adopting alone may be heterosexual and be living in a married couple (in which case the possibilities to adopt alone are tightly restricted), in an unmarried couple or alone. They may also be homosexual and be living in a registered partnership, in an informal couple or alone.

31. Second-parent adoption, namely the adoption of one partner's biological child by the other partner, is allowed in heterosexual couples (whether married or unmarried) but is not possible in same-sex couples.

32. Currently, a draft law is pending which proposes amendments to the provisions of the Civil Code regulating the relations between parent and child and the right to bear a name, as well as amendments to a number of other laws (Kindschaftsrechts- und Namensrechtsänderungsgesetz). It does not include any proposals to change the provisions here at issue, in particular Articles 179 to 182 of the Civil Code. Although these provisions are renumbered under the proposed amendments, their wording remains unchanged.

B. Same-sex couples

33. Same-sex couples are not allowed to marry, in accordance with Article 44 of the Civil Code (on this issue, see Schalk and Kopf v. Austria, no. 30141/04, 24 June 2010). Article 44 of the Civil Code provides:

"The marriage contract shall form the basis for family relationships. Under the marriage contract two persons of opposite sex declare their lawful intention to live together in indissoluble matrimony, to beget and raise children and to support each other."

34. On 1 January 2010 the Registered Partnership Act entered into force. It gives same-sex couples the opportunity to enter into a registered partnership.

35. Section 2 of the Registered Partnership Act provides as follows:

"A registered partnership may be formed only by two persons of the same sex (registered partners). They thereby commit themselves to a lasting relationship with mutual rights and obligations."

36. The rules on the establishment of a registered partnership, its effects and its dissolution resemble the rules governing marriage (for more details, see Schalk and Kopf, cited above, §§ 16-23). Like married couples, registered partners are expected to live together like spouses in every respect, to share a common home, to treat each other with respect and to provide mutual assistance (section 8(2) and (3)). Registered partners have the same obligations regarding maintenance as spouses (section 12). The Registered Partnership Act also contains a comprehensive range of amendments to existing legislation in order to provide registered partners with the same status as spouses in various other fields of law such as inheritance law, labour, social and social insurance law, fiscal law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as the law on foreigners.

37. However, some differences between marriage and registered partnership remain, the most important of which concern parental rights. Hence, assisted reproduction is available only to married or unmarried different-sex couples (section 2(1) of the Artificial Procreation Act – Fort-pflanzungs-medizingesetz).

38. Furthermore, registered partners are not allowed to adopt a child jointly, nor is second-parent adoption permitted.

39. Section 8(4) of the Registered Partnership Act provides as follows:

"Registered partners shall not be allowed to adopt a child jointly, nor shall one registered partner be allowed to adopt the other partner's child."

40. A person living in a registered partnership may adopt on his or her own: an amendment to Article 181 § 1, sub-paragraph 2, of the Civil Code introduced at the same time as the Registered Partnership Act states that the registered partner has to consent if his or her partner wishes to adopt a child.

41. The general section of the explanatory report on the draft law (Erläu-terungen zur Regierungsvorlage, 485 of Annex to the Minutes of the National Council, XXIV GP) noted that the purpose of the Registered Partnership Act was to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships, having particular regard to developments in other European countries. However, it was not intended

to include any provisions concerning children or any amendments to the law in force in respect of children. In that connection the explanatory report noted that the joint adoption of a child by registered partners was excluded, as was the adoption of one registered partner's child by the other partner.

42. The specific comment on section 8(4) of the Registered Partnership Act noted that this provision contained a prohibition on adoption, as repeatedly requested during the consultation procedure. Furthermore, the comments expressed the view that the judgments of the European Court of Human Rights in the cases of E.B v. France (no. 435466/02, 22 January 2008) and Fretté (cited above) were not relevant in this context, as they related only to the applicants' aptitude to raise a child. The legislature was free to regulate this issue. Moreover, second-parent adoption or joint adoption by registered partners was in any case excluded, as Austrian law on adoption as it stood did not allow situations in which a child had, for legal purposes, two fathers or two mothers.

43. The specific comment on the amendment of Article 181 § 1, sub-paragraph 2, of the Civil Code merely noted that, as the result of an oversight, the draft legislation had not proposed an amendment, an omission that had subsequently been corrected.

C. Children born outside marriage

44. Under Article 166 of the Civil Code the mother of a child born outside marriage has sole custody (meaning that she exercises parental responsibility, caring for the child and raising him or her, representing the child in legal matters and managing his or her assets).

45. If the parents of a child born outside marriage are living in a common household they can agree to exercise custody jointly, under Article 167 of the Civil Code. Since an amendment to the Civil Code that entered into force on 1 July 2001, the parents of a child born outside marriage can also agree to exercise custody jointly if they are not living in a common household. An agreement to exercise joint custody is subject to the approval of the court, which has to assess whether the agreement serves the child's interests.

46. Both parents are obliged to provide maintenance for the child (Article 140 § 1 of the Civil Code). In principle, maintenance is to be provided in kind. The parent not living in the same household as the child has to provide maintenance in the form of maintenance payments.

47. The parent not living in the same household as the child has contact rights pursuant to Article 148 § 1 of the Civil Code. Since 1 July 2001 this is also considered to be a right for the child concerned (before that date it was only regarded as a right for the parent). The parents and the child should agree on the exercise of contact rights. If they are unable to reach agreement the court, at the request of one of the persons concerned and having regard to the needs and wishes of the child, must put in place a contact arrangement which serves the interests of the child.

48. Furthermore, under Article 178 § 1 of the Civil Code the parent who does not have custody has the right to be informed of certain important matters concerning the child, some of which require his or her approval.

III. INTERNATIONAL CONVENTIONS AND COUNCIL OF EUROPE MATERIALS

A. Convention on the Rights of the Child

49. The Convention on the Rights of the Child was adopted by the General Assembly of the United Nations on 20 November 1989 and came into force on 2 September 1990. It has been ratified by all Council of Europe member States. Its relevant provisions read as follows:

Article 3

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal

guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

Article 21

"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. European Convention on the Adoption of Children (revised 2008)

50. The revised European Convention on the Adoption of Children was opened for signature on 27 November 2008 and entered into force on 1 September 2011. It has been ratified by seven States, namely Denmark, Finland, the Netherlands, Norway, Romania, Spain and Ukraine. Austria has not ratified or signed the Convention.

51. One of the reasons for the revision, as stated in the preamble to the 2008 Convention, was that some of the provisions of the 1967 European Convention on the Adoption of Children

were outdated and contrary to the case-law of the European Court of Human Rights. The relevant provisions of the 2008 Convention read as follows:

Article 4 – Granting of an adoption

"1. The competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the best interests of the child.

2. In each case the competent authority shall pay particular attention to the importance of the adoption providing the child with a stable and harmonious home."

Article 7 – Conditions for adoption

"1. The law shall permit a child to be adopted:

a. by two persons of different sex

i. who are married to each other, or

ii. where such an institution exists, have entered into a registered partnership together;

b. by one person.

2. States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living together in a stable relationship."

Article 11 – Effects of an adoption

"1. Upon adoption a child shall become a full member of the family of the adopter(s) and shall have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established. The adopter(s)

shall have parental responsibility for the child. The adoption shall terminate the legal relationship between the child and his or her father, mother and family of origin.

2. Nevertheless, the spouse or partner, whether registered or not, of the adopter shall retain his or her rights and obligations in respect of the adopted child if the latter is his or her child, unless the law otherwise provides.

..."

52. The explanatory report on the 2008 Convention states the following under the heading "General considerations":

"14. In a sense, there is only one principle essential to good adoption practice, namely that adoption should be in the best interests of the child as stated in Article 4, paragraph 1, of the Convention. ..."

53. Under the heading "Article 7 – Conditions for adoption" the explanatory report states, in so far as relevant in the present context:

"42. This article provides for adoption either by a couple or by one person.

43. While the scope of the 1967 Convention is restricted to heterosexual married couples, the scope of the revised Convention is extended to heterosexual unmarried couples who have entered into a registered partnership in States which recognise that institution. By such a regulation the trend in many States is taken into account.

..

45. Concerning paragraph 2 it was noted that certain State Parties (Sweden in 2002 and the United Kingdom in 2005) denounced the 1967 Convention on the ground that same sex registered partners under their domestic law may apply jointly to become adoptive parents and that this was not in line with the Convention. Similar situations in other States could also lead

to the denunciation of the 1967 Convention. However, it was also noted that the right of same sex registered partners to adopt jointly a child was not a solution that a large number of States Parties were willing to accept at the present time.

46. In these circumstances, paragraph 2 shall enable those States which wished to do so, to extend the revised Convention to cover adoptions by same sex couples who are married or registered partners. In this respect, it is not unusual for Council of Europe instruments to introduce innovative provisions, but to leave it to States Parties to decide whether or not to extend their application to them ...

47. States are also free to extend the scope of the Convention to different or same sex couples who are living together in a stable relationship. It is up to States Parties to specify the criteria for assessing the stability of such a relationship."

C. Recommendation of the Committee of Ministers

54. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, covers a wide range of areas where lesbian, gay, bisexual or transgender persons may encounter discrimination. In the chapter concerning the "Right to respect for private and family life" it provides as follows:

"23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.

24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.

25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

...

27. Taking into account that the child's best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity."

IV. COMPARATIVE LAW

A. Study by the Council of Europe Commissioner for Human Rights

55. A recent study by the Council of Europe Commissioner for Human Rights entitled "Discrimination on grounds of sexual orientation and gender identity in Europe" (Council of Europe Publishing, June 2011) contains the following information on the issue:

"LGBT [lesbian, gay, bisexual and transgender persons] can adopt a child by one of three procedures. A single lesbian woman or gay man may apply to become an adoptive parent (single-parent adoption). Alternatively, a same-sex couple can adopt their partner's biological or adopted children without terminating the first parent's legal rights. These are so called 'second-parent adoptions' and give the child two legal guardians. Second-parent adoptions also protect the parents by giving both of them legally recognised parental status. The lack of second-parent adoption deprives the child and the non-biological parent of rights if the biological parent dies or in the case of divorce, separation, or other circumstances that would bar the parent from carrying out parental responsibilities. The child also has no right to inherit from the non‑biological parent. Moreover, at an everyday level, the lack of second-parent adoption rules out parental leave, which can be harmful financially for LGBT families. The third procedure is joint adoption of a child by a same sex couple.

Ten member states allow second-parent adoption to same-sex couples (Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom). Apart from Finland and Germany these member states also give access to joint adoptions for same-sex couples. In Austria and France there is no access to second-parent

adoption but same-sex couples in registered partnerships are allowed some parental authority or responsibilities. No access to joint adoption or second-parent adoption is a reality in 35 member states: Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Poland, Portugal, Romania, the Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Switzerland, 'the former Yugoslav Republic of Macedonia', Turkey and Ukraine. ..."

B. Further information on comparative law

56. From the information available to the Court, including a survey of thirty-nine Council of Europe member States, it would appear that in addition to the ten member States mentioned by the Commissioner's study, (Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Spain, Sweden and the United Kingdom (with the exception of Northern Ireland)), one further member State, namely Slovenia, has accepted second-parent adoption by same-sex couples in the recent case-law of its courts.

57. The majority (twenty-four) of the thirty-nine Council of Europe member States on which information is available to the Court reserve second-parent adoption to married couples.

Ten member States (Belgium, Iceland, the Netherlands, Portugal, Romania, Russia, Slovenia, Spain, Ukraine and the United Kingdom (with the exception of Northern Ireland)) also allow second-parent adoption by unmarried couples. Six States in this group allow second-parent adoption by unmarried heterosexual and unmarried same-sex couples alike, while four (Portugal, Romania, Russia and Ukraine) allow it – like Austria – only for unmarried different-sex couples but not for unmarried same-sex couples.

The remaining States surveyed have adopted different solutions, for instance allowing second-parent adoption for married couples and registered partners (for example, in Germany and Finland), but not for unmarried couples, whether heterosexual or homosexual.

The law

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

58. The applicants complained under Article 14 of the Convention taken in conjunction with Article 8 that they were being discriminated against in the enjoyment of their family life on account of the first and third applicants' sexual orientation. They submitted that there was no reasonable and objective justification for allowing the adoption of one partner's child by the other partner where heterosexual couples, whether married or unmarried, were concerned, while prohibiting the adoption of one partner's child by the other partner in the case of same-sex couples.

Article 8 of the Convention reads as follows:

"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 provides:

"The enjoyment of the rights and freedoms set forth in [the] 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."

A. Admissibility

59. The Government asserted that the application should be declared inadmissible as being manifestly ill-founded. They argued that on the facts of the case there was no issue of

discrimination. In particular, they submitted that the domestic courts had refused to authorise the second applicant's adoption on the ground that his father had not consented and that it was not in the child's interests. Consequently, the legal impossibility for a homosexual to adopt his or her partner's child, resulting from Article 182 § 2 of the Civil Code, had not come into play. In the Government's view, the applicants were therefore requesting the Court to review this provision in the abstract.

60. The Government thus appear to argue that the applicants cannot claim to be victims of the alleged violation within the meaning of Article 34 of the Convention as, in the specific circumstances of the case, they were not directly affected by the law complained of. However, the Court notes that the Government have not raised an explicit objection as to admissibility on that ground. The Court considers it appropriate to deal with the issues raised by the Government in the context of the examination of the merits of the case.

61. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

62. The applicants argued that they were in a relevantly similar situation to different-sex couples raising children. They referred to numerous scientific studies which confirmed that children developed equally well in same-sex families and in different-sex families.

63. The applicants noted that second-parent adoption was open to married couples. Same-sex couples were not allowed to marry under Austrian law. Even if they became registered partners, second-parent adoption was explicitly prohibited by section 8(4) of the Registered Partnership Act. However, the applicants stressed that they did not wish to assert a right which was reserved to marriage-based families.

64. They emphasised that the key issue in the present case was the unequal treatment between unmarried different-sex couples and unmarried same-sex couples. Under Austrian law, second-parent adoption was possible for unmarried heterosexual couples, but not for unmarried same-sex couples. The applicants pointed out that this was a crucial difference compared with Gas and Dubois v. France (no. 25951/07, 15 March 2012), as under French law second-parent adoption was reserved to married couples. The present case therefore raised an issue similar to that in Karner v. Austria (no. 40016/98, ECHR 2003-IX), in that a right which was open to unmarried heterosexual couples was refused to same-sex couples. Furthermore they pointed out that only four Council of Europe member States adopted the same position as Austria, that is to say, allowing second-parent adoption in unmarried opposite-sex couples while prohibiting it in same-sex couples. The vast majority either reserved second-parent adoption to married couples or granted it also to unmarried couples irrespective of their sexual orientation.

65. The applicants asserted that they had indeed been treated differently in the proceedings at issue. Before the domestic courts, they had argued that the refusal by the second applicant's father to consent to the adoption was not justified as he had been acting against the interests of the child. Consequently, the second applicant's interest in the adoption outweighed his father's interest in objecting to it. Thus, they argued that the court should have overridden the father's refusal in accordance with Article 181 § 3 of the Civil Code. In the case of an opposite-sex couple, the District Court would have carried out a detailed examination and would have had to deliver a separate decision on this issue. However, in the applicants' case it had denied them any inquiry of the facts on the ground that the adoption requested by them was in any case not possible under Austrian law. This position had been explicitly confirmed by the Supreme Court.

66. The applicants stressed that the gist of their complaint was that they were automatically excluded from any chance of adoption. The case was therefore similar to E.B. v. France ([GC], no. 43546/02, 22 January 2008) in that they were excluded from any meaningful possibility of adopting on account of the first and third applicants' sexual orientation.

67. The applicants noted the Government's argument that Austrian adoption law was aimed at protecting the interests of the child. According to the Court's case-law, it was for the Government to show that the exclusion of same-sex couples from second-parent adoption was necessary to achieve that aim. There was a far-reaching scientific consensus that same-sex

couples were as capable as different-sex couples of ensuring the positive development of children. From among the studies they submitted, the applicants referred at the hearing to a large-scale study entitled "The life of children in same-sex partnerships" commissioned by the German Ministry of Justice (Rupp Martina (ed.), Die Lebenssituation von Kindern in gleich-geschlechtlichen Partnerschaften, Cologne, 2009).

68. In so far as the Government had argued that Austrian law sought to avoid a situation where a child had two fathers or two mothers for legal purposes, the applicants pointed out that they had formed a de facto family for many years but were still denied any possibility of legal recognition of their family life. Furthermore, they submitted that under Austrian law an adopted child often had two mothers or two fathers. Under Article 182 § 2 of the Civil Code the adoption severed the family-law relationship between the adopted child and the biological parent or parents. However, mutual maintenance obligations and inheritance rights, albeit subsidiary to those of the adoptive parents, remained intact.

69. The applicants submitted a further argument based on the 2008 European Convention on the Adoption of Children, the Committee of Ministers' Recommendation of 31 March 2010 and the United Nations Convention on the Rights of the Child. In all these texts the key notion in respect of adoption was the best interests of the child and not the gender or the sexual orientation of the parents. Finally, they contested the Government's argument that there were sufficient alternative possibilities under Austrian law for giving legal recognition to the relationship between a child and his or her parent's same-sex partner.

(b) The Government

70. The Government did not contest the applicability of Article 14 taken together with Article 8. They accepted that the relationship between the three applicants constituted family life. However, they pointed out that the facts of the present case differed from those in Gas and Dubois (cited above), as the second applicant had a father with whom he also maintained a family relationship.

71. Furthermore, the Government argued that the applicants' situation was not comparable to that of a married couple in which one spouse wished to adopt the other spouse's child, and invited the Court to follow its findings in Gas and Dubois (cited above, §§ 66-68).

72. In respect of the comparison with an unmarried different-sex couple, the Government accepted that the applicants were in a comparable situation, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable as different-sex couples for the adoption of children in general or for second-parent adoption in particular. They were also in a comparable situation in that any adoption required the consent of both biological parents.

73. The Government added that the fact that the adoption of a minor severed parental ties was considered compatible with Article 8 (they referred to Emonet and Others v. Switzerland (no. 39051/03, 13 December 2007), and Eski v. Austria (no. 21949/03, 25 January 2007), and that States enjoyed a wide margin of appreciation in the area of adoption law. Austrian adoption law gave priority to the biological parents when it came to the care of their child. Since adoption resulted in the loss of parental rights it was only to be authorised if it was clearly in the child's interests. The consent of the replaced parent, whose relationship with the child was also protected by Article 8, was therefore a prerequisite for adoption. Austrian law struck a reasonable balance between all the interests involved.

74. On the facts of the case, the Government argued that it did not raise a discrimination issue as there had been no difference in treatment between the first and third applicants' case and the case of an unmarried different-sex couple. They asserted that the domestic courts, in particular the Regional Court, had thoroughly assessed the question of the second applicant's interest in the adoption and had come to the conclusion that he had a relationship with his father and that there was thus no need to replace the latter by an adoptive parent. The Government stressed in particular that the consent of both biological parents was an essential precondition for any adoption. As the second applicant's father did not consent in the present case, the courts would have been similarly prevented from agreeing to the adoption if the request had been made by the unmarried different-sex partner of the third applicant. The Government further argued that the applicants had not substantiated their allegations that there were grounds for overriding the father's refusal to consent to the adoption, nor had they requested a formal decision on that point.

75. Furthermore, the Government asserted that the Civil Code was not aimed at excluding same-sex partners. The impossibility for a woman to adopt another woman's child would also apply if an aunt wished to adopt her nephew while his relationship with his mother was still intact. The explicit exclusion of second-parent adoption in same-sex couples had only been introduced by the Registered Partnership Act in 2010. The latter had not been in force when the present case had been determined by the domestic courts and was therefore not relevant in the present context.

76. Should the Court consider that there had been a difference in treatment and enter into the question of justification for the prohibition of second-parent adoption in same-sex couples, the Government argued that recreating the biological family and securing the child's well-being were legitimate aims. Austrian adoption law did not aim to exclude same-sex couples but sought, as a general rule, to avoid a situation where a child had two mothers or two fathers for legal purposes. The law pursued these aims using appropriate means, as it also had to take the interests of other persons involved into account, and secured the interests of the partner of the child's parent by other means.

77. Lastly, the Government asserted that States had a wide margin of appreciation on the issue of second-parent adoption by same-sex couples. According to the Government's information only ten Council of Europe member States permitted such adoptions. It followed that there was no European standard and it could not even be said that a trend or a tendency existed.

(c) The third parties

(i) FIDH, ICJ, ILGA-Europe, BAAF, NELFA and ECSOL

78. In their joint comments these six non-governmental organisations stressed that, like Karner (cited above), the present case concerned a difference of treatment in that an unmarried different-sex couple was granted a right which was denied to an unmarried same-sex couple. The standards developed in Karner should therefore be applied. Furthermore, in Salgueiro da Silva Mouta v. Portugal (no. 33290/96, ECHR 1999‑IX) and in E.B. v. France (cited above), the Court had implicitly accepted that there were no reasons why a child should not be raised by a lesbian or gay individual living with a same-sex partner. A similar finding

had recently been made by the Inter-American Court of Human Rights in the case of Atala Riffo and Daughters v. Chile (judgment of 24 February 2012).

79. Furthermore, if one considered the question of European consensus, the third-party interveners noted that the majority of the forty-seven Council of Europe member States restricted second-parent adoption to married different-sex couples. In the present case only those States which extended second-parent adoption to others, for instance to same sex-couples (married, living in a registered partnership or cohabiting) or to unmarried different-sex couples, could serve as comparison. Within that group fourteen States extended, or were planning to extend, second-parent adoption to same-sex couples, while only five (including Austria) extended it to unmarried different-sex couples while excluding same-sex couples.

80. Finally, Article 7 of the 2008 European Convention on the Adoption of Children recognised the variety of adoption legislation. This did not alter the fact that Articles 14 and 8 of the Convention prohibited member States from extending the right to adopt to one group but not to another on discriminatory grounds.

(ii) The European Centre for Law and Justice (ECLJ)

81. The ECLJ argued that Article 8 did not apply, as there had been no interference with the applicant's de facto family life. It further noted that there was no right to adopt or to be adopted. In essence the applicants wished to assert a right to legal recognition of their family life. However, the right to found a family under Article 12 was, like the right to marry, reserved to opposite-sex couples.

82. Should the case be examined under Article 8, even assuming interference with the applicants' right to respect for their family life, it was prescribed by law, namely by Article 182 § 2 of the Civil Code, and served a legitimate aim, namely to protect the relationship between the second applicant and his father, who did not consent to the adoption. The domestic courts' refusal of the adoption requested by the applicants also served the legitimate aims of preserving the natural family and providing legal certainty for the child. Biological reality was an objective factor and was therefore to be regarded as reasonable justification.

83. With regard to Article 14 taken in conjunction with Article 8, the ECLJ submitted that the first and third applicants were not in a similar situation to a different-sex couple as they did not have the biological possibility to found a family. There had been no difference in treatment, as Article 182 § 2 of the Civil Code applied to all couples, whether of different sex or of the same sex. The fact that the effects were different for a same-sex couple did not amount to discrimination.

(iii) The Attorney General for Northern Ireland

84. The Attorney General for Northern Ireland referred to the 2008 European Convention on the Adoption of Children, noting that it could serve to assess the state of European consensus with respect to adoption. He observed in particular that Article 4 established the best interests of the child as the governing principle of any adoption. Article 7 made it clear that there was no consensus in respect of adoption by same-sex couples.

85. The Attorney General explained that litigation was currently pending in Northern Ireland since, under Articles 14 and 15 (1) of the 1987 Adoption (Northern Ireland) Order as amended by the Civil Partnership Act, neither a same-sex couple, whether they were civil partners or not, nor a gay or lesbian person who was in a civil partnership could apply to adopt, while a single person regardless of their sexual orientation who was not in a civil partnership could apply to adopt. It was alleged in these proceedings that the cumulative effect of these provisions violated Article 14 of the Convention taken in conjunction with Article 8.

86. Starting from the observation that the Convention did not guarantee a right to adopt, the Attorney General for Northern Ireland concluded on the basis of the Court's recent case-law (E.B. v. France, Gas and Dubois, Schalk and Kopf, all cited above, and S.H. and Others v. Austria [GC], no. 57813/00, 3 November 2011) that the Court had so far exercised judicial restraint, accepting that the domestic legislature was better placed than the European judge to assess questions concerning the notion of family, marriage and the relations between parents and children.

(iv) Amnesty International

87. Amnesty International provided an overview of non-discrimination clauses in international and regional human rights treaties and of the relevant case-law of the Court and the Inter-American Court of Human Rights. They also drew on the interpretation of the relevant clauses by the various United Nations treaty monitoring bodies, in particular the Human Rights Committee and the Committee on the Rights of the Child.

88. They pointed out that differences in treatment based on sexual orientation required particularly convincing and weighty reasons, and referred in particular to a recent judgment by the Inter-American Court (Atala Riffo and Daughters v. Chile) which had clarified that "sexual orientation is part of a person's intimacy and is not relevant when examining aspects related to an individual's suitability as a parent."

89. Amnesty International further referred to the Convention on the Rights of the Child, noting that Article 3 made the best interests of the child the "primary consideration" in all actions concerning children. In respect of adoption, Article 21 of the Convention on the Rights of the Child established that the best interests of the child were the "paramount consideration". Thus, the Convention on the Rights of the Child placed important limits on the States' margin of appreciation, prohibiting them, for instance, from applying different standards based on the composition of the child's family or the sexual orientation of a parent. Consequently, any adoption system had to allow the courts or other relevant authorities to base a determination of adoption petitions primarily on what was best for the child.

(v) Alliance Defending Freedom

90. Alliance Defending Freedom noted that the Convention did not guarantee a right to adopt nor did the Court's case-law recognise such a right under Article 8. By contrast, the Court had found Article 14 taken in conjunction with Article 8 to be applicable in cases of alleged discrimination in the adoption procedure and had examined a small number of such cases (Fretté v. France, no, 36515/97, ECHR 2002-I, E.B. v. France and Gas and Dubois, both cited above). It was important to note that in E.B. v. France one of the decisive considerations for the Court was the fact that French law allowed single persons to adopt, thereby opening up the possibility of adoption by a single homosexual. The present case was different as the finding of a violation would amount to rewriting domestic law, which allowed second-parent adoption for heterosexual couples only. In that context the third-party intervener noted that there was no European consensus on the issue.

91. As a second line of argument Alliance Defending Freedom asserted that the widely circulated "no differences" thesis – that is to say, the claim made by various studies that children raised by same-sex couples were not disadvantaged in any significant respect compared with children raised by heterosexual parents – had been called into question by recent social research, in particular by studies carried out in the United States. Given the inconclusive findings of the scientific research and the wide margin of appreciation States enjoyed in the area of family law, it was justified in the interests of the child to reserve adoption, including second-parent adoption, to heterosexual couples.

2. The Court's assessment

(a) Applicability of Article 14 of the Convention taken in conjunction with Article 8

92. The Court has dealt with a number of cases concerning discrimination on grounds of sexual orientation in the sphere of private and family life. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults (see Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45; Norris v. Ireland, 26 October 1988, Series A no. 142; and Modinos v. Cyprus, 22 April 1993, Series A no. 259) and the discharge of homosexuals from the armed forces (see Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, ECHR 1999‑VI). Others were examined under Article 14 taken in conjunction with Article 8. The issues at stake included differing ages of consent under criminal law for homosexual relations (see L. and V. v. Austria, nos. 39392/98 and 39829/98, ECHR 2003‑I), the granting of parental rights (see Salgueiro da Silva Mouta, cited above), authorisation to adopt a child (see Fretté, E.B. v. France and Gas and Dubois, all cited above), the right to succeed to the deceased partner's tenancy (see Karner, cited above, and Kozak v. Poland, no. 13102/02, 2 March 2010), the right to social insurance cover (see P.B. and J.S. v. Austria, no. 18984/02, 22 July 2010) and the question of same‑sex couples' access to marriage or to an alternative form of legal recognition (see Schalk and Kopf, cited above).

93. In the present case the applicants formulated their complaint under Article 14 taken in conjunction with Article 8, claiming that all three of them enjoyed family life together. The Government did not dispute the applicability of Article 14 taken in conjunction with Article 8. The Court sees no reason to follow a different approach for the following reasons.

94. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for instance, Schalk and Kopf, cited above, § 89; E.B. v. France, cited above, § 47; Karner, cited above, § 32; and Petrovic v. Austria, 27 March 1998, § 22, Reports of Judgments and Decisions 1998-II).

95. The Court reiterates that the relationship of a cohabiting same-sex couple living in a stable de facto relationship falls within the notion of "family life" just as the relationship of a different-sex couple in the same situation would (see Schalk and Kopf, cited above, § 94). Furthermore, the Court found in its admissibility decision in Gas and Dubois v. France (no. 25951/07, 31 August 2010) that the relationship between two women who were living together and had entered into a civil partnership, and the child conceived by one of them by means of assisted reproduction but being brought up by both of them, constituted "family life" within the meaning of Article 8 of the Convention.

96. The first and third applicants in the present case form a stable same-sex couple. They have been cohabiting for many years and the second applicant shares their home. His mother and her partner care for him jointly. The Court therefore finds that the relationship between all three applicants amounts to "family life" within the meaning of Article 8 of the Convention.

97. The Court concludes that Article 14 of the Convention taken in conjunction with Article 8 applies to the facts of the present case.

(b) Compliance with Article 14 taken in conjunction with Article 8

(i) The principles established in the Court's case-law

98. It is the Court's established case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in

other words, 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. The Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference of treatment (see Schalk and Kopf, cited above, § 96, and Burden v. the United Kingdom [GC], no. 13378/05, § 60, ECHR 2008).

99. Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons (see, for example, E.B. v. France, cited above, § 91; Kozak, cited above, § 92; Karner, cited above, §§ 37 and 42; L. and V. v. Austria, cited above, § 45; and Smith and Grady, cited above, § 90). Where a difference of treatment is based on sex or sexual orientation the State's margin of appreciation is narrow (see Kozak, cited above, § 92, and Karner, cited above, § 41). Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see E.B. v. France, cited above, §§ 93 and 96, and Salgueiro da Silva Mouta, cited above, § 36).

100. Before examining the applicants' complaint the Court points out that three types of situation may be distinguished in the context of adoption by homosexuals. Firstly, a person may wish to adopt on his or her own (individual adoption). Secondly, one partner in a same-sex couple may wish to adopt the other partner's child, with the aim of giving both of them legally recognised parental status (second-parent adoption). Finally, a same‑sex couple may wish to adopt a child (joint adoption) (see the study of the Council of Europe's Commissioner for Human Rights, cited at paragraph 55 above; see also E.B. v. France, cited above, § 33).

101. So far, the Court has had to deal with two cases relating to individual adoption by homosexuals (Fretté and E.B. v. France, both cited above) and with one case relating to second-parent adoption in a same-sex couple (Gas and Dubois, also cited above).

102. In Fretté (cited above) the French authorities had refused the request for authorisation to adopt, finding that owing to his "lifestyle" (meaning his homosexuality) the applicant did not provide the requisite safeguards for adopting a child. The Court, examining the case under Article 14 taken in conjunction with Article 8, noted that French law authorised any unmarried person, man or woman, to apply to adopt, and that the French authorities had refused the applicant's request for prior authorisation on the ground – albeit implicit -– of his

sexual orientation. Thus there had been a difference in treatment based on sexual orientation (§ 32). The Court found that the domestic authorities' decisions had pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure. With regard to whether a difference in treatment was justified, the Court noted in particular that there was little common ground between member States of the Council of Europe, where the law appeared to be going through a transitional phase, and that national authorities should enjoy a wide margin of appreciation when ruling on such matters. In respect of the competing interests of the applicant and children eligible for adoption, the Court noted that the scientific community was divided over the possible consequences of children being brought up by one or more homosexual parents, regard being had in particular to the limited number of scientific studies on the subject published at the material time. In conclusion, the Court considered that the refusal to authorise the adoption had not infringed the principle of proportionality and that, accordingly, the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention (§§ 37-43).

103. In its Grand Chamber judgment in E.B. v. France (cited above), the Court, again examining the case under Article 14 taken in conjunction with Article 8, reversed its position. It analysed in detail the reasons given by the French authorities for refusing the applicant, who was living with another woman in a stable same-sex relationship, authorisation to adopt. The Court noted that the domestic authorities had based their decisions on two main grounds, the lack of a "paternal referent" in the applicant's household or immediate circle of family and friends and the lack of commitment on the part of her partner. It added that the two grounds formed part of an overall assessment of the applicant's situation, with the result that the illegitimacy of one ground contaminated the entire decision. While the second ground was not unreasonable, the first ground was implicitly linked to the applicant's homosexuality and the authorities' reference to it was excessive in the context of a single person's request for authorisation to adopt. In sum, the applicant's sexual orientation had been consistently at the centre of deliberations in her regard and had been decisive for the decision to refuse her authorisation to adopt (§§ 72-89). The Court went on to say that if the reasons advanced for a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention (§ 93). It observed that under French law a single person was allowed to adopt and that it was undisputed that this opened up the possibility of adoption by a single homosexual. Having regard to its analysis of the reasons advanced by the French authorities, it concluded that in refusing the applicant

authorisation to adopt, they had made a distinction on the basis of her sexual orientation which was not acceptable under the Convention. The Court consequently found a violation of Article 14 taken in conjunction with Article 8 (§§ 94-98).

104. The case of Gas and Dubois (cited above) concerned two women forming a same-sex couple who had concluded a civil partnership (pacte civil de solidarité (PACS)) under French law. One of them was the mother of a child conceived by means of assisted reproduction. Under French law she was the sole parent of the child. The applicants complained under Article 14 taken in conjunction with Article 8 of the Convention that one partner could not adopt the other's child. More specifically, they wished to obtain a simple adoption order (adoption simple) under French law in order to create a parent-child relationship between the child and her mother's partner with the possibility of sharing parental responsibility. The domestic courts had refused the adoption request on the ground that it would transfer parental rights from the child's mother to her partner, which was not in the child's interests (§ 62). The Court examined the applicants' situation in comparison with that of a married couple. It noted that, in cases of adoption simple, French law allowed only married couples to share parental rights. As Contracting States were not obliged to grant access to marriage to same-sex couples, and having regard to the special status conferred by marriage, the applicants' legal situation was not comparable to that of a married couple (§ 68). As to the situation of unmarried different-sex couples living together, like the applicants, in a civil partnership, the Court noted that second-parent adoption was not open to them either (§ 69). Thus, there had been no difference in treatment based on sexual orientation. In conclusion, the Court found that there had been no violation of Article 14 taken in conjunction with Article 8.

(ii) Application of these principles to the present case

(α) Comparison with a married couple in which one spouse wishes to adopt the other spouse's child

105. The first issue to be addressed is whether the applicants, namely the first and third applicants, who are living together as a same-sex couple, and the third applicant's son, are in a

situation which is relevantly similar to that of a married different-sex couple in which one spouse wishes to adopt the other spouse's biological child.

106. The Court has recently answered this question in the negative in Gas and Dubois. The Court finds it appropriate to repeat and confirm the relevant considerations here. It reiterates in the first place that Article 12 of the Convention does not impose an obligation on the Contracting States to grant same-sex couples access to marriage (see Schalk and Kopf, cited above, §§ 54-64). Nor can a right to same-sex marriage be derived from Article 14 taken in conjunction with Article 8 (ibid., § 101). Where a State chooses to provide same-sex couples with an alternative means of legal recognition, it enjoys a certain margin of appreciation as regards the exact status conferred (ibid., § 108; see also Gas and Dubois, cited above, § 66). Furthermore, the Court has repeatedly held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences (see, among other authorities, Gas and Dubois, cited above, § 68, and Burden, cited above, § 63).

107. Austrian law indeed creates a special regime for married couples in respect of adoption. Under Article 179 § 2 of the Civil Code, joint adoption is open to married couples only. In turn, married couples may, as a rule, only adopt jointly. Second-parent adoption of the other spouse's child is provided for in the aforementioned Article as an exception to that rule.

108. The Government, relying on the Court's Gas and Dubois judgment, argued that the applicants were not in a relevantly similar situation to a married couple. For their part, the applicants stressed that they did not wish to assert a right that was reserved to married couples. The Court does not see any reason to deviate from its case-law in this regard.

109. In the light of these considerations, the Court concludes that the first and third applicants are not in a relevantly similar situation to a married couple in respect of second-parent adoption.

110. Consequently, there has been no violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation is compared with that of a married couple in which one spouse wishes to adopt the other spouse's child.

(ß) Comparison with an unmarried different-sex couple in which one partner wishes to adopt the other partner's child

111. The Court notes that the applicants' submissions concentrated on the comparison with an unmarried different-sex couple. They pointed out that under Austrian law second-parent adoption was open not only to married couples, but also to unmarried heterosexual couples, while it was legally impossible for same-sex couples.

Relevantly similar situation

112. The Court observes that, in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple. Indeed, the Government did not dispute that the situations were comparable, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples. The Court accepts that the applicants, who wished to create a legal relationship between the first and second applicants, were in a relevantly similar situation to a different-sex couple in which one partner wished to adopt the other partner's child.

Difference in treatment

113. The Court will now turn to the question whether there was a difference in treatment based on the first and third applicants' sexual orientation.

114. Austrian law allows second-parent adoption by an unmarried different-sex couple. In general terms, individuals may adopt under Article 179 of the Civil Code, and nothing in Article 182 § 2 of the Civil Code, which regulates the effects of adoption, prevents one partner in an unmarried heterosexual couple from adopting the other partner's child without severing the ties between that partner and the child. In contrast, second-parent adoption in a same-sex couple is legally impossible. This follows from Article 182 § 2 of the Civil Code, according to which any person who adopts replaces the biological parent of the same sex. In the present case, as the first applicant is a woman, the second applicant's adoption by her could only sever the relationship with his mother, who is her same-sex partner. Adoption can therefore not serve to create a parent‑child relationship between the first and second

applicants in addition to the relationship with his mother, the third applicant. Although neutral at first glance, Article 182 § 2 of the Civil Code excludes second-parent adoption in a same-sex couple.

115. For the sake of completeness the Court observes that since the entry into force of the Registered Partnership Act on 1 January 2010 same-sex couples have had the opportunity to enter into a registered partnership. The first and third applicants have not made use of this opportunity. In any case, this would not open up the possibility of second-parent adoption to them, as section 8(4) of the Act explicitly prohibits the adoption of one registered partner's child by the other partner.

116. There is thus no doubt that the applicable legislation leads to a distinction between unmarried different-sex and same-sex couples in respect of second-parent adoption. Under Austrian law as it stands second-parent adoption was and still is impossible in the applicants' case. This would be so even if the biological father of the second applicant were dead or unknown or if there were grounds for overriding his refusal to consent to the adoption. It would even be impossible if the second applicant's father were ready to give his consent to the adoption. This was not disputed by the Government.

117. However, the Government argued on the facts of the case that it disclosed no element of discrimination. They submitted that the applicants' adoption request had been refused on grounds unrelated to the first and third applicants' sexual orientation. Firstly, the courts and in particular the Regional Court had refused the adoption on the ground that it was not in the second applicant's interests. Secondly, any adoption required the consent of the child's biological parents. As the second applicant's father did not consent, the courts had been obliged to refuse the adoption request. They would have had to decide in exactly the same way had the first applicant been the male partner of the third applicant. In other words, the difference in law resulting from Article 182 § 2 of the Civil Code did not come into play in the circumstances of the applicants' case. Consequently, the Government asserted that the applicants were asking the Court to carry out a review of the law in abstracto.

118. Having regard to the content of the domestic courts' decisions (see paragraphs 15, 18 and 20 above), the Court is not convinced by the Government's argument. First of all, the domestic courts made it clear that an adoption producing the effect desired by the applicants, namely establishing a parent-child relationship between the first and second applicants in

addition to the parent-child relationship between the latter and his mother, was in any case impossible under Article 182 § 2 of the Civil Code.

119. The District Court relied on the legal impossibility argument alone. It did not carry out any investigation into the circumstances of the case. In particular, it did not deal at all with the question whether the second applicant's father consented to the adoption or whether there were any grounds for overriding his refusal to consent, as alleged by the applicants.

120. The Regional Court too relied on the legal impossibility of the adoption requested by the applicants, but also had regard to some other factors. It expressed doubts as to whether the second applicant could be represented by his mother in the adoption proceedings owing to a possible conflict of interests. However, it found that the question need not be resolved as the District Court had rightly refused to grant the adoption without any further investigation. On the basis of the materials before the Court it does not appear that the Regional Court heard evidence from any of the persons concerned, namely the applicants and the second applicant's father. As to the role of the latter the Regional Court confined itself to observing – on the basis of the file – that he had regular contact with his son. It did not deal with the question whether, as alleged by the applicants, there were grounds for overriding the father's refusal to consent under Article 181 § 3 of the Civil Code. By contrast, it dwelt at length on the fact that the notion of "parents" in Austrian family law meant two persons of opposite sex. It also had regard to the interest of the child in maintaining contact with two parents of different sex, which in its view militated clearly against authorising the adoption of a child by the same-sex partner of one of its parents. Furthermore, it examined in the light of the Court's Karner judgment (cited above) whether adoption law as it stood discriminated against same-sex partners.

121. A further important element to be considered is the fact that the Regional Court declared an appeal on points of law to the Supreme Court to be admissible on the ground that there was no case-law on "the issue now to be determined, ... namely whether the adoption of a child by the same-sex partner of one of its parents is lawful". In the Court's view this plainly contradicts the Government's assertion that the legal impossibility of second-parent adoption in a same-sex couple did not play a role in the determination of the present case.

122. The Supreme Court confirmed that the adoption of a child by the female partner of his or her biological mother was legally impossible under Article 182 § 2 of the Civil Code, finding that this provision was compatible with Article 14 taken in conjunction with Article 8

as falling within the State's margin of appreciation. Finally, it also confirmed that in view of the legal impossibility of the adoption requested it was not necessary to examine whether the conditions for overriding the father's refusal to consent, as an exceptional measure under Article 181 § 3 of the Civil Code, were met.

123. In conclusion, the Court dismisses the Government's argument that the applicants were not affected by the difference in law resulting from Article 182 § 2 of the Civil Code. In the Court's view, the legal impossibility of the adoption requested by the applicants was consistently at the centre of the domestic courts' considerations (see, mutatis mutandis, E.B. v. France, cited above, § 88).

124. Indeed, this fact prevented the domestic courts from examining in any meaningful manner whether the adoption was in the second applicant's interests as required by Article 180a of the Civil Code. Consequently, they did not investigate the circumstances of the case in detail. Moreover, they did not examine whether there were any reasons which might justify overriding the father's refusal to consent, in accordance with Article 181 § 3 of the Civil Code. The Government argued that the applicants had not sufficiently substantiated their allegations that there were such reasons, and pointed out that they had failed to request a formal decision on that issue. It suffices for the Court to note that the domestic courts did not dismiss the applicants' submissions on either of these grounds. As set out above, the District Court and the Regional Court did not deal with that issue at all and the Supreme Court confirmed in unequivocal terms that it had not been necessary to deal with it in view of the legal impossibility of the adoption requested.

125. Had the first and third applicants been an unmarried different-sex couple, the domestic courts would not have been able to refuse the adoption request as a matter of principle. Instead, the courts would have been required to examine whether the adoption served the second applicant's interests within the meaning of Article 180a of the Civil Code. If the child's father had not consented to the adoption, the courts would have had to examine whether there were exceptional circumstances such as to justify overriding his refusal under Article 181 § 3 of the Civil Code (see, as an example, Eski, cited above, §§ 39-42, concerning second-parent adoption in a different-sex couple, in which the Austrian courts conducted a detailed examination of that issue, balancing the interests of all the persons concerned – the couple, the child and the biological father of the child – having duly heard evidence from them and having established all the relevant facts).

126. Consequently, the Court finds that the applicants' complaint is in no sense an actio popularis. As already stated (see paragraph 123 above), the applicants were directly affected by the law complained of, as Article 182 § 2 of the Civil Code contains an absolute prohibition on second-parent adoption in a same-sex couple, making any examination of the specific circumstances of their case unnecessary and irrelevant and leading to the refusal of their adoption request as a matter of principle. It follows that the Court is not reviewing the law in abstracto: the blanket prohibition at issue, by its very nature, removes the factual circumstances of the case from the scope of both the domestic courts' and this Court's examination (see, mutatis mutandis, Hirst v. the United Kingdom (no. 2) [GC], no. 74025/01, § 72, ECHR 2005‑IX).

127. The Court would add that, at first sight, the difference in treatment may seem to concern mainly the first applicant, who is treated differently from one member of an unmarried different-sex couple who wishes to adopt the other partner's child. However, as all three of the applicants enjoy family life together (see paragraph 96 above) and the adoption request was aimed at obtaining legal recognition of that family life, the Court considers that all three applicants are directly affected by the difference of treatment at issue and may therefore claim to be victims of the alleged violation.

128. Finally, the Government advanced another argument, namely that the legal impossibility of granting the applicants' adoption request was not discriminatory as it was not based on the first and third applicants' sexual orientation. They submitted that Article 182 § 2 of the Civil Code, which made it impossible for a woman to adopt a child while the legal ties with the child's mother were maintained, applied as a general rule. That rule would also prohibit an aunt from adopting her nephew while his relationship with his mother remained intact.

129. The Court is not convinced by this argument. The applicants claimed that they were treated differently from an unmarried heterosexual couple with regard to the possibility of obtaining legal recognition of their family life through second-parent adoption. The Court notes firstly that the relationship between two adult sisters or between an aunt and her nephew does not in principle fall within the notion of "family life" within the meaning of Article 8 of the Convention. Secondly, even if it did, the Court has already held that the relationship between two sisters living together is qualitatively of a different nature to the relationship of a couple, including a same-sex couple (see, mutatis mutandis, Burden, cited above, § 62).

Consequently, Article 182 § 2 of the Civil Code does not affect other persons in the same way as it affects the applicants, whose family life is based on a same-sex couple.

130. Having regard to all the considerations set out above, the Court finds that there was a difference of treatment between the applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner's child. That difference was inseparably linked to the fact that the first and third applicants formed a same-sex couple, and was thus based on their sexual orientation.

131. The present case is therefore to be distinguished from Gas and Dubois (cited above, § 69), in which the Court found that there was no difference of treatment based on sexual orientation between an unmarried different-sex couple and a same-sex couple as, under French law, second-parent adoption was not open to either of them.

Legitimate aim and proportionality

132. Although it follows from the considerations set out above (see, in particular, paragraphs 116 and 126), the Court deems it appropriate to stress the fact that the present case does not concern the question whether or not the applicants' adoption request should have been granted in the circumstances of the case. Consequently, it is not concerned with the role of the second applicant's father or whether there were any reasons to override his refusal to consent. All these issues would be for the domestic courts to decide, were they in a position to examine the merits of the adoption request.

133. The issue before the Court is precisely the fact that they were not in such a position in the applicants' case, as adoption of the second applicant by his mother's same-sex partner was in any case legally impossible in accordance with Article 182 § 2 of the Civil Code. By contrast, the domestic courts would have been required to examine the merits of the adoption request had it concerned second-parent adoption in an unmarried heterosexual couple.

134. Although the present case may be seen against the background of the wider debate on same-sex couples' parental rights, the Court is not called upon to rule on the issue of second-parent adoption by same-sex couples as such, let alone on the question of adoption by same-sex couples in general. What it has to decide is a narrowly defined issue of alleged

discrimination between unmarried different-sex couples and same-sex couples in respect of second-parent adoption.

135. The Court reiterates that the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require a State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. While Article 8 does not guarantee a right to adopt, the Court has already held, in respect of adoption by a single homosexual, that a State which creates a right going beyond its obligations under Article 8 of the Convention may not apply that right in a manner which is discriminatory within the meaning of Article 14 (see E.B. v. France, cited above, § 49).

136. In the context of the present case the Court notes that there is no obligation under Article 8 of the Convention to extend the right to second‑parent adoption to unmarried couples (see Gas and Dubois, cited above, §§ 66-69; see also Emonet and Others, cited above, §§ 79-88). Nonetheless, Austrian law allows second-parent adoption in unmarried different-sex couples. The Court therefore has to examine whether refusing that right to (unmarried) same-sex couples serves a legitimate aim and is proportionate to that aim.

137. Both the domestic courts and the Government argued that Austrian adoption law was aimed at recreating the circumstances of a biological family. As the Regional Court observed in its judgment of 21 February 2006, the provisions at issue aimed to protect the "traditional family". Austrian law was based on the principle that, in accordance with biological reality, a minor child should have two persons of opposite sex as parents. Thus the decision not to provide for a child to be adopted by the same-sex partner of one of the parents, with the result of severing the relationship with the opposite-sex parent, served a legitimate aim. Similarly, the Supreme Court, in its judgment of 27 September 2006, noted that the primary aim of adoption was to provide children who had no parents or whose parents were not able to care for them with responsible caregivers. That aim could only be achieved by recreating the situation of a biological family as far as possible. In short, the domestic courts and the Government relied on the protection of the traditional family, based on the tacit assumption that only a family with parents of different sex could adequately provide for a child's needs.

138. The Court has accepted that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see Karner, cited above, § 40, and Kozak, cited above, § 98). It goes without saying that the protection of the interests of the child is also a legitimate aim. It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality was adhered to.

139. The Court reiterates the principles developed in its case-law. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it (see Karner, cited above, § 41, and Kozak, cited above, § 98). Also, given that the Convention is a living instrument, to be interpreted in present-day conditions, the State, in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life (see Kozak, cited above, § 98).

140. In cases in which the margin of appreciation is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people, in this instance persons living in a homosexual relationship, from the scope of application of the provisions at issue (see Karner, cited above, § 41, and Kozak, cited above, § 99).

141. Applying the case-law cited above, the Court notes that the burden of proof is on the Government. It is for the Government to show that the protection of the family in the traditional sense and, more specifically, the protection of the child's interests, require the exclusion of same-sex couples from second-parent adoption, which is open to unmarried heterosexual couples.

142. The Court would repeat that Article 182 § 2 of the Civil Code contains an absolute, albeit implicit, prohibition on second-parent adoption for same-sex couples. The Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs. On the contrary, they conceded that, in personal terms, same-sex couples could be as suitable or unsuitable as different-sex couples when it came to adopting

children. Furthermore, the Government stated that the Civil Code was not aimed at excluding same-sex partners from second-parent adoption. Nonetheless, they stressed that the legislature had wished to avoid a situation in which a child had two mothers or two fathers for legal purposes. The explicit exclusion of second-parent adoption in same-sex couples had only been introduced by the Registered Partnership Act in 2010, which had not been in force when the present case was determined by the domestic courts and was therefore not relevant in the present case.

143. The Court has already dealt with the argument that the Civil Code does not aim specifically to exclude same-sex partners (see paragraphs 128 and 129 above). Regarding the Registered Partnership Act, the Court agrees that it is not directly at issue in the present case. It may nevertheless be of relevance in so far as it may shed light on the reasons underlying the prohibition of second-parent adoption in same-sex couples. However, the explanatory report on the draft law (see paragraph 42 above) only states that section 8(4) of the Act was included as a result of repeated requests made during the consultation procedure. In other words, it merely reflects the position of those sectors of society which are opposed to the idea of opening up second-parent adoption to same-sex couples.

144. The Court would add that the Austrian legislation appears to lack coherence. Adoption by one person, including one homosexual, is possible. If he or she has a registered partner, the latter has to consent, in accordance with the amendment to Article 181 § 1, sub-paragraph 2, of the Civil Code, which was introduced together with the Registered Partnership Act (see paragraph 40 above). The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. Nevertheless, Austrian law insists that a child should not have two mothers or two fathers (see, mutatis mutandis, Christine Goodwin v. the United Kingdom [GC], no. 28957/95, § 78, ECHR 2002‑VI, where the Court also took into consideration the lack of coherence of the domestic legal system).

145. The Court finds force in the applicants' argument that de facto families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection. The Court observes that in contrast to individual adoption or joint adoption, which are usually aimed at creating a relationship with a child previously unrelated to the adopter, second-parent adoption serves to confer rights vis-à-vis the child on the partner of one of the child's parents. The Court itself has often stressed the importance of granting legal

recognition to de facto family life (see Wagner and J.M.W.L. v. Luxembourg, no. 76240/01, § 119, 28 June 2007; see also, in the context of second-parent adoption, Eski, cited above, § 39, and Emonet and Others, cited above, §§ 63-64).

146. All the above considerations – the existence of de facto family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes, and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples – cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples arising out of Article 182 § 2 of the Civil Code. Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child, which is a key notion in the relevant international instruments (see, in particular, paragraph 49 above, and E.B. v. France, cited above, § 95).

147. The Government advanced another argument to justify the difference in treatment complained of. Relying on Article 8 of the Convention, they asserted that the margin of appreciation was a wide one in the sphere of adoption law, which had to strike a careful balance between the interests of all the persons involved. In the present context it was even wider, as there was no European consensus on the issue of second-parent adoption by same-sex couples.

148. The Court observes that the breadth of the State's margin of appreciation under Article 8 of the Convention depends on a number of factors. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see, as recent examples, S. H. and Others v. Austria, cited above, § 94, and A, B and C v. Ireland [GC], no. 25579/05, § 232, ECHR 2010). However, the Court reaffirms that when it comes to issues of discrimination on the grounds of sex or sexual orientation to

be examined under Article 14, the State's margin of appreciation is narrow (see paragraph 99 above).

149. Furthermore, and solely in order to respond to the Government's assertion that no European consensus exists, it has to be borne in mind that the issue before the Court is not the general question of same-sex couples' access to second-parent adoption, but the difference in treatment between unmarried different-sex couples and same-sex couples in respect of this type of adoption (see paragraph 134 above). Consequently, only those ten Council of Europe member States which allow second-parent adoption in unmarried couples may be regarded as a basis for comparison. Within that group, six States treat heterosexual couples and same-sex couples in the same manner, while four adopt the same position as Austria (see the comparative-law information at paragraph 57 above). The Court considers that the narrowness of this sample is such that no conclusions can be drawn as to the existence of a possible consensus among Council of Europe member States.

150. In the Court's view, the same holds true for the 2008 Convention on the Adoption of Children. Firstly, it notes that this Convention has not been ratified by Austria. Secondly, given the low number of ratifications so far, it may be open to doubt whether the Convention reflects common ground among European States at present. In any event, the Court notes that Article 7 § 1 of the 2008 Convention on the Adoption of Children provides that States are to permit adoption by two persons of different sex (who are married or, where that institution exists, are registered partners) or by one person. Under Article 7 § 2, States are free to extend the scope of the Convention to same-sex couples who are married or have entered into a registered partnership, as well as "to different-sex couples and same-sex couples who are living together in a stable relationship". This indicates that Article 7 § 2 does not mean that States are free to treat heterosexual and same-sex couples who live in a stable relationship differently. The Committee of Ministers' Recommendation of 31 March 2010 (CM/Rec (2010)5) appears to point in the same direction: paragraph 23 calls on member States to ensure that the rights and obligations conferred on unmarried couples apply in a non-discriminatory way to both same-sex and different-sex couples. In any event, even if the interpretation of Article 7 § 2 of the 2008 Convention were to lead to another result, the Court reiterates that States retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (see Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08, § 128, ECHR 2010 (extracts)).

151. The Court is aware that striking a balance between the protection of the family in the traditional sense and the Convention rights of sexual minorities is in the nature of things a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition (see Kozak, cited above, § 99). However, having regard to the considerations set out above, the Court finds that the Government have failed to adduce particularly weighty and convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different-sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction is therefore incompatible with the Convention.

152. The Court emphasises once more that the present case does not concern the question whether the applicants' adoption request should have been granted in the circumstances of the case. It concerns the question whether the applicants were discriminated against on account of the fact that the courts had no opportunity to examine in any meaningful manner whether the requested adoption was in the second applicant's interests, given that it was in any case legally impossible. In this context the Court refers to recent judgments in which it found a violation of Article 14 taken in conjunction with Article 8 because the father of a child born outside marriage could not obtain an examination by the domestic courts of whether the award of joint custody to both parents or sole custody to him was in the child's interests (see Zaunegger v. Germany, no. 22028/04, §§ 61-63, 3 December 2009, and Sporer v. Austria, no. 35637/03, §§ 88-90, 3 February 2011).

153. In conclusion, the Court finds that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

154. Article 41 of the Convention provides:

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

A. Damage

155. The applicants claimed 50,000 euros (EUR) each in respect of non-pecuniary damage.

156. The Government asserted that an award of compensation for non-pecuniary damage was not justified in the circumstances. They pointed out in particular that the applicants were not prevented from living together as they wished. In any case, the sum claimed by the applicants was not in line with the awards made in comparable cases.

157. The Court considers that the applicants must have suffered non-pecuniary damage that is not sufficiently compensated for by the mere finding of a violation of Article 14 taken together with Article 8. Furthermore, the Court considers that the applicants were affected as a family by the violation found. It therefore finds it appropriate to make a joint award in respect of non-pecuniary damage. Making its assessment on an equitable basis and having regard to the sum awarded in a comparable case (see E.B. v. France, cited above, § 102), it awards the applicants jointly EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

158. The applicants also claimed a total amount of EUR 49,680.94 under the head of costs and expenses. This amount was composed of EUR 6,156.59 for costs incurred before the domestic courts and EUR 43,524.35 for those incurred before the Court. The sums included value-added tax (VAT).

159. The costs of the domestic proceedings included EUR 2,735.71 in respect of the proceedings before the Constitutional Court and EUR 3,420.88 in respect of the proceedings before the civil courts. The applicants argued that the proceedings before the Constitutional Court had been necessary, as it had only become clear through the Constitutional Court's decision that they would be able to apply to the civil courts for approval of the adoption agreement without the risk that the application would result in a loss of parental rights for the third applicant.

160. The costs of the Convention proceedings included EUR 889.08 in travel and accommodation costs incurred by the applicants' counsel in attending the hearing before the First Section and EUR 913.22 in travel and accommodation costs incurred in attending the hearing before the Grand Chamber. They further included a total amount of EUR 1,832.30 in respect of compensation for loss of time in connection with counsel's travel to and stay in Strasbourg to attend the two hearings. The remainder of the costs claimed were lawyer's fees. The applicants pointed out that the proceedings before the Grand Chamber were not merely a repetition of the Chamber proceedings, in particular as the Court had put a number of further questions to the parties and a number of third-party comments had had to be studied and be addressed at the hearing.

161. The Government took the view that the costs for the proceedings before the Constitutional Court had not been necessarily incurred. They argued that in the light of the Constitutional Court's case-law on Article 140 of the Federal Constitution, an individual could lodge a direct complaint with the Constitutional Court only if the alleged violation resulted from a direct application of the law. In the present case, the applicants had had an opportunity to bring their case before the civil courts.

162. In respect of the Convention proceedings, the Government submitted that the costs claimed were excessive as a whole. Furthermore, they asserted that the applicants had been able to rely to a large extent on arguments already submitted in the domestic proceedings, and that in the proceedings before the Grand Chamber they had been able to rely on their submissions before the Chamber.

163. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In respect of the domestic proceedings the Court considers that the costs claimed for the proceedings before the Constitutional Court were not necessarily incurred. It notes in particular that the Constitutional Court dismissed the applicants' complaint as inadmissible. It therefore only awards the costs claimed in respect of the proceedings before the civil courts, namely EUR 3,420.88. Turning to the costs of the Convention proceedings the Court, regard being had to the documents in its possession and the above criteria, considers it appropriate to award EUR 25,000. In total, the Court awards the applicants EUR 28,420.88 under the head of costs and expenses.

C. Default interest

164. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

The Court's decision

1. Declares, unanimously, the application admissible;

2. Holds, unanimously, that there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention when the applicants' situation is compared with that of a married couple in which one spouse wishes to adopt the other spouse's child;

3. Holds, by ten votes to seven, that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention when the applicants' situation is compared with that of an unmarried different-sex couple in which one partner wishes to adopt the other partner's child;

4. Holds, by eleven votes to six,

(a) that the respondent State is to pay, within three months, the following amounts:

(i) EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, jointly to the applicants, in respect of non-pecuniary damage;

(ii) EUR 28,420.88 (twenty-eight thousand four hundred and twenty euros and eighty-eight cents), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 19 February 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Chapter II Employment

Case of Lustig-Prean and Beckett v. The United Kingdom [5]

Procedure

1. The case originated in two applications against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The first applicant, Mr Duncan Lustig-Prean, is a British national born in 1959 and resident in London. He was represented before the Commission and, subsequently, before the Court by Mr S. Grosz, a solicitor practising in London. His application was introduced on 23 April 1996 and was registered on 7 May 1996 under file no. 31417/96.

The second applicant, Mr John Beckett, is a British national born in 1970 and resident in Sheffield. He was represented before the Commission and, subsequently, before the Court by Ms H. Larter, a solicitor practising in Sheffield. His application was introduced on 11 July 1996 and was registered on 22 July 1996 under file no. 32377/96.

2. Both applicants complained that the investigations into their homosexuality and their discharge from the Royal Navy on the sole ground that they are homosexual constituted violations of Article 8 of the Covention taken alone and in conjunction with Article 14.

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[5] Applications (nos. 31417/96 and 32377/96) Judgment Strasbourg 27 September 1999;

FINAL 27/12/1999

3. On 20 May 1997 the Commission (Plenary) decided to give notice of the applications to the United Kingdom Government ("the Government") and invited them to submit observations on the admissibility and merits of the applications. In addition, the applications were joined to two similar

applications (nos. 33985/96 and 33986/96, Smith v. the United Kingdom and Grady v. the United Kingdom).

The Government, represented by Mr M. Eaton and, subsequently, by Mr C. Whomersley, both Agents, Foreign and Commonwealth Office, submitted their observations on 17 October 1997, to which the applicants replied on 20 November and 8 December 1997, respectively.

4. On 17 January 1998 the Commission decided to adjourn the applications pending the outcome of a reference to the European Court of Justice ("ECJ") pursuant to Article 177 of the Treaty of Rome by the English High Court on the question of the applicability of the Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion and Working Conditions 76/207/EEC ("the Equal Treatment Directive") to a difference of treatment based on sexual orientation.

5. On 23 January 1998 the Commission granted Mr Beckett legal aid.

6. On 13 July 1998 the High Court delivered its judgment withdrawing its reference of the above question given the decision of the ECJ in the case of R. v. Secretary of State for Defence, ex parte Perkins (13 July 1998).

7. Following the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 2 thereof, the applications fall to be examined by the Court.

In accordance with Rule 52 § 1 of the Rules of Court[1], the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber constituted within the Section included ex officio Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr J.-P. Costa, Acting President of the Section and President of the Chamber (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr L. Loucaides, Mr P. Kūris, Mr W. Fuhrmann, Mrs H.S. Greve and Mr K. Traja (Rule 26 § 1 (b)).

8. On 23 February 1998 the Chamber declared the applications admissible[2] and, while it retained the joinder of the present applications, it decided to disjoin them from the above-mentioned Smith and Grady cases. It was also decided to hold a hearing on the merits of the case.

9. On 4 May 1999 the President of the Chamber decided to grant Mr Lustig-Prean legal aid.

10. The hearing in this case and in the case of Smith and Grady v. the United Kingdom took place in public in the Human Rights Building, Strasbourg, on 18 May 1999.

The facts

I. The Circumstances of the case

A. The first applicant

11. Mr Lustig-Prean (the first applicant) joined the Royal Navy Reserve as a radio operator and in 1982 commenced a career in the Royal Navy. On 27 April 1983 he became a midshipman in the executive branch of the navy. His evaluation of November 1989 noted that he was an officer with “great potential” and the “sort of person that the Royal Navy needs to attract and retain”. His evaluation of December 1993 concluded that the applicant “is a balanced, enlightened and knowledgeable man who enjoys my complete trust in all matters.

He is an outstanding prospect for early promotion to commander." In 1994 the applicant attained the rank of lieutenant-commander.

12. For about thirty months prior to June 1994 the applicant had been involved in a steady relationship with a civilian partner. In early June 1994

the applicant was informed that the Royal Navy Special Investigations Branch ("the service police") had been given his name anonymously in connection with an allegation of homosexuality and was investigating the matter. The applicant admitted to his commanding officer that he was homosexual.

13. The applicant was interviewed on 13 June 1994 by personnel from the service police about his sexual orientation for approximately twenty minutes. At the beginning of the interview, the applicant was cautioned that he did not have to answer questions and that any responses could be used in evidence later. He was also informed that he could obtain legal advice. The applicant confirmed his awareness of those rights and agreed to be interviewed without legal advice. He then confirmed that he was homosexual, acknowledging that he had been a practising homosexual since his teenage years.

He was then asked, inter alia, whether he had had homosexual contact with service personnel (at least four questions on this subject), what type of sexual relations he had had with a particular person, when and where this had occurred, about his current relationship and whether his parents knew of his homosexuality. The applicant was asked repeatedly about who had tipped him off that he was the subject of an investigation by the service police and he was told that the question was put because the service police had "a lot of background knowledge about certain things" and there was somebody "providing information to us". The applicant indicated that he was anxious to assist the service police to make sure that the issue was kept as "private and discreet as possible". He was then informed that a search was normally completed but the search did not take place since, in anticipation, the applicant had already cleared his cabin of any incriminating evidence.

14. The applicant was again interviewed on 14 June 1994 for approximately ten minutes. It was explained to the applicant that the purpose of the interview was to ask him about an allegation, contained in an anonymous letter sent to the applicant's commanding officer some time previously, that the applicant had had a relationship with a serviceman. The interviewer then explained that he was "attempting to keep the need to visit Newcastle and to investigate this matter to a minimum", as the applicant wished. The applicant was then asked whether he had had the relationship as alleged in the letter. The anonymous letter was read. The writer claimed that he had recently had a relationship with the applicant, that the writer was HIV-positive and that he believed that the applicant was involved with a member of the armed forces. The applicant's comments were requested, in particular, as to who would have written the letter. The interviewer also enquired of the applicant "purely as a matter of interest, although it's a personal thing" whether the applicant was HIV-positive. In this context, it was indicated a number of times to the applicant that the purpose of the second interview was to avoid further investigations. He was also told that it would "come back" on the applicant's interviewer if the latter did not properly follow up on the anonymous letter.

15. In a final evaluation dated 14 June 1994 the applicant's commander noted that the applicant left the ship "with a well-deserved reputation for outstanding professional ability and admirable personal qualities". He concluded that the applicant's "loyal, dependable and always dignified service" would be "sorely missed".

16. On 16 December 1994 the Admiralty Board informed the applicant that it had decided to terminate his commission and to discharge him, administratively, from the navy with effect from 17 January 1995. The ground for his discharge was his sexual orientation. The applicant's commission was removed and most of the bonus which he had received with that promotion was recouped by the naval authorities (£4,875 out of £6,000). His term of service would otherwise have terminated in 2009, with the possibility of renewal.

B. The second applicant

17. On 20 February 1989 Mr Beckett (the second applicant) joined the Royal Navy, enlisting for twenty-two years' service. In 1991 he became a substantive weapons engineering mechanic. The applicant's report dated 27 November 1992 noted that he displayed potential in a number of areas essential to good leadership, that he had the ability to become an above-average leading hand and that if he applied his new skills wisely he could, with experience, be considered as a potential officer candidate.

18. In May 1993 the applicant had been refused time off to deal with a personal matter (he wished to collect his Aids test results) and consequently he spoke with the chaplain, to whom he admitted his sexual orientation. On 10 May 1993 the applicant was asked by his lieutenant-commander to repeat what he had told the chaplain and he again admitted his homosexuality to that officer. He was then called for interview by the service police. He was cautioned in the same terms as the first applicant and told that he would not be questioned on the above admissions prior to a search of his locker. His consent to the search was requested and given. The interview, which had lasted approximately five minutes, was suspended pending the search. During the search, slides (of himself, his partner and some of his service friends) and personal postcards were seized.

19. The applicant's interview with the service police then resumed and lasted approximately one hour. The applicant immediately confirmed his homosexuality, later clarifying that he first had "niggling doubts" about his sexual orientation approximately two and a half years previously. He was then questioned about a previous relationship with a woman; he was asked the woman's name and where she was from, when he had that relationship, why it ended, whether they had a sexual relationship, whether he enjoyed their relationship and whether "she was enough for you". Details were sought as to how and what he did when he realised he was homosexual and, in this respect, he was asked what sort of feelings he had for a man, whether he had been "touched up" or "abused" as a child and whether he had bought pornographic magazines.

The applicant was then questioned about his first and current homosexual relationship which began in December 1992 and, in this regard, he was asked about his first night with his partner, who was "butch" and who was "bitch" in the relationship and what being "butch" meant in sexual terms. Detailed questions were put as to how they had sex and whether they used condoms, lubrication and other sex aids, whether they ever had sex in a public place and how they intended to develop the relationship. He was also asked about gay bars he frequented, whether he had ever joined contact magazines, whether his parents knew about his homosexuality and whether he agreed that his secret life could be used as a basis to blackmail him and render him a weak link in the service. The personal slides and postcards which had been taken from his locker were examined and the applicant was questioned in detail about their contents.

20. The service police report completed after the applicant's interview included several internal documents where it was noted that the applicant, in openly declaring his homosexuality and his relationship with a civilian, had effectively disposed "of any immediate potential security concern". For that reason, it was considered in the report that "no cause was identified for conducting a security interview with Beckett". That report also accepted that a case for fraudulent entry into the armed forces would be inappropriate given the date when the applicant had discovered his homosexuality. An officer, who advised the Admiralty Board on the applicant's discharge, noted that the applicant's reporting officers had commented on his "affability, intelligence, dedication and ambition" and pointed out that, had it not been for the applicant's homosexuality, "his Royal Navy career would have blossomed".

21. Prior to his discharge, the applicant completed his duties and remained in communal sleeping accommodation with no reported difficulties. On 28 July 1993 the applicant's administrative discharge was approved on the basis of his homosexuality. The applicant then complained about the decision to discharge him to the Admiralty Board and on 6 December 1994 the Admiralty Board dismissed the applicant's complaint.

C. The applicants' judicial review proceedings (R. v. Ministry of Defence, ex parte Smith and Others 2 Weeky Law Reports 305)

22. Along with Ms Smith and Mr Grady (see paragraph 3 above), the applicants obtained leave to apply for judicial review of the decisions to discharge them from the armed forces. The applicants argued that the policy of the Ministry of Defence against homosexuals in the armed forces was "irrational", that it was in breach of the Convention and that it was contrary to the Equal Treatment Directive. The Ministry of Defence maintained that the policy was necessary mainly to maintain morale and unit effectiveness, in view of the loco parentis role of the services as regards minor recruits and in light of the requirement of communal living in the armed forces.

23. On 7 June 1995 the High Court dismissed the application for judicial review, Lord Justice Simon Brown giving the main judgment of the court. He noted that the cases illustrated the hardships resulting from the absolute policy against homosexuals in the armed forces and that all four of the applicants had exemplary service records, some with reports written in glowing terms. Moreover, he found that in none of the cases before him was it suggested that the applicants' sexual orientation had in any way affected their ability to carry out their work or had any ill-effect on discipline. There was no reason to doubt that, but for their discharge on the sole ground of sexual orientation, they would have continued to perform their service duties entirely efficiently and with the continued support of their colleagues. All were devastated by their discharge.

Simon Brown LJ reviewed the background to the "age old" policy, the relevance of the Parliamentary Select Committee's report of 1991, the position in other armed forces around the world, the arguments of the Ministry of Defence (noting that the security argument was no longer of substantial concern to the Government) together with the applicants' arguments against the policy. He considered that the balance of argument clearly lay with the applicants,

describing the applicants' submissions in favour of a conduct-based code as "powerful". In his view, the tide of

history was against the Ministry of Defence. He further observed that it was improbable, whatever the High Court would say, that the policy could survive for much longer and added, "I doubt whether most of those present in court throughout the proceedings now believe otherwise."

24. However, having considered arguments as to the test to be applied in the context of these judicial review proceedings, Simon Brown LJ concluded that the conventional Wednesbury principles, adapted to a human rights context, should be applied.

Accordingly, where fundamental human rights were being restricted, the Minister of Defence needed to show that there was an important competing interest to justify the restriction. The primary decision was for him and the secondary judgment of the court amounted to asking whether a reasonable Minister, on the material before him, could have reasonably made that primary judgment. He later clarified that it was only if the purported justification "outrageously defies logic or accepted moral standards" that the court could strike down the Minister's decision. He noted that within the limited scope of that review, the court had to be scrupulous to ensure that no recognised ground of challenge was in truth available to an applicant before rejecting the application. When the most fundamental human rights are threatened, the court would not, for example, be inclined to overlook some minor flaw in the decision-making process, or to adopt a particularly benevolent view of the Minister's evidence, or to exercise its discretion to withhold relief. However, he emphasised that, even where the most fundamental human rights were being restricted, "the threshold of unreasonableness is not lowered".

It was clear that the Secretary of State had cited an important competing public interest. But the central question was whether it was reasonable for the Secretary of State to take the view that allowing homosexuals into the forces would imperil that interest. He pointed out that, although he might have considered the Minister wrong,

"…[the courts] owe a duty ... to remain within their constitutional bounds and not trespass beyond them. Only if it were plain beyond sensible argument that no conceivable damage could be done to the armed services as a fighting unit would it be appropriate for this Court now to remove the issue entirely from the hands of both the military and of the government. If the Convention … were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown proportionate to the benefits then clearly the primary judgment … would be for us and not others: the constitutional balance would shift. But that is not the position. In exercising merely a secondary judgment, this Court is bound to act with some reticence. Our approach must reflect, not overlook, where responsibility ultimately lies for the defence of the realm and recognise too that Parliament is exercising a continuing supervision over this area of prerogative power."

Accordingly, while the Minister's suggested justification for the ban may have seemed "unconvincing", the Minister's stand could not properly be said to be unlawful. It followed that the applications had to be rejected "albeit with hesitation and regret". A brief analysis of the Convention's case-law led the judge to comment that he strongly suspected that, as far as the United Kingdom's obligations were concerned, the days of the policy were numbered.

25. Simon Brown LJ also found that the Equal Treatment Directive was not applicable to discrimination on grounds of sexual orientation and that the domestic courts could not rule on Convention matters. He also observed that the United States, Canada, Australia, New Zealand, Ireland, Israel, Germany, France, Norway, Sweden, Austria and the Netherlands permitted homosexuals to serve in their armed forces and that the evidence indicated that the only countries operating a blanket ban were Turkey and Luxembourg (and, possibly, Portugal and Greece).

26. In August 1995 a consultation paper was circulated by the Ministry of Defence to "management" levels in the armed forces relating to the Ministry of Defence's policy against

homosexuals in those forces. The covering letter circulating this paper pointed out that the "Minister for the Armed Forces has decided that evidence is to be gathered within the Ministry of Defence in support of the current policy on homosexuality". It was indicated that the case was likely to progress to the European courts and that the applicants in the judicial review proceedings had argued that the Ministry of Defence's position was "bereft of factual evidence" but that this was not surprising since evidence was difficult to amass given that homosexuals were not permitted to serve. Since "this should not be allowed to weaken the arguments for maintaining the policy", the addressees of the letter were invited to comment on the consultation paper and "to provide any additional evidence in support of the current policy by September 1995". The consultation paper attached referred, inter alia, to two incidents which were considered damaging to unit cohesion. The first involved a homosexual who had had a relationship with a sergeant's mess waiter and the other involved an Australian on secondment whose behaviour was described as "so disruptive" that his attachment was terminated.

27. On 3 November 1995 the Court of Appeal dismissed the applicants' appeal. The Master of the Rolls, Sir Thomas Bingham, delivered the main judgment (with which the two other judges of the Court of Appeal agreed).

28. As to the court's approach to the issue of "irrationality", he considered that the following submission was an accurate distillation of the relevant jurisprudence on the subject:

"the court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision- maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

He went on to quote from, inter alia, the judgment of Lord Bridge in R. v. Secretary of State for the Home Department, ex parte Brind [1991] 1 Appeal Cases 696, where it was pointed out that:

"the primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment."

Moreover, he considered that the greater the policy content of the decision and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court had to be in holding a decision to be irrational.

29. Prior to applying this test of irrationality, the Master of the Rolls noted that the case concerned innate qualities of a very personal kind, that the decisions of which the applicants complained had had a profound effect on their careers and prospects and that the applicants' rights as human beings were very much in issue. While the domestic court was not the primary decision-maker and while it was not the role of the courts to regulate the conditions of service in the armed forces, "it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people' …".

30. He then reviewed, by reference to the test of irrationality outlined above, the submissions of the parties in favour of and against the policy, commenting that the applicants' arguments were "of very considerable cogency" which called to be considered in depth with particular reference to past experience in the United Kingdom, to the developing experience of other countries and to the potential effectiveness of a detailed prescriptive code in place of the present blanket ban. However, he concluded that the policy could not be considered

"irrational" at the time the applicants were discharged from the armed forces, finding that the threshold of irrationality was "a high one" and that it had not been crossed in this case.

31. On the Convention, the Master of the Rolls noted as follows:

"It is, inevitably, common ground that the United Kingdom's obligation, binding in international law, to respect and ensure compliance with [Article 8 of the Convention] is not one that is enforceable by domestic courts. The relevance of the Convention in the present context is as background to the complaint of irrationality. The fact that a decision-maker failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning the exercise of that discretion."

He observed that to dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behaviour, would not appear to show respect for that person's private and family life and that there might be room for argument as to whether the policy answered a "pressing social need" and, in particular, was proportionate to the legitimate aim pursued. However, he held that these were not questions to which answers could be properly or usefully proffered by the Court of Appeal, but rather were questions for the European Court of Human Rights to which court the applicants might have to pursue their claim. He further accepted that the Equal Treatment Directive did not apply to complaints in relation to sexual orientation.

32. Henry LJ of the Court of Appeal agreed with the judgment of the Master of the Rolls and, in particular, with the latter's approach to the irrationality test and with his view on the inability of the court to resolve Convention issues. He questioned the utility of a debate as to the likely fate of the "longstanding" policy of the Ministry of Defence before the European Court of Human Rights with which the primary adjudicating role on the Convention lay. The Court of Appeal did not entertain "hypothetical questions". In Henry LJ's view, the only relevance of the Convention was as "background to the complaint of irrationality", which point had been already made by the Master of the Rolls. It was important to highlight this

point since Parliament had not given the domestic courts primary jurisdiction over human rights issues contained in the Convention and because the evidence and submissions before the Court of Appeal related to that court's secondary jurisdiction and not to its primary jurisdiction.

33. Thorpe LJ of the Court of Appeal agreed with both preceding judgments and, in particular, with the views expressed on the rationality test to be applied and on its application in the particular case. The applicants' arguments that their rights under Article 8 had been breached were "persuasive" but the evidence and arguments that would ultimately determine that issue were not before the Court of Appeal. He also found that the applicants' challenge to the arguments in support of the policy was "completely persuasive" and added that what impressed him most in relation to the merits was the complete absence of illustration and

substantiation by specific examples, not only in the Secretary of State's evidence filed in the High Court, but also in the case presented to the Parliamentary Select Committee in 1991. The policy was, in his view, "ripe for review and for consideration of its replacement by a strict conduct code". However, the applicants' attack on the Secretary of State's rationality fell "a long way short of success".

34. On 19 March 1996 the Appeals Committee of the House of Lords refused leave to appeal to the House of Lords.

D. The applicants' Industrial Tribunal proceedings

35. In December 1995 Mr Lustig-Prean issued proceedings in the Industrial Tribunal claiming unfair dismissal and sexual discrimination contrary to the Sexual Discrimination Act 1975. Those proceedings were adjourned pending the above-described application for leave to appeal to the House of Lords. Further to the rejection of the application, he requested the withdrawal of his Industrial Tribunal proceedings and those proceedings were dismissed by the Industrial Tribunal on 25 April 1996.

36. In December 1997 Mr Beckett also issued proceedings in the Industrial Tribunal claiming sexual discrimination contrary to the 1975 Act. In the light of subsequent decisions of the ECJ and of the domestic courts, the second applicant subsequently requested the withdrawal of those proceedings which were, on 27 August 1998, dismissed by the Industrial Tribunal.

II. Relevant domestic law and practice

A. Decriminalisation of homosexual acts

37. By virtue of section 1(1) of the Sexual Offences Act 1967, homosexual acts in private between two consenting adults (at the time meaning 21 years or over) ceased to be criminal offences. However, such acts continued to constitute offences under the Army and Air Force Acts 1955 and the Naval Discipline Act 1957 (Section 1(5) of the 1967 Act). Section 1(5) of the 1967 Act was repealed by the Criminal Justice and Public Order Act 1994 (which Act also reduced the age of consent to 18 years). However, section 146(4) of the 1994 Act provided that nothing in that section prevented a homosexual act (with or without other acts or circumstances) from constituting a ground for discharging a member of the armed forces.

B. R. v. Secretary of State for Defence, ex parte Perkins, judgments of 13 March 1997 and 13 July 1998, and related cases

38. On 30 April 1996 the ECJ decided that transsexuals were protected from discrimination on grounds of their transsexuality under European Community law (P. v. S. and Cornwall County Council [1996] Industrial Relations Law Reports 347).

39. On 13 March 1997 the High Court referred to the ECJ pursuant to Article 177 of the Treaty of Rome the question of the applicability of the Equal Treatment Directive to differences of treatment based on sexual orientation (R. v. Secretary of State for Defence, ex

parte Perkins, 13 March 1997). Mr Perkins had been discharged from the Royal Navy on grounds of his homosexuality.

40. On 17 February 1998 the ECJ found that the Equal Pay Directive 75/117/EEC did not apply to discrimination on grounds of sexual orientation (Grant v. South West Trains Ltd [1998] Industrial Cases Reports 449).

41. Consequently, on 2 March 1998 the ECJ enquired of the High Court in the Perkins' case whether it wished to maintain the Article 177 reference. After a hearing between the parties, the High Court decided to withdraw the question from the ECJ (R. v. Secretary of State for Defence, ex parte Perkins, 13 July 1998). Leave to appeal was refused.

C. The Ministry of Defence policy on homosexual personnel in the armed forces

42. As a consequence of the changes made by the Criminal Justice and Public Order Act 1994, updated Armed Forces' Policy and Guidelines on Homosexuality ("the Guidelines") were distributed to the respective service directorates of personnel in December 1994. The Guidelines provided, inter alia, as follows:

"Homosexuality, whether male or female, is considered incompatible with service in the armed forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness. If individuals admit to being homosexual whilst serving and their Commanding Officer judges that this admission is well-founded they will be required to leave the services. ...

The armed forces' policy on homosexuality is made clear to all those considering enlistment. If a potential recruit admits to being homosexual, he/she will not be enlisted. Even if a

potential recruit admits to being homosexual but states that he/she does not at present nor in the future intend to engage in homosexual activity, he/she will not be enlisted. ...

In dealing with cases of suspected homosexuality, a Commanding Officer must make a balanced judgment taking into account all the relevant factors. ... In most circumstances, however, the interests of the individual and the armed forces will be best served by formal investigation of the allegations or suspicion. Depending on the circumstances, the Commanding Officer will either conduct an internal inquiry, using his own staff, or he will seek assistance from the Service Police. When conducting an internal inquiry he will normally discuss the matter with his welfare support staff. Homosexuality is not a medical matter, but there may be circumstances in which the Commanding Officer should seek the advice of the Unit Medical Officer on the individual concerned and may then, if the individual agrees, refer him/her to the Unit Medical Officer. ...

A written warning in respect of an individual's conduct or behaviour may be given in circumstances where there is some evidence of homosexuality but insufficient ... to apply for administrative discharge ... . If the Commanding Officer is satisfied on a high standard of proof of an individual's homosexuality, administrative action to terminate service ... is to be initiated, ..."

One of the purposes of the Guidelines was the reduction of the involvement of the service police whose investigatory methods, based on criminal procedures, had been strongly resented and widely publicised in the past (confirmed at paragraph 9 of the Homosexual Policy Assessment Team's report of February 1996 which is summarised at paragraphs 44-55 below. However, paragraph 100 of this report indicated that investigation into homosexuality is part of "normal service police duties".)

43. The affidavit of Air Chief Marshal Sir John Frederick Willis KCB, CBE, Vice Chief of the Defence Staff, Ministry of Defence dated 4 September 1996, which was submitted to the

High Court in the case of R. v. Secretary of State for Defence, ex parte Perkins (13 July1998), read, in so far as relevant, as follows:

"The policy of the Ministry of Defence is that the special nature of homosexual life precludes the acceptance of homosexuals and homosexuality in the armed forces. The primary concern of the armed forces is the maintenance of an operationally effective and efficient force and the consequent need for strict maintenance of discipline. [The Ministry of Defence] believes that the presence of homosexual personnel has the potential to undermine this.

The conditions of military life, both on operations and within the service environment, are very different from those experienced in civilian life. … The [Ministry of Defence] believes that these conditions, and the need for absolute trust and confidence between personnel of all ranks, must dictate its policy towards homosexuality in the armed forces. It is not a question of a moral judgement, nor is there any suggestion that homosexuals are any less courageous than heterosexual personnel; the policy derives from a practical assessment of the implications of homosexuality for fighting power."

D. The report of the Homosexuality Policy Assessment Team – February 1996

1. General

44. Following the decision in the case of R. v. Ministry of Defence, ex parte Smith and Others 2 Weekly Law Reports 305, the Homosexuality Policy Assessment Team ("HPAT") was established by the Ministry of Defence in order to undertake an internal assessment of the armed forces' policy on homosexuality. The HPAT was composed of Ministry of Defence civil servants and representatives of the three services. The HPAT's assessment was to form the basis of the Ministry's evidence to the next Parliamentary Select Committee (as confirmed in the affidavit of Air Chief Marshal Sir John Frederick Willis referred to at paragraph 43 above). The HPAT was to consult the Ministry of Defence, the armed forces' personnel of all

ranks, service and civilian staff responsible for carrying out the policy together with members of the legal adviser's staff. It was also to examine the policies of other nations (Annex D to the HPAT report).

The report of the HPAT was published in February 1996 and ran to approximately 240 pages, together with voluminous annexes. The starting-point of the assessment was an assumption that homosexual men and women were in themselves no less physically capable, brave, dependable and skilled than heterosexuals. It was considered that any problems to be identified would lie in the difficulties which integration of declared homosexuals would pose to the military system which was largely staffed by heterosexuals. The HPAT considered that the best predictors of the "reality and severity" of the problems of the integration of homosexuals would be the service personnel themselves (paragraph 30 of the report).

2. The methods of investigation used

45. There were eight main areas of investigation (paragraph 28 of the report):

(a) The HPAT consulted with policy-makers in the Ministry of Defence. The latter emphasised the uniqueness of the military environment and the distinctly British approach to service life and the HPAT found little disagreement with this general perspective from the service people it interviewed (paragraph 37);

(b) A signal was sent to all members of the services, including the reserve forces, requesting any written views on the issues. By 16 January 1996 the HPAT had received 639 letters. 587 of these letters were against any change in the policy, 58 of which were multiply signed. Only 11 of those letters were anonymous (paragraphs 46-48);

(c) The HPAT attitude survey consisted of a questionnaire administered to a total of 1,711 service personnel chosen as representative of the services. The questionnaires were administered in examination-type conditions and were to be completed anonymously. The results indicated that there was "overwhelming support across the services" for the policy excluding homosexuals from the armed forces. Service personnel viewed homosexuality as clearly more acceptable in civilian than in service life (paragraphs 49-59 and Annex G);

(d) During the HPAT's visit to ten military bases in late 1995 in order to administer the above questionnaire, individual one-to-one interviews were conducted with personnel who had completed the attitude questionnaire. 180 interviewees randomly selected from certain ranks and occupational areas were selected from each of the ten units visited. Given the small number of interviewees, the responses were analysed qualitatively rather than quantitatively (Annex G);

(e) A number of single-service focus group discussions were held with randomly selected personnel from representative ranks and functions (Annex G refers to 36 such discussions whereas paragraph 61 of the report refers to 43). The purpose of the group discussions was to examine the breadth and depth of military views and to provide insights that would complement the survey results. The HPAT commented that the nature of the discussions showed little reticence in honestly and fully putting forward views; there was an "overwhelming view that homosexuality was not 'normal' or 'natural' whereas women and ethnic minorities were 'normal'". The vast majority of participants believed that the present ban on homosexuals should remain (paragraphs 61-69 and Annex G);

(f) One sub-team of the HPAT went to Australia, Germany and France and the other visited the United States, Canada and the Netherlands. The

HPAT interviewed an eminent Israeli military psychologist since the Israeli military would not accept the HPAT visit (paragraphs 70-77 and Annex H). It is also apparent that the HPAT spoke to representatives of the police, the fire service and the merchant navy (paragraphs 78-82);

(g) Tri-service regional focus discussion groups were also held to examine the breadth and depth of the personnel's views. The groups were drawn from the three services and from different units. Three such discussion groups were held and overall the results were the same as those from the single-service focus groups (paragraphs 83-84 and Annex G);

(h) Postal single-service attitude surveys were also completed by a randomly selected sample of personnel stratified by rank, age and gender. The surveys were distributed to 3,000 (6%) of the Royal Navy and Royal Marine personnel, to 6,000 (5.4%) of the Army personnel and to 4,491 (6%) of the Royal Air Force personnel. On average over half of the surveys were returned (paragraphs 65-86 and Annex G).

3. The impact on fighting power

46. The HPAT report defined "fighting power" (often used interchangeably with combat effectiveness, operational efficiency or operational effectiveness) as the "ability to fight" which is in turn made up of three components. These are the "conceptual" and "physical" components together with the "moral component", the latter being defined as "the ability to get people to fight including morale, comradeship, motivation, leadership and management".

47. The focus throughout the assessment was upon the anticipated effects on fighting power and this was found to be the "key problem" in integrating homosexuals into the armed forces. It was considered well established that the presence of known or strongly suspected homosexuals in the armed forces would produce certain behavioural and emotional responses and problems which would affect morale and, in turn, significantly and negatively affect the fighting power of the armed forces.

These anticipated problems included controlling homosexual behaviour and heterosexual animosity, assaults on homosexuals, bullying and harassment of homosexuals, ostracism and

avoidance, “cliquishness” and pairing, leadership and decision-making problems including allegations of

favouritism, discrimination and ineffectiveness (but excluding the question of homosexual officers taking tactical decisions swayed by sexual preference), sub-cultural friction, privacy/decency issues, increased dislike and suspicions (polarised relationships), and resentment over imposed change especially if controls on heterosexual expression also had to be tightened (see Section F.II of the report).

4. Other issues

48. The HPAT also assessed other matters it described as “subsidiary” (Section G and paragraph 177 of the report). It found that, while cost implications of changing the policy were not quantifiable, it was not considered that separate accommodation for homosexuals would be warranted or wise and, accordingly, major expenditures on accommodation were considered unlikely (paragraphs 95-97). Wasted training as regards discharged homosexuals was not considered to be a significant argument against maintaining the policy (paragraphs 98-99). Should the wider social and legal position change in relation to civilian homosexual couples, then entitlements for homosexual partners would have to be accepted (paragraph 101). Large amounts of money or time were unlikely to be devoted to homosexual awareness training, given that it was unlikely to be effective in changing attitudes. It was remarked that, if required, tolerance training would probably be best addressed as “part of an integrated programme for equal opportunities training in the military” (paragraph 102). There were strong indications that recruitment and retention rates would go down if there was a change in policy (paragraphs 103-04).

49. Concerns expressed about the fulfilment of the forces’ loco parentis responsibilities for young recruits were found not to stand up to close examination (paragraph 111).

5. Medical and security concerns

50. Medical and security concerns were considered separately (Sections H and I, respectively, and paragraph 177 of the report). While it was noted that medical concerns of personnel (in relation to, inter alia, Aids) were disproportionate to the clinical risks involved, it was considered that these concerns would probably need to be met with education packages and compulsory Aids testing. Otherwise, real acceptance and integration of homosexuals would be seriously prejudiced by emotional reactions and resentments and by concerns about the threat of Aids. The security issues (including the possibility of blackmail of those suspected of being homosexual) raised in defence of the policy were found not to stand up to close examination.

6. The experience in other countries and in civilian disciplined services

51. The HPAT observed that there were a wide variety of official positions and legal arrangements evolving from local legal and political circumstances and ranging from a formal prohibition of all homosexual activity (the United States), to administrative arrangements falling short of real equality (France and Germany), to a deliberate policy to create an armed force friendly to homosexuals (the Netherlands). According to the HPAT, those countries which had no legal ban on homosexuals were more tolerant, had written constitutions and therefore a greater tradition of respect for human rights. The report continued:

"But nowhere did HPAT learn that there were significant numbers of open homosexuals serving in the Forces … . Whatever the degree of official toleration or encouragement, informal pressures or threats within the military social system appeared to prevent the vast majority of homosexuals from choosing to exercise their varying legal rights to open expression of their active sexual identity in a professional setting. … It goes without saying that the continuing reticence of military homosexuals in these armed forces means that there has been little practical experience of protecting them against ostracism, harassment or physical attack.

Since this common pattern of a near absence of openly homosexual personnel occurs irrespective of the formal legal frameworks, it is reasonable to assume that it is the informal functioning of actual military systems which is largely incompatible with homosexual self-expression. This is entirely consistent with the pattern of British service personnel's attitudes confirmed by the HPAT."

52. In January 1996 there were over 35,000 British service personnel (25% approximately of the British armed forces) deployed overseas on operations, more than any other NATO country in Europe (paragraph 43).

The HPAT concluded, nevertheless, that the policy had not presented significant problems when working with the armed forces of allied nations. The HPAT remarked that British service personnel had shown a "robust indifference" to arrangements in foreign forces and no concern over what degree of acceptance closely integrated allies give to homosexuals. This is because the average service person considers that those others "are not British, have different standards, and are thus only to be expected to do things differently" and because personnel from different nations are accommodated apart. It was also due to the fact that homosexuals in foreign forces, where they were not formally banned, were not open about their sexual orientation. Consequently, the chances were small of the few open homosexuals happening to be in a situation where their sexual orientation would become a problem with British service personnel (paragraph 105).

53. Important differences were considered by the HPAT to exist between the armed forces and civilian disciplined services in the United Kingdom including the police, the fire brigade and the merchant navy which did not operate the same policy against homosexuals. It considered that:

"None of these occupations involves the same unremittingly demanding and long-term working environment as the Armed Forces, or requires the same emphasis on building rapidly

interchangeable, but fiercely committed and self-supporting teams, capable of retaining their cohesion after months of stress, casualties and discomfort …" (paragraph 203)

7. Alternative options to the current policy

54. Alternative options were considered by the HPAT including a code of conduct applicable to all, a policy based on the individual qualities of homosexual personnel, lifting the ban and relying on service personnel reticence, the "don't ask, don't tell" solution offered by the USA and a "no open homosexuality" code. It concluded that no policy alternative could be identified which avoided risks for fighting power with the same certainty as the present policy and which, in consequence, would not be strongly opposed by the service population (paragraphs 153-75).

8. The conclusions of the HPAT (paragraphs 176-91)

55. The HPAT found that:

"the key problem remains and its intractability has indeed been re-confirmed. The evidence for an anticipated loss in fighting power has been set out in section F and forms the centrepiece of this assessment. The various steps in the argument and the overall conclusion have been shown not only by the Service authorities but by the great majority of Service personnel in all ranks".

Current service attitudes were considered unlikely to change in the near future. While clearly hardship and invasion of privacy were involved, the risk to fighting power demonstrated why the policy was, nevertheless, justified. It considered that it was not possible to draw any meaningful comparison between the integration of homosexuals and of women and ethnic

minorities into the armed forces since homosexuality raised problems of a type and intensity that gender and race did not.

The HPAT considered that, in the longer term, evolving social attitudes towards homosexuality might reduce the risks to fighting power inherent in change but that their assessment could "only deal with present attitudes and risks". It went on:

"… certainly, if service people believed that they could work and live alongside homosexuals without loss of cohesion, far fewer of the anticipated problems would emerge. But the Ministry must deal with the world as it is. Service attitudes, in as far as they differ from those of the general population, emerge from the unique conditions of military life, and represent the current social and psychological realities. They indicate military risk from a policy change…

… after collecting the most exhaustive evidence available, it is also evident that in the UK homosexuality remains in practice incompatible with service life if the armed services, in their present form, are to be maintained at their full potential fighting power. ... Furthermore, the justification for the present policy has been overwhelmingly endorsed by a demonstrated consensus of the profession best able to judge it. It must follow that a major change to the Ministry's current Tri-service Guidelines on homosexuality should be contemplated only for clearly stated non-defence reasons, and with a full acknowledgement of the impact on Service effectiveness and service people's feelings."

E. The armed forces' policy on sexual and racial harassment and bullying and on equal opportunities

56. The Defence Council's "Code of Practice on Race Relations" issued in December 1993 declared the armed forces to be equal opportunity employers. It stated that no form of racial discrimination, harassment or abuse would be tolerated, that allegations would be investigated

and, if proved, disciplinary action would be taken. It provided for a complaints procedure in relation to discrimination or harassment and it warned against the victimisation of service personnel who made use of their right of complaint and redress.

57. In January 1996 the army published an Equal Opportunities Directive dealing with racial and sexual harassment and bullying. The policy document contained, as a preamble, a statement of the Adjutant-General which reads as follows:

"The reality of conflict requires high levels of teamwork in which individual soldiers can rely absolutely on their comrades and their leaders. There can, therefore, be no place in the Army for harassment, bullying and discrimination which will affect morale and break down the trust and cohesion of the group.

It is the duty of every soldier to ensure that the Army is kept free of such behaviour which would affect cohesion and efficiency. Army policy is clear: all soldiers must be treated equally on the basis of their ability to perform their duty.

I look to each one of you to uphold this policy and to ensure that we retain our acknowledged reputation as a highly professional Army."

The Directive provided definitions of racial and sexual harassment, indicated that the army wanted to prevent all forms of offensive and unfair behaviour in these respects and pointed out that it was the duty of each soldier not to behave in a way that could be offensive to others or to allow others to behave in that way. It also defined bullying and indicated that, although the army fosters an aggressive spirit in soldiers who will have to go to war, controlled aggression, self-sufficiency and strong leadership must not be confused with thoughtless and meaningless use of intimidation and violence which characterise bullying. Bullying undermines morale and creates fear and stress both in the individual and the group being bullied and in the organisation. The army was noted to be a close-knit community where team

work, cohesion and trust are paramount. Thus, high standards of personal conduct and respect for others were demanded from all.

The Directive endorsed the use of military law by commanders. Supplementary leaflets promoting the Directive were issued to every individual soldier. In addition, specific equal opportunities posts were created in personnel centres and a substantial training programme in the Race Relations Act 1976 was initiated.

F. The reports of the Parliamentary Select Committee

58. Every five years an Armed Forces' Bill goes through Parliament and a Select Committee conducts a review in connection with that bill.

59. The report of the Select Committee dated 24 April 1991 noted, under the heading "Homosexuality":

"That the present policy causes very real distress and the loss to the services of some men and women of undoubted competence and good character is beyond dispute. Society outside the armed forces is now much more tolerant of differences in sexual orientation than it was, and this may also possibly be true of the armed forces. Nevertheless, there is considerable force to the [Ministry of Defence's] argument that the presence of people known to be homosexual can cause tension in a group of people required to live and work sometimes under great stress and physically at very close quarters, and thus damage its cohesion and fighting effectiveness. It may be that this will change particularly with the integration of women into hitherto all-male units. We are not yet persuaded that the time has come to require the armed forces to accept homosexuals or homosexual activity."

60. The 1996 Select Committee report (produced after that committee's review of the Armed Forces Act 1996) referred to evidence taken from members of the Ministry of Defence and from homosexual support groups and to the HPAT Report. Once again, the committee did not recommend any change in the Government's policy. It noted that, since its last report, a total of 30 officers and 331 persons of other rank had been discharged or dismissed on grounds of homosexuality. The committee was satisfied that no reliable lessons could as yet be drawn from the experience of other countries. It acknowledged the strength of the human rights arguments put forward, but noted that there had to be a balance struck between individual rights and the needs of the whole. It was persuaded by the HPAT summary of the strength of opposition throughout the armed services to any relaxation of the policy. It accepted that the presence of openly homosexual servicemen and women would have a significant adverse impact on morale and, ultimately, on operational effectiveness. The matter was then debated in the House of Commons and members, by 188 votes to 120, rejected any change to the existing policy.

G. Information to persons recruited into the armed forces

61. Prior to September 1995, applicants to the armed forces were informed about the armed forces' policy as regards homosexuals in the armed forces by means of a leaflet entitled "Your Rights and Responsibilities". To avoid any misunderstanding and so that each recruit to each of the armed services received identical information, on 1 September 1995 the armed forces introduced a Service Statement to be read and signed before enlistment. Paragraph 8 of that statement is headed "Homosexuality" and states that homosexuality is not considered compatible with service life and "can lead to administrative discharge".

The law

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

62. The applicants complained that the investigations into their homosexuality and their subsequent discharge from the Royal Navy on the sole ground that they were homosexual, in pursuance of the Ministry of Defence's absolute policy against homosexuals in the British armed forces, constituted a violation of their right to respect for their private lives protected by Article 8 of the Convention. That Article, in so far as is relevant, reads as follows:

"1. Everyone has the right to respect for his private … life…

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, … for the prevention of disorder…"

A. Whether there was an interference

63. The Government accepted, in their written observations, that there had been interferences with the applicants' right to respect for their private lives. However, noting that neither of the applicants denied knowledge during the relevant period of the policy against homosexuals in the armed forces, the Government made no admissions as to the dates from which the

applicants also appreciated that they were homosexual. During the hearing before the Court the Government, referring in particular to Mr Lustig-Prean, clarified that, if the applicants were aware of the policy and of their homosexuality on recruitment, then their discharge would not have amounted to an interference with their rights guaranteed by Article 8 of the Convention.

The applicants argued that they were not complaining about being refused entry to the armed forces and that they had not been dismissed for lying during recruitment. In any event, the protection afforded by Article 8 could not depend on the degree of knowledge of the applicants of their sexual orientation when they were young men.

64. The Court notes that the Government have not claimed that the applicants waived their rights under Article 8 of the Convention when they initially joined the armed forces. It also notes that the applicants were not dismissed for failure to disclose their homosexuality on recruitment. Further, the Government do not dispute Mr Beckett's statement made during his interview that he had discovered his homosexual orientation after recruitment.

In these circumstances, the Court is of the view that the investigations by the military police into the applicants' homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of their sexual orientation also constituted an interference with that right (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and, mutatis mutandis, the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 23, § 44).

B. Whether the interferences were justified

65. Such interferences can only be considered justified if the conditions of the second paragraph of Article 8 are satisfied. Accordingly, the interferences must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim (see the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 18, § 39).

1. “In accordance with the law”

66. The parties did not dispute that there had been compliance with this element of Article 8 § 2 of the Convention. The Court notes that the Ministry of Defence policy excluding homosexuals from the armed forces was confirmed by the Court of Appeal in the present case to be lawful, in terms of both domestic and applicable European Community law. The policy was given statutory recognition and approval by the Sexual Offences Act 1967 and, more recently, by the Criminal Justice and Public Order Act 1994. The Court, accordingly, finds this requirement to be satisfied.

2. Legitimate aim

67. The Court observes that the essential justification offered by the Government for the policy and for the consequent investigations and discharges is the maintenance of the morale of service personnel and, consequently, of the fighting power and the operational effectiveness of the armed forces (see paragraph 88 below). The Court finds no reason to doubt that the policy was designed with a view to ensuring the operational effectiveness of the armed forces or that investigations were, in principle, intended to establish whether the person concerned was a homosexual to whom the policy was applicable. To this extent, therefore, the Court considers that the resulting interferences can be said to pursue the legitimate aims of “the interests of national security” and “the prevention of disorder”.

The Court has more doubt as to whether the investigations continued to serve any such legitimate aim once the applicants had admitted their homosexuality. However, given the Court’s conclusion at paragraph 104 below, it does not find that it is necessary to decide whether this element of the investigations pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

3. "Necessary in a democratic society"

68. It remains to be determined whether the interferences in the present cases can be considered "necessary in a democratic society" for the aforesaid aims.

(a) The Government's submissions

69. The Government accepted from the outset that neither the applicants' service records nor their conduct gave any grounds for complaint and that there was no evidence that, prior to the discovery of their sexual orientation, such orientation adversely affected the performance by them or by their colleagues of their duties. Nor was it contended by the Government that homosexuals were less physically capable, brave, dependable or skilled than heterosexuals.

70. However, the Government emphasised, in the first place, the special British armed forces' context of the case. It was special because it was intimately connected with the nation's security and was, accordingly, central to a State's vital interests. Unit cohesion and morale lay at the heart of the effectiveness of the armed forces. Such cohesion and morale had to withstand the internal rigours of normal and corporate life, close physical and shared living conditions together with external pressures such as grave danger and war, all of which factors the Government argued applied or could have applied to each applicant. In this respect, the armed forces' were unique and there were no genuine comparables in terms of the civilian disciplined forces, such as the police and the fire brigade.

In such circumstances, the Government, while accepting that members of the armed forces had the right to the Convention's protection, argued that different, and stricter, rules applied in this context (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 24, § 57; the Grigoriades v. Greece judgment of 25 November 1997, Reports of Judgments and Decisions 1997-VII, pp. 2589-90, § 45; and the Kalaç v. Turkey judgment of 1 July 1997, Reports 1997-IV, p. 1209, § 28). Moreover, given the national security dimension

to the present case a wide margin of appreciation was properly open to the State (see the Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, § 59). Accordingly, the narrow margin of appreciation which applied to cases involving intimate private life matters could not be transposed unaltered to the present case.

In support of their argument for a broad margin of appreciation, the Government also referred to the fact that the issue of homosexuals in the armed forces has been the subject of intense debate in recent years in the United Kingdom, suggesting that the sensitivity and special context of the question meant that the decision was largely one for the national authorities. It was true that the degree of risk to fighting power was not consistent over time, given that attitudes and opinions, and, consequently, domestic law on the subject of homosexuality had developed over the years. Nevertheless, the approach to such matters in an armed forces context had to be cautious given the inherent risks. The process of review was ongoing and the Government indicated their commitment to a free vote in Parliament on the subject after the next Parliamentary Select Committee review of the policy in 2001.

71. Secondly, the Government argued that admitting homosexuals to the armed forces at this time would have a significant and negative effect on the morale of armed forces' personnel and, in turn, on the fighting power and the operational effectiveness of the armed forces. They considered that the observations and conclusions in the HPAT report of February 1996 (and, in particular, Section F of the report) provided clear evidence of the risk to fighting power and operational effectiveness. The Government submitted that the armed forces' personnel (on whose views the HPAT report was based) were best placed to make this risk assessment and that their views should therefore be afforded considerable weight. Moreover, the relatively recent analyses completed by the HPAT, by the domestic courts (in R. v. Ministry of Defence, ex parte Smith and Others 2 Weekly Law Reports 305) and by the Parliamentary Select Committee all led to the conclusion that the policy should be maintained.

The Government considered that the choice between establishing a code of conduct and maintaining the present policy lay at the heart of the judgment to be made in this matter. However, the view in the United Kingdom was that such a code would not at present be

sufficient to meet the risks identified because it was the knowledge or suspicion of the fact that a person was homosexual, and not the conduct of that person, which would cause damage to morale and effectiveness. Even assuming that the attitudes on which the HPAT report was based were at least in part based on a lack of tolerance or on insufficient broadmindedness, the reality of the risk to effectiveness remained. It was true that many European armed forces no longer excluded homosexuals but the relevant changes had been adopted in those countries too recently to yield any valuable lessons.

As to the applicants' submission about the alleged lack of evidence of past problems caused by the presence of homosexuals in the armed forces, the Government pointed out that the discharge of all persons of established homosexual orientation before such damage occurred meant that concrete evidence establishing the risks identified by the HPAT might not be available. In any event, the Government noted that the risks envisaged would result from the general relaxation of the policy, rather than its modification in any particular instance.

72. Thirdly, and as to the charge made by the applicants that the views expressed to the HPAT by the clear majority of serving personnel could be labelled as "homophobic prejudice", the Government pointed out that these views represented genuine concerns expressed by those with first-hand and detailed knowledge of the demands of service life. Most of those surveyed displayed a clear difference in attitude towards homosexuality in civilian life. Conclusions could not be drawn from the fact that women and racial minorities were admitted while homosexuals were not because women and men were segregated in recognition of potential problems that might arise, whereas such arrangements were simply not possible in the case of same sex orientation. The concerns about homosexuals were of a type and intensity not engendered by women or racial minorities.

73. Once there was a suspicion of homosexuality, an investigation was carried out. According to the Government, the extent of such investigation would depend on the circumstances but an investigation usually implied questioning the individual and seeking corroborative evidence. If homosexuality was denied, investigations were necessary and even if it was admitted, attempts were made to find relevant evidence through interviews and, depending on the

circumstances, other inquiries. The aim of the investigations was to verify the homosexuality of the person suspected in order to detect those seeking an administrative discharge based on false pretences. During the hearing, the Government gave two recent examples of false claims of homosexuality in the army and in the Royal Air Force and three recent examples of such false claims in the Royal Navy. The investigations were also necessary given certain security concerns (in particular, the risk of blackmail of homosexual personnel), in light of the greater risk from the Aids virus in the homosexual community and for disciplinary reasons (homosexual acts might be disciplined in certain cases including, for example, where they resulted from an abuse of authority). The Government maintained that the applicants freely chose, in any event, to answer the questions put to them. Both were told that they did not have to answer the questions and that they could have legal advice.

While the bulk of the questioning was, in the submission of the Government, justified by the reasons for the investigation outlined above, the Government did not seek to defend the level of detailed questioning about precise sexual activities to which, at one stage, Mr Beckett was subjected. However, they argued that these indefensible, but specific, aspects of the questioning did not tilt the balance in favour of a finding of a violation.

(b) The applicants' submissions

74. The applicants submitted that the interferences with their private lives, given the subject matter, nature and extent of the intrusions at issue, were serious and grave and required particularly serious reasons by way of justification (see the Dudgeon judgment cited above, p. 21, § 52). The subject matter of the interferences was a most intimate part of their private lives, made public by the Ministry of Defence policy itself. The applicants also took issue with the detailed investigations carried out by the service police and with, in particular, the prurient questions put during the interviews, together with the search of Mr Beckett's locker and the seizure

of his personal postcards and photographs. Referring also to their years of service, to their promotions (past and imminent), to their exemplary service records and to the fact that there

was no indication that their homosexuality had in any way affected their work or service life, the applicants emphasised that they were, nevertheless, deprived of a career in which they excelled on the basis of "unsuitability for service" by reason of a blanket policy against homosexuals in the armed forces.

The applicants added, in this context, that a blanket policy was not adopted by the armed forces in any other context. It was not adopted in the case of personal characteristics or traits such as gender, race or colour. Indeed, the Ministry of Defence actively promoted equality and tolerance in these areas. Nor was there a blanket policy against those whose actions could or did affect morale and service efficiency such as those involved in theft or adultery or those who carried out dangerous acts under the influence of drugs or alcohol. In the latter circumstances, the individual could be dismissed, but only after a consideration of all the circumstances of the case. Moreover, no policy against homosexuals existed in comparable British services such as the Merchant Navy, the Royal Fleet Auxiliary, the police and the fire brigade, Mr Beckett pointing out that he had worked successfully as a police officer since his discharge from the navy.

75. The applicants also argued that the Government's core argument as to the risk to morale and, consequently, to fighting power and operational effectiveness was unsustainable for three main reasons.

76. In the first place, the applicants considered that the Government could not, consistently with Article 8, rely on and pander to the perceived prejudice of other service personnel. Given the absence of any rational basis for armed forces' personnel to behave any differently if they knew that an individual was a homosexual, the alleged risk of adverse reactions by service personnel was based on pure prejudice. It was the responsibility of the armed forces by reason of Article 1 of the Convention to ensure that those they employed understood that it was not acceptable for them to act by reference to pure prejudice. However, rather than taking steps to remedy such prejudice, the armed forces punished the victims of prejudice. The applicants considered that the logic of the Government's argument applied equally to the contexts of racial, religious and gender prejudice; the Government could not seriously suggest that, for

example, racial prejudice on the part of armed forces' personnel would be sufficient to justify excluding coloured persons from those forces.

Moreover, Convention jurisprudence established that the Government could not rely on pure prejudice to justify interference with private life (see, inter alia, application no. 25186/94, Sutherland v. the United Kingdom, Commission's report of 1 July 1997, as yet unpublished, §§ 56, 57, 62, 63 and 65). Furthermore, the applicants pointed out that the Court has found (in its Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, p. 17, §§ 36 and 38) that the demands of "pluralism, tolerance and broadmindedness" apply as much to service personnel as to other persons and that fundamental rights must be protected in the army of a democratic State just as in the society that such an army serves. They argued that the Court's reasoning in that case was based on a vital principle equally applicable in the present case – the armed forces of a country exist to protect the liberties valued by a democratic society, and so the armed forces should not be allowed themselves to march over, and cause substantial damage to, such principles.

77. Secondly, the applicants argued that such perceived prejudice would not have occurred but for the actions of the Ministry of Defence in adopting and applying the policy. The Government accepted that the applicants had worked efficiently and effectively in the armed forces for years without any problems arising by reason of their sexual orientation. The Government's concern related to the presence of openly homosexual service personnel; the private lives of the present applicants were indeed private and would have remained so but for the policy. There was, accordingly, no reason to believe that any difficulty would have arisen had it not been for the policy adopted by the Government.

78. Thirdly, the applicants submitted that the Government were required to substantiate their concerns about the threat to military discipline (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38) but had not produced any objective evidence to support their submission as to the risk to morale and operational effectiveness.

In this respect, they argued that the HPAT report was inadequate and fundamentally flawed. The assessment was not carried out by independent consultants. It was, moreover, conducted against the background of the publicly voiced hostility of the armed forces' authorities to a change in the policy and followed the circulation of an army consultation document which suggested that senior army personnel thought that the purpose of the HPAT review was to gather evidence in support of the current policy on homosexuality. Indeed the majority of the questions in the HPAT questionnaire expressed hostile attitudes to homosexuality or suggested

negative responses. In addition, the report contained no concrete evidence of specific problems caused by the presence of homosexual personnel in the armed forces of the United Kingdom or overseas. Furthermore, it was based on a statistically insignificant response rate and those responding were not guaranteed anonymity.

79. As to the dismissal by the HPAT of the experience of other countries which did not ban homosexuals from their armed forces, the applicants considered that the statement in the report that armed forces' personnel of such other countries were more tolerant was not supported by any evidence. In any event, even if those other countries had written constitutions and, consequently, a longer tradition of respect for human rights, the Government were required to comply with their Convention obligations. Whether there was a lack of openly homosexual personnel serving in the armed forces of those countries or not, the fact remained that sexual orientation was part of an individual's private life and no conclusions could be drawn from the fact that homosexuals serving in foreign armed forces might have chosen to keep their sexuality private as they were entitled to do. The applicants also pointed to the number of United Kingdom service personnel who had worked and were currently working alongside homosexual personnel in the armed forces of other NATO countries without any apparent problems.

As to the assertion that investigations were necessary to avoid false declarations of homosexuality by those wishing to leave the armed forces, the applicants pointed to the lack of evidence of such false declarations presented by the Government and to the fact that they

themselves had clearly wished to stay in the armed forces. In addition, they submitted that they felt obliged to answer the questions in the interviews because otherwise, as the Government accepted, their private and intimate affairs would have been the subject of wider and less discreet investigations elsewhere.

As to the Government's reliance on the Court's Kalaç judgment, the applicants pointed out that the case related to the sanctioning of public conduct and not of an individual's private characteristics.

(c) The Court's assessment

(i) Applicable general principles

80. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued (see the Norris judgment cited above, p. 18, § 41).

Given the matters at issue in the present case, the Court would underline the link between the notion of "necessity" and that of a "democratic society", the hallmarks of the latter including pluralism, tolerance and broadmindedness (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 36, and the Dudgeon judgment cited above, p. 21, § 53).

81. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left open to Contracting States in the context of this assessment, which varies according to the nature of

the activities restricted and of the aims pursued by the restrictions (see the Dudgeon judgment cited above, pp. 21 and 23, §§ 52 and 59).

82. Accordingly, when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention (see the Dudgeon judgment cited above, p. 21, § 52).

When the core of the national security aim pursued is the operational effectiveness of the armed forces, it is accepted that each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect (see the Engel and Others judgment cited above, p. 25, § 59). The Court also considers that it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk to operational effectiveness must be "substantiated by specific examples" (see, mutatis mutandis, the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, §§ 36 and 38, and the Grigoriades judgment cited above, pp. 2589-90, § 45).

(ii) Application to the facts of the case

83. It is common ground that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required (see paragraph 82 above). In the case of the present applicants, the Court finds the interferences to have been especially grave for the following reasons.

84. In the first place, the investigation process (see the Guidelines at paragraph 42 above and the Government's submissions at paragraph 73) was of an exceptionally intrusive character.

An anonymous letter to Mr Lustig-Prean's commanding officer, and Mr Beckett's confiding in a service chaplain, prompted the investigations into their sexual orientation, a matter which, until then, each applicant had kept private. The investigations were conducted by the service police, whose investigation methods were, according to the HPAT, based on criminal procedures and whose presence the HPAT described as widely publicised and strongly resented among the forces (see paragraph 42 above). It is clear from the transcripts of the interviews that the investigations had already commenced prior to the interviews. Two interviews were conducted with each applicant on the subject of their homosexuality and both applicants were asked detailed questions of an intimate nature about their particular sexual practices and preferences. Certain lines of questioning of both applicants were, in the Court's view, particularly intrusive and offensive and, indeed, the Government accepted that they could not defend the level of detailed questioning about precise sexual activities to which Mr Beckett was, at one point, subjected. Mr Beckett's locker was also searched, personal postcards and photographs were seized and he was later questioned on the content of these items. After the interviews, a service police report was prepared for the naval authorities on each applicant's homosexuality and related matters.

85. Secondly, the administrative discharge of the applicants had, as Sir Thomas Bingham MR described, a profound effect on their careers and prospects.

Prior to the events in question, both applicants enjoyed relatively successful service careers in their particular field. Mr Lustig-Prean had over twelve years' service in the navy and the year before he was discharged he had been promoted to lieutenant-commander. His evaluations prior to and after his discharge were very positive. Mr Beckett enlisted for twenty two years' service. He had served in the navy for over four years and was a substantive weapons engineering mechanic when discharged in July 1993. His evaluations prior to and after his

discharge were also very positive. The Government accepted in their observations that neither of the applicants' service records nor the conduct of the applicants gave any grounds for complaint and the High Court described their service records as "exemplary".

The Court notes, in this respect, the unique nature of the armed forces (underlined by the Government in their pleadings before the Court) and, consequently, the difficulty in directly transferring essentially military qualifications and experience to civilian life. In this regard, it recalls that one of the reasons why the Court considered Mrs Vogt's dismissal from her post as a school teacher to be a "very severe measure", was its finding that school teachers in her situation would "almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience" (Vogt judgment cited above, p. 29, § 60).

86. Thirdly, the absolute and general character of the policy which led to the interferences in question is striking (see the Dudgeon judgment cited above, p. 24, § 61, and the Vogt judgment cited above, p. 28, § 59). The policy results in an immediate discharge from the armed forces once an individual's homosexuality is established and irrespective of the individual's conduct or service record. With regard to the Government's reference to the Kalaç judgment, the Court considers that the compulsory retirement of Mr Kalaç is to be distinguished from the discharge of the present applicants, the former being dismissed on grounds of his conduct while the applicants were discharged on grounds of their innate personal characteristics.

87. Accordingly, the Court must consider whether, taking account of the margin of appreciation open to the State in matters of national security, particularly convincing and weighty reasons exist by way of justification for the interferences with the applicants' right to respect for their private lives.

88. The core argument of the Government in support of the policy is that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on

morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government rely in this respect on the report of the HPAT and, in particular, on Section F of the report.

Although the Court acknowledges the complexity of the study undertaken by the HPAT, it entertains certain doubts as to the value of the HPAT report for present purposes. The independence of the assessment contained in the report is open to question given that it was completed by Ministry of Defence civil servants and service personnel (see paragraph 44 above) and given the approach to the policy outlined in the letter circulated by the Ministry of Defence in August 1995 to management levels in the armed forces (see paragraph 26 above). In addition, on any reading of the Report and the methods used (see paragraph 45 above), only a very small proportion of the armed forces' personnel participated in the assessment. Moreover, many of the methods of assessment (including the consultation with policy-makers in the Ministry of Defence, one-to-one interviews and the focus group discussions) were not anonymous. It also appears that many of the questions in the attitude survey suggested answers in support of the policy.

89. Even accepting that the views on the matter which were expressed to the HPAT may be considered representative, the Court finds that the perceived problems which were identified in the HPAT report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. The Court observes, in this respect, that no moral judgment is made on homosexuality by the policy, as was confirmed in the affidavit of the Vice Chief of the Defence Staff filed in the Perkins' proceedings (see paragraph 43 above). It is also accepted by the Government that neither the records nor conduct of the applicants nor the physical capability, courage, dependability and skills of homosexuals in general are in any way called into question by the policy.

90. The question for the Court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue.

The Court observes from the HPAT report that these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above, any more than similar negative attitudes towards those of a different race, origin or colour.

91. The Government emphasised that the views expressed in the HPAT report served to show that any change in the policy would entail substantial damage to morale and operational effectiveness. The applicants considered these submissions to be unsubstantiated.

92. The Court notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail. Thorpe LJ in the Court of Appeal found that there was no actual or significant evidence of such damage as a result of the presence of homosexuals in the armed forces (see paragraph 33 above), and the Court further considers that the subsequent HPAT assessment did not, whatever its value, provide evidence of such damage in the event of the policy changing. Given the number of homosexuals dismissed between 1991 and 1996 (see paragraph 60 above), the number of homosexuals who were in the armed forces at the relevant time cannot be said to be insignificant. Even if the absence of such evidence can be explained by the consistent application of the policy, as submitted by the Government, this is insufficient to demonstrate to the Court's satisfaction that operational effectiveness problems of the nature and level alleged can be anticipated in the absence of the policy (see the Vereinigung Demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38).

93. However, in the light of the strength of feeling expressed in certain submissions to the HPAT and the special, interdependent and closely knit nature of the armed forces' environment, the Court considers it reasonable to assume that some difficulties could be anticipated as a result of any change in what is now a long-standing policy. Indeed, it would

appear that the presence of women and racial minorities in the armed forces led to relational difficulties of the kind which the Government suggest admission of homosexuals would entail (see paragraphs 56 and 57 above).

94. The applicants submitted that a strict code of conduct applicable to all personnel would address any potential difficulties caused by negative attitudes of heterosexuals. The Government, while not rejecting the possibility out of hand, emphasised the need for caution given the subject matter and the armed forces context of the policy and pointed out that this was one of the options to be considered by the next Parliamentary Select Committee in 2001.

95. The Court considers it important to note, in the first place, the approach already adopted by the armed forces to deal with racial discrimination and with racial and sexual harassment and bullying (see paragraphs 56-57 above). The January 1996 Directive, for example, imposed both a strict code of conduct on every soldier together with disciplinary rules to deal with any inappropriate behaviour and conduct. This dual approach was supplemented with information leaflets and training programmes, the army emphasising the need for high standards of personal conduct and for respect for others.

The Government, nevertheless, underlined that it is "the knowledge or suspicion of homosexuality" which would cause the morale problems and not conduct, so that a conduct code would not solve the anticipated difficulties. However, in so far as negative attitudes to homosexuality are insufficient, of themselves, to justify the policy (see paragraph 90 above), they are equally insufficient to justify the rejection of a proposed alternative. In any event, the Government themselves recognised during the hearing that the choice between a conduct code and the maintenance of the policy lay at the heart of the judgment to be made in this case. This is also consistent with the Government's direct reliance on Section F of the HPAT's report, where the anticipated problems identified as posing a risk to morale were almost exclusively problems relating to behaviour and conduct (see paragraphs 46-47 above).

The Government maintained that homosexuality raised problems of a type and intensity that race and gender did not. However, even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules which have been found to be effective in the latter case would not equally prove effective in the former. The "robust indifference" reported by the HPAT of the large number of British armed forces' personnel serving abroad with allied forces to homosexuals serving in those foreign forces, serves to confirm that the perceived problems of integration are not insuperable (see paragraph 52 above).

96. The Government highlighted particular problems which might be posed by the communal accommodation arrangements in the armed forces. Detailed submissions were made during the hearing, the parties disagreeing as to the potential consequences of shared single-sex accommodation and associated facilities.

The Court notes that the HPAT itself concluded that separate accommodation for homosexuals would not be warranted or wise and that substantial expenditure would not, therefore, have to be incurred in this respect. Nevertheless, the Court remains of the view that it has not been shown that the conduct codes and disciplinary rules referred to above could not adequately deal with any behavioural issues arising on the part either of homosexuals or of heterosexuals.

97. The Government, referring to the relevant analysis in the HPAT report, further argued that no worthwhile lessons could be gleaned from the relatively recent legal changes in those foreign armed forces which now admitted homosexuals. The Court disagrees. It notes the evidence before the domestic courts to the effect that the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (see the Dudgeon judgment cited above, pp. 23-24, § 60).

98. Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

99. While the applicants' administrative discharges were a direct consequence of their homosexuality, the Court considers that the justification for the investigations into the applicants' homosexuality requires separate consideration in so far as those investigations continued after the applicants' early and clear admissions of homosexuality.

100. The Government maintained that investigations, including the interviews and searches, were necessary in order to detect false claims of homosexuality by those seeking administrative discharges from the armed forces. The Government cited five examples of individuals in the armed forces who had relatively recently made such false claims. However, since it was and is clear, in the Court's opinion, that at the relevant time both Mr Lustig-Prean and Mr Beckett wished to remain in the navy, the Court does not find that the risk of false claims of homosexuality could, in the case of the present applicants, provide any justification for their continued questioning.

101. The Government further submitted that the medical, security and disciplinary concerns outlined by the HPAT justified certain lines of questioning of the applicants. However, the Court observes that, in the HPAT report, security issues relating to those suspected of being homosexual were found not to stand up to close examination as a ground for maintaining the policy. The Court is, for this reason, not persuaded that the risk of blackmail, being the main security ground canvassed by the Government, justified the continuation of the questioning of either of the present applicants. Similarly, the Court does not find that the clinical risks (which were, in any event, substantially discounted by the HPAT as a ground for maintaining the policy) justified the extent of the applicants' questioning. Moreover, no disciplinary issue existed in the case of either applicant.

102. The Government, referring to the cautions given to the applicants at the beginning of their interviews, further argued that the applicants were not obliged to participate in the interview process. Moreover, Mr Beckett was asked to consent to a search of his locker. The Court considers, however, that the applicants did not have any real choice but to cooperate. It is clear that the interviews formed a standard and important part of the investigation process which was designed to verify to "a high standard of proof" the sexual orientation of the applicants (see the Guidelines at paragraph 42 above and the Government's submissions at paragraph 73). Had the applicants not participated in the interview process and had Mr Beckett not consented to the search, the Court is satisfied that the authorities would have proceeded to verify the suspected homosexuality of the applicants by other means which were likely to be less discreet. This was, in fact, made clear a number of times to Mr Lustig-Prean during his interview, who confirmed that he wished to keep the matter as discreet as possible.

103. In such circumstances, the Court considers that the Government have not offered convincing and weighty reasons justifying the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the naval authorities.

104. In sum, the Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention.

105. Accordingly, there has been a violation of Article 8 of the Convention.

II. Alleged violation of Article 14 of the Convention in conjunction with article 8

106. The applicants also invoked Article 14 of the Convention in conjunction with Article 8 in relation to the operation of the Ministry of Defence policy against them. Article 14 reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] 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."

107. The Government argued that no separate issue arose under Article 14 of the Convention and the applicants relied on their submissions outlined in the context of Article 8 above.

108. The Court considers that, in the circumstances of the present case, the applicants' complaints that they were discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence, amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 of the Convention (see the Dudgeon judgment cited above, pp. 25-26, §§ 64-70).

109. Accordingly, the Court considers that the applicants' complaints under Article 14 in conjunction with Article 8 do not give rise to any separate issue.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

110. Article 41 of the Convention provides:

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

111. The applicants submitted detailed claims for compensation in respect of pecuniary and non-pecuniary damage and for the reimbursement of their costs and expenses. However, they required further information from the Government before they could complete their proposals.

112. The Government argued at the hearing that a finding of a violation would be sufficient just satisfaction or, in the alternative, that the submissions of the applicants were inflated. The Government also required further time to respond in detail to the applicants' definitive proposals.

113. The Court has already agreed to provide further time to the parties to submit their definitive just satisfaction proposals. Accordingly, the Court considers that the question raised under Article 41 is not yet ready for decision. It is, accordingly, necessary to reserve it and to fix the further procedure, account being taken of the possibility of an agreement between the parties (Rule 75 § 4 of the Rules of Court).

The Court's decision

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;

3. Holds that the question of the application of Article 41 of the Convention is not ready for decision;

Consequently,

(a) reserves the said question;

(b) invites the parties to notify the Court of any agreement they may reach;

(c) reserves the further procedure and delegates to the President the power to fix the same if need be.

Case of Smith and Grady v. The United Kingdom [6]

Procedure

1. The case originated in two applications against the United Kingdom of Great Britain and Northern Ireland lodged by the applicants with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The first applicant, Ms Jeanette Smith, is a British national born in 1966 and resident in Edinburgh. Her application was introduced on 9 September 1996 and was registered on 27 November 1996 under file no. 33985/96. The second applicant, Mr Graeme Grady, is a British national born in 1963 and resident in London. His application was introduced on 6 September 1996 and was also registered on 27 November 1996 under file no. 33986/96. Both applicants were represented before the Commission and, subsequently, before the Court by Mr P. Leech, a legal director of Liberty which is a civil liberties group based in London.

2. The applicants complained that the investigations into their homosexuality and their discharge from the Royal Air Force on the sole ground that they are homosexual constituted violations of Article 8 of the Convention taken alone and in conjunction with Article 14. They also invoked Articles 3 and 10 of the Convention taken alone and in conjunction with Article 14 in relation to the policy of the Ministry of Defence against homosexuals in the armed forces and the consequent investigations and discharges. They further complained under Article 13 that they did not have an effective domestic remedy for these violations.

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[6] Applications nos. 33985/96 and 33986/96 Judgment Strasbourg 27 September 1999 ; final 27/12/1999

3. On 20 May 1997 the Commission (Plenary) decided to give notice of the applications to the United Kingdom Government ("the Government") and invited them to submit observations on the admissibility and merits of the applications. In addition, the applications were joined to two similar applications (nos. 31417/96 and 32377/96, Lustig-Prean v. the United Kingdom and Beckett v. the United Kingdom).

The Government, represented by Mr M. Eaton and, subsequently, by Mr C. Whomersley, both Agents, Foreign and Commonwealth Office, submitted their observations on 17 October 1997.

4. On 17 January 1998 the Commission decided to adjourn the applications pending the outcome of a reference to the European Court of Justice ("ECJ") pursuant to Article 177 of the Treaty of Rome by the English High Court on the question of the applicability of the Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion and Working Conditions 76/207/EEC ("the Equal Treatment Directive") to a difference of treatment based on sexual orientation.

5. On 17 April 1998 the applicants submitted their observations in response to those of the Government.

6. On 13 July 1998 the High Court delivered its judgment withdrawing its reference of the above question given the decision of the ECJ in the case of R. v. Secretary of State for Defence, ex parte Perkins (13 July 1998).

7. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with the provisions of Article 5 § 2 thereof, the applications were examined by the Court.

In accordance with Rule 52 § 1 of the Rules of Court[1], the President of the Court, Mr L. Wildhaber, assigned the case to the Third Section. The Chamber constituted within that Section included ex officio Sir Nicolas Bratza, the judge elected in respect of the United Kingdom (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr J.-P. Costa, Acting President of the Section and President of the Chamber (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr L. Loucaides, Mr P. Kūris, Mr W. Fuhrmann, Mrs H.S. Greve and Mr K. Traja (Rule 26 § 1 (b)).

8. On 23 February 1998 the Chamber declared the applications admissible[2] and, while it retained the joinder of the present applications, it decided to disjoin them from the Lustig-Prean and Beckett cases. The Chamber also decided to hold a hearing on the merits of the case.

9. On 29 April 1999 the President of the Chamber decided to grant Ms Smith legal aid.

10. The hearing in this case and in the case of Lustig-Prean and Beckett v. the United Kingdom, took place in public in the Human Rights Building, Strasbourg, on 18 May 1999.

The facts

I. The Circumstances of the case

A. The first applicant

11. On 8 April 1989 Ms Jeanette Smith (the first applicant) joined the Royal Air Force to serve a nine-year engagement (which could be extended) as an enrolled nurse. She

subsequently obtained the rank of senior aircraft woman. From 1991 to 1993 she was recommended for promotion. A promotion was dependent on her becoming a staff nurse and in 1992 she was accepted for the relevant conversion course. Her final exams were to take place in September 1994.

12. On 12 June 1994 the applicant found a message on her answering machine from an unidentified female caller. The caller stated that she had informed the air force authorities of the applicant's homosexuality. On 13 June 1994 the applicant did not report, as required, for duty. On that day a woman telephoned the air force Provost and Security Service ("the service police") stating, inter alia, that the applicant was homosexual and was sexually harassing the caller.

13. On 15 June 1994 the applicant reported for duty. She was called to a pre-disciplinary interview because of her absence without leave. In explaining why she did not report for duty, she referred to the anonymous telephone message and admitted that she was homosexual. She also confirmed that she had a previous and current homosexual relationship. Both relationships were with civilians and the current relationship had begun eighteen months previously. The assistance of the service police was requested, a unit investigation report was opened and an investigator from the service police was appointed.

14. The applicant was interviewed on the same day by that investigator and another officer (female) from the service police. The interview lasted approximately thirty-five minutes. She was cautioned that she did not have to say anything but that anything she did say could be given in evidence. The applicant later confirmed that her solicitor had advised her not to say anything but she agreed that she would answer simple questions but not the "nitty gritty". She was told that she might be asked questions which could embarrass her and that if she felt embarrassed she should say so. It was also explained that the purpose of the questions was to verify that her admission was not an attempt to obtain an early discharge from the service.

The applicant confirmed that, while she had had "thoughts" about her sexual orientation for about six years, she had her first lesbian relationship during her first year in the air force. She was asked how she came to realise that she was lesbian, the names of her previous partners (she refused to give this information) and whether her previous partners were in the service (this question was put a number of times). She was questioned about how she had met her current partner and the extent of her relationship with that partner but she would not respond at first, at which stage her interviewer queried how else he was to substantiate her homosexuality. The applicant then confirmed that she and her partner had a full sexual relationship.

She was also asked whether she and her partner had a sexual relationship with their foster daughter (16 years old). The applicant indicated that she knew the consequences of her homosexuality being discovered and, while she considered herself just as capable of doing the job as another, she had come to terms with what was going to happen to her. The interviewers also wanted to know whether she had taken legal advice, who was her solicitor, what advice he had already given her and what action she proposed to take after the interview. She was also asked whether she had thought about HIV, whether she was being "careful", what she did in her spare time and whether she was into "girlie games" like hockey and netball. The applicant agreed that her partner, who was waiting outside during the interview, could be interviewed for "corroboration" purposes.

15. The report prepared by the interviewers dated 15 June 1994 described the subsequent interview of the applicant's partner. The latter confirmed that she and the applicant had been involved in a full sexual relationship for about eighteen months but she declined to elaborate further.

16. The investigation report was sent to the applicant's commanding officer who, on 10 August 1994, recommended the applicant's administrative discharge. On 16 November 1994 the applicant received a certificate of discharge from the armed forces. An internal air force document dated 17 October 1996 described the applicant's overall general assessment for trade proficiency and personal qualities as very good and her overall conduct assessments as exemplary.

B. The second applicant

17. On 12 August 1980 Mr Graeme Grady (the second applicant) joined the Royal Air Force at the rank of aircraftman serving as a trainee administrative clerk. By 1991 he had achieved the rank of sergeant and worked as a personnel administrator, at which stage he was posted to Washington at the British Defence Intelligence Liaison Service (North America) – "BDILS(NA)". He served as chief clerk and led the BDILS(NA) support staff team. In May 1993 the applicant, who was married with two children, told his wife that he was homosexual.

18. The applicant's general assessment covering the period June 1992 to June 1993 gave him 8 out of a maximum of 9 marks for trade proficiency, supervisory ability and personal qualities. His ability to work well with all rank levels, with Canadian and Australian peers and with his senior officer contacts was noted, his commanding officer concluding that the applicant was highly recommended for promotion (a special recommendation being noted as well within his reach) and that he was particularly suited for "PS [personal assistant]/SDL [special duties list]/Diplomatic duties".

19. Following disclosures to the wife of the head of the BDILS(NA) by their nanny, the head of the BDILS(NA) reported that it was suspected that the applicant was homosexual. A unit investigation report was opened and a service police officer nominated as investigator.

20. On 12 May 1994 the applicant's security clearance was replaced with a lower security clearance. On 17 May 1994 he was relieved of his duties by the head of the BDILS(NA) and was informed that he was being returned to the United Kingdom pending investigation of a problem with his security clearance. On the same day the applicant was brought to his home to pack his belongings and was required to leave Washington for the United Kingdom. He was then required to remain at the relevant air force base in the United Kingdom.

21. On 19 May 1994 the head of the BDILS(NA) advised two service police investigators, who had by then arrived in Washington, that his own wife, their nanny, the applicant's wife and another (female) employee of the BDILS(NA), together with the latter's husband, should be interviewed.

22. The nanny detailed in a statement how, through her own involvement in the homosexual community, she had come to suspect that the applicant was homosexual. The wife of the head of the BDILS(NA) revealed in interview confidences made to her by the applicant's wife about the applicant's marriage difficulties and sex life and informed investigators about a cycling holiday taken by the applicant with a male colleague. It was decided by the investigators that her statement would serve no useful purpose. The applicant's colleague and the latter's husband also spoke of the applicant's marriage difficulties, the sleeping arrangements of the applicant and his wife and the applicant's cycling holiday with a male colleague. These persons were also asked about the possibility of the applicant having had an extra-marital relationship and of being involved in the homosexual community. The investigators later reported that these friends were clearly loyal to the applicant and not to be believed.

23. The applicant's wife was then interviewed. The case progress report dated 22 May 1994 describes the interview in detail. It was explained to the applicant's wife that the interview related to the applicant's security clearance and that her husband had been transferred to the United Kingdom at short notice in accordance with standard procedure. She agreed to talk to the investigators and, further to questioning, outlined in some detail their financial position, the course of and the current state of their marriage, their sexual habits and the applicant's relationship with his two children. She confirmed that her husband's sexual tendencies were normal and indicated that her husband had gone on his own on the cycling holiday in question.

24. On 23 May 1994 the applicant's lower security clearance was suspended.

25. On 25 May 1994 the applicant was required to attend an interview with the same two investigators who had returned from the United States. It began at 2.35 p.m. and was conducted under caution with an observer (also from the air force) present at the applicant's request. The applicant was informed that an allegation had been made regarding his sexual orientation (the terms "queen" and "out and out bender" were used) and it was made clear that

the investigators had been to Washington and had spoken to a number of people, one or two of whom thought he was gay.

The applicant denied he was homosexual. He was asked numerous questions about his work, his relationship with the head of the BDILS(NA), his cycling holiday and about his female colleague. He was told that his wife had been interviewed in detail and he was informed from time to time by the interviewers if his answers matched those of his wife. He was asked to tell the interviewers about the break-up of his marriage, whether he had extra-marital affairs, about his and his wife's sex life including their having protected sex and about their financial situation. He was also questioned on the cycling holiday, about a male colleague and the latter's sexual orientation. They asked the applicant who he was calling since he had returned to the United Kingdom and how he was telephoning. He was told that he would be asked to supply his electronic diary which contained names, addresses and telephone numbers and was told that the entries would be verified for homosexual contacts. They informed the applicant that they had a warrant if he did not agree to a search of his accommodation. The applicant agreed to the search. The applicant also requested time to think and to take legal advice. The interview was adjourned at 3.14 p.m.

26. The applicant then took advice from a solicitor and his accommodation was searched. The interview recommenced at 7.44 p.m. with the applicant's solicitor and an observer present. Despite being pressed with numerous questions, the applicant answered "no comment" to most of the questions posed. Given the applicant's responses, his lawyer was asked what advice had been given to the applicant. The applicant's digital diary was taken from him. He was asked whether he realised the security implications of the investigation and that his career was on the line if the allegations against him were proved. One of the investigators then asked him:

"… if you wish to change your mind and want to speak to me, while I'm still here, before I go back to Washington; because I'm going back to Washington. Because I'm going to see the Colonel tomorrow, that is the one in London, who is then going to see the General and we're going to get permission to speak to the Americans … and I shall stay out there, Graeme, until

I have spoken to all Americans that you know. Expense is not a problem. Time is not a problem …"

The detailed evidence given by his wife to the investigators was put to the applicant, including information about his relationship with his son, his daughter and his mother-in-law, about matters relating to the family home of which the applicant was not aware and about his having protected sex with his wife. The interviewer returned again to the subject of the applicant having previously grown cold towards his wife but now declaring his love for her. The applicant continued to respond "no comment". It was explained to the applicant's solicitor that the service attitude in relation to investigations involving acts of alleged homosexuality did not warrant the provision of legal advice and that the applicant's solicitor was only delaying matters. The investigators also mentioned that it was a security matter which they would not detail further since his solicitor did not have security clearance, but that the applicant should not be surprised if some counter-intelligence people came to talk to him and that there would be no legal advice for that.

The applicant requested time to speak to his lawyer and the interview was interrupted at 8.10 p.m. The applicant then spoke to his lawyer and asked to think about matters overnight.

27. The interview recommenced at 3.27 p.m. on 26 May 1994 with the same investigators and an observer, but the applicant did not require a solicitor. The applicant admitted his homosexuality almost immediately and confirmed that the reason he denied it at first was that he was not clear about the position as regards the retention of certain accumulated benefits on discharge and he was concerned about his family's financial position in that eventuality. However, he had since discovered that his discharge would be administrative and that he would get his terminal benefits, so he could be honest.

The applicant was questioned further about a person called "Randy", whether his wife knew he was homosexual, whether a male colleague was homosexual and when he had "come out". He was asked whether he was a practising homosexual, but he declined to give the name of

his current partner, at which stage it was explained to him that the service had to verify his admission of homosexuality to avoid fraudulent attempts at early discharge. He was then questioned about his first homosexual relationship (he confirmed that it began in October 1993), his homosexual partners (past and present), who they were, where they worked, how old they were, how the applicant met them and about the nature of his relationship with them, including the type of sex they had.

During this interview, the personal items taken from the applicant were produced and the applicant was questioned about, inter alia, the contents of his digital diary, a photograph, a torn envelope and a letter from the applicant to his current partner. He was questioned further about when he first realised he was homosexual, who knew about his sexual orientation, his relationship with his wife (including their sexual relationship), what his wife thought about his homosexuality, his HIV status and again about the nature of his sexual relationships with his homosexual partners. The interview terminated at 4.10 p.m.

28. The investigators prepared a report on 13 June 1994. In his certificate of qualifications and reference on discharge dated 12 October 1994, the applicant was described as a loyal serviceman and a conscientious and hard worker who could be relied upon to achieve the highest standards. It was also noted that he had displayed sound personal qualities and integrity throughout his service and had enjoyed the respect of his superiors, peers and subordinates alike. The applicant was administratively discharged with effect from 12 December 1994.

C. The applicants' judicial review proceedings (R. v. Ministry of Defence, ex parte Smith and Others 2 Weekly Law Reports 305)

29. Along with Mr Lustig-Prean and Mr Beckett (see paragraph 3 above), the applicants obtained leave to apply for judicial review of the decisions to discharge them from the armed forces. The applicants argued that the policy of the Ministry of Defence against homosexuals in the armed forces was "irrational", that it was in breach of the Convention and that it was

contrary to the Equal Treatment Directive. The Ministry of Defence maintained that the policy was necessary mainly to maintain morale and unit effectiveness, in view of the loco parentis role of the services as regards minor recruits and in light of the requirement of communal living in the armed forces.

30. On 7 June 1995 the High Court dismissed the application for judicial review, Lord Justice Simon Brown giving the main judgment of the court. He noted that the cases illustrated the hardships resulting from the absolute policy against homosexuals in the armed forces and that all four of the applicants had exemplary service records, some with reports written in glowing terms. Moreover, he found that in none of the cases before him was it suggested that the applicants' sexual orientation had in any way affected their ability to carry out their work or had any ill-effect on discipline. There was no reason to doubt that, but for their discharge on the sole ground of sexual orientation, they would have continued to perform their service duties entirely efficiently and with the continued support of their colleagues. All were devastated by their discharge.

Simon Brown LJ reviewed the background to the "age-old" policy, the relevance of the Parliamentary Select Committee's report of 1991, the position in other armed forces around the world, the arguments of the Ministry of Defence (noting that the security argument was no longer of substantial concern to the government) together with the applicants' arguments against the policy. He considered that the balance of argument clearly lay with the applicants, describing the applicants' submissions in favour of a conduct-based code as "powerful". In his view, the tide of history was against the Ministry of Defence. He further observed that it was improbable, whatever the High Court would say, that the policy could survive for much longer and added, "I doubt whether most of those present in court throughout the proceedings now believe otherwise."

31. However, having considered arguments as to the test to be applied in the context of these judicial review proceedings, Simon Brown LJ concluded that the conventional Wednesbury principles, adapted to a human rights context, should be applied.

Accordingly, where fundamental human rights were being restricted, the Minister of Defence needed to show that there was an important competing interest to justify the restriction. The primary decision was for him and the secondary judgment of the court amounted to asking whether a reasonable Minister, on the material before him, could have reasonably made that primary judgment. He later clarified that it was only if the purported justification "outrageously defies logic or accepted moral standards" that the court could strike down the Minister's decision. He noted that within the limited scope of that review, the court had to be scrupulous to ensure that no recognised ground of challenge was in truth available to an applicant before rejecting the application. When the most fundamental human rights are threatened, the court would not, for example, be inclined to overlook some minor flaw in the decision-making process, or to adopt a particularly benevolent view of the Minister's evidence, or to exercise its discretion to withhold relief. However, he emphasised that, even where the most fundamental human rights were being restricted, "the threshold of unreasonableness is not lowered".

It was clear that the Secretary of State had cited an important competing public interest. But the central question was whether it was reasonable for the Secretary of State to take the view that allowing homosexuals into the forces would imperil that interest. He pointed out that, although he might have considered the Minister wrong,

"… [the courts] owe a duty ... to remain within their constitutional bounds and not trespass beyond them. Only if it were plain beyond sensible argument that no conceivable damage could be done to the armed services as a fighting unit would it be appropriate for this court now to remove the issue entirely from the hands of both the military and of the government. If the Convention … were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown proportionate to the benefits then clearly the primary judgment … would be for us and not others: the constitutional balance would shift. But that is not the position. In exercising merely a secondary judgment, this court is bound to act with some reticence. Our approach must reflect, not overlook, where responsibility ultimately lies for the defence of the

realm and recognise too that Parliament is exercising a continuing supervision over this area of prerogative power."

Accordingly, while the Minister's suggested justification for the ban may have seemed "unconvincing", the Minister's stand could not properly be said to be unlawful. It followed that the applications had to be rejected "albeit with hesitation and regret". A brief analysis of the Convention's case-law led the judge to comment that he strongly suspected that, as far as the United Kingdom's obligations were concerned, the days of the policy were numbered.

32. Simon Brown LJ also found that the Equal Treatment Directive was not applicable to discrimination on grounds of sexual orientation and that the domestic courts could not rule on Convention matters. He also observed that the United States, Canada, Australia, New Zealand, Ireland, Israel, Germany, France, Norway, Sweden, Austria and the Netherlands permitted homosexuals to serve in their armed forces and that the evidence indicated that the only countries operating a blanket ban were Turkey and Luxembourg (and, possibly, Portugal and Greece).

33. In August 1995 a consultation paper was circulated by the Ministry of Defence to "management" levels in the armed forces relating to the Ministry of Defence's policy against homosexuals in those forces. The covering letter circulating this paper pointed out that the "Minister for the Armed Forces has decided that evidence is to be gathered within the Ministry of Defence in support of the current policy on homosexuality". It was indicated that the case was likely to progress to the European courts and that the applicants in the judicial review proceedings had argued that the Ministry of Defence's position was "bereft of factual evidence" but that this was not surprising since evidence was difficult to amass given that homosexuals were not permitted to serve. Since "this should not be allowed to weaken the arguments for maintaining the policy", the addressees of the letter were invited to comment on the consultation paper and "to provide any additional evidence in support of the current policy by September 1995". The consultation paper attached referred, inter alia, to two incidents which were considered damaging to unit cohesion. The first involved a homosexual who had had a relationship with a sergeant's mess waiter and the other involved an Australian

on secondment whose behaviour was described as "so disruptive" that his attachment was terminated.

34. On 3 November 1995 the Court of Appeal dismissed the applicants' appeal. The Master of the Rolls, Sir Thomas Bingham, delivered the main judgment (with which the two other judges of the Court of Appeal agreed).

35. As to the court's approach to the issue of "irrationality", he considered that the following submission was an accurate distillation of the relevant jurisprudence on the subject:

"the court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

He went on to quote from, inter alia, the judgment of Lord Bridge in R. v. Secretary of State for the Home Department, ex parte Brind [1991] 1 Appeal Cases 696, where it was pointed out that:

"the primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make that primary judgment."

Moreover, he considered that the greater the policy content of the decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court had to be in holding a decision to be irrational.

36. Prior to applying this test of irrationality, the Master of the Rolls noted that the case concerned innate qualities of a very personal kind, that the decisions of which the applicants complained had had a profound effect on their careers and prospects and that the applicants' rights as human beings were very much in issue. While the domestic court was not the primary decision-maker and while it was not the role of the courts to regulate the conditions of service in the armed forces, "it has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people' …".

37. He then reviewed, by reference to the test of irrationality outlined above, the submissions of the parties in favour of and against the policy, commenting that the applicants' arguments were "of very considerable cogency" which called to be considered in depth with particular reference to past experience in the United Kingdom, to the developing experience of other countries and to the potential effectiveness of a detailed prescriptive code in place of the present blanket ban. However, he concluded that the policy could not be considered "irrational" at the time the applicants were discharged from the armed forces, finding that the threshold of irrationality was "a high one" and that it had not been crossed in this case.

38. On the Convention, the Master of the Rolls noted as follows:

"It is, inevitably, common ground that the United Kingdom's obligation, binding in international law, to respect and ensure compliance with [Article 8 of the Convention] is not one that is enforceable by domestic courts. The relevance of the Convention in the present context is as background to the complaint of irrationality. The fact that a decision-maker

failed to take account of Convention obligations when exercising an administrative discretion is not of itself a ground for impugning the exercise of that discretion."

He observed that to dismiss a person from his or her employment on the grounds of a private sexual preference, and to interrogate him or her about private sexual behaviour, would not appear to show respect for that person's private and family life and that there might be room for argument as to whether the policy answered a "pressing social need" and, in particular, was proportionate to the legitimate aim pursued. However, he held that these were not questions to which answers could be properly or usefully proffered by the Court of Appeal but rather were questions for the European Court of Human Rights, to which court the applicants might have to pursue their claim. He further accepted that the Equal Treatment Directive did not apply to complaints in relation to sexual orientation.

39. Henry LJ of the Court of Appeal agreed with the judgment of the Master of the Rolls and, in particular, with the latter's approach to the irrationality test and with his view on the inability of the court to resolve Convention issues. He questioned the utility of a debate as to the likely fate of the "longstanding" policy of the Ministry of Defence before the European Court of Human Rights with which the primary adjudicating role on the Convention lay. The Court of Appeal did not entertain "hypothetical questions". In Henry LJ's view, the only relevance of the Convention was as "background to the complaint of irrationality", which point had been already made by the Master of the Rolls. It was important to highlight this point since Parliament had not given the domestic courts primary jurisdiction over human rights issues contained in the Convention and because the evidence and submissions before the Court of Appeal related to that court's secondary jurisdiction and not to its primary jurisdiction.

40. Thorpe LJ of the Court of Appeal agreed with both preceding judgments and, in particular, with the views expressed on the rationality test to be applied and on its application in the particular case. The applicants' arguments that their rights under Article 8 had been breached were "persuasive" but the evidence and arguments that would ultimately determine that issue were not before the Court of Appeal. He also found that the applicants' challenge to

the arguments in support of the policy was "completely persuasive" and added that what impressed him most in relation to the merits was the complete absence of illustration and substantiation by specific examples, not only in the Secretary of State's evidence filed in the High Court, but also in the case presented to the Parliamentary Select Committee in 1991. The policy was, in his view, "ripe for review and for consideration of its replacement by a strict conduct code". However, the applicants' attack on the Secretary of State's rationality fell "a long way short of success".

41. On 19 March 1996 the Appeals Committee of the House of Lords refused leave to appeal to the House of Lords.

D. The applicants' Industrial Tribunal proceedings

42. At or around the time the applicants lodged their applications for leave to take judicial review proceedings, they also instituted proceedings before the Industrial Tribunal alleging discrimination contrary to the Sexual Discrimination Act 1975. The latter proceedings were stayed pending the outcome of the judicial review proceedings.

43. By letter dated 25 November 1998 the applicants confirmed to the Court that they had requested the withdrawal of the Industrial Tribunal proceedings given the outcome of the judicial review proceedings and other intervening jurisprudence of the domestic courts and of the ECJ.

II. Relevant domestic law and practice

A. Decriminalisation of homosexual acts

44. By virtue of section 1(1) of the Sexual Offences Act 1967, homosexual acts in private between two consenting adults (at the time meaning 21 years or over) ceased to be criminal offences. However, such acts continued to constitute offences under the Army and Air Force Acts 1955 and the Naval Discipline Act 1957 (Section 1(5) of the 1967 Act). Section 1(5) of

the 1967 Act was repealed by the Criminal Justice and Public Order Act 1994 (which Act also reduced the age of consent to 18 years). However, section 146(4) of the 1994 Act provided that nothing in that section prevented a homosexual act (with or without other acts or circumstances) from constituting a ground for discharging a member of the armed forces.

B. R. v. Secretary of State for Defence, ex parte Perkins, judgments of 13 March 1997 and 13 July 1998, and related cases

45. On 30 April 1996 the ECJ decided that transsexuals were protected from discrimination on grounds of their transsexuality under European Community law (P. v. S. and Cornwall County Council [1996] Industrial Relations Law Reports 347).

46. On 13 March 1997 the High Court referred to the ECJ pursuant to Article 177 of the Treaty of Rome the question of the applicability of the Equal Treatment Directive to differences of treatment based on sexual orientation (R. v. Secretary of State for Defence, ex parte Perkins, 13 March 1997). Mr Perkins had been discharged from the Royal Navy on grounds of his homosexuality.

47. On 17 February 1998 the ECJ found that the Equal Pay Directive 75/117/EEC did not apply to discrimination on grounds of sexual orientation (Grant v. South West Trains Ltd [1998] Industrial Cases Reports 449).

48. Consequently, on 2 March 1998 the ECJ enquired of the High Court in the Perkins' case whether it wished to maintain the Article 177 reference. After a hearing between the parties, the High Court decided to withdraw the question from the ECJ (R. v. Secretary of State for Defence, ex parte Perkins, 13 July 1998). Leave to appeal was refused.

C. The Ministry of Defence policy on homosexual personnel in the armed forces

49. As a consequence of the changes made by the Criminal Justice and Public Order Act 1994, updated Armed Forces' Policy and Guidelines on Homosexuality ("the Guidelines") were distributed to the respective service directorates of personnel in December 1994. The Guidelines provided, inter alia, as follows:

"Homosexuality, whether male or female, is considered incompatible with service in the armed forces. This is not only because of the close physical conditions in which personnel often have to live and work, but also because homosexual behaviour can cause offence, polarise relationships, induce ill-discipline and, as a consequence, damage morale and unit effectiveness. If individuals admit to being homosexual whilst serving and their Commanding Officer judges that this admission is well-founded they will be required to leave the services ...

The armed forces' policy on homosexuality is made clear to all those considering enlistment. If a potential recruit admits to being homosexual, he/she will not be enlisted. Even if a potential recruit admits to being homosexual but states that he/she does not at present nor in the future intend to engage in homosexual activity, he/she will not be enlisted ...

In dealing with cases of suspected homosexuality, a Commanding Officer must make a balanced judgment taking into account all the relevant factors. ... In most circumstances, however, the interests of the individual and the armed forces will be best served by formal investigation of the allegations or suspicion. Depending on the circumstances, the Commanding Officer will either conduct an internal inquiry, using his own staff, or he will seek assistance from the Service Police. When conducting an internal inquiry he will normally discuss the matter with his welfare support staff. Homosexuality is not a medical matter, but there may be circumstances in which the Commanding Officer should seek the advice of the Unit Medical Officer on the individual concerned and may then, if the individual agrees, refer him/her to the Unit Medical Officer ...

A written warning in respect of an individual's conduct or behaviour may be given in circumstances where there is some evidence of homosexuality but insufficient ... to apply for administrative discharge ... . If the Commanding Officer is satisfied on a high standard of proof of an individual's homosexuality, administrative action to terminate service ... is to be initiated ..."

One of the purposes of the Guidelines was the reduction of the involvement of the service police whose investigatory methods, based on criminal procedures, had been strongly resented and widely publicised in the past (confirmed at paragraph 9 of the Homosexual Policy Assessment Team's report of February 1996 which is summarised at paragraphs 51‑62 below. However, paragraph 100 of this report indicated that investigation into homosexuality is part of "normal service police duties".)

50. The affidavit of Air Chief Marshal Sir John Frederick Willis KCB, CBE, Vice Chief of the Defence Staff, Ministry of Defence dated 4 September 1996, which was submitted to the High Court in the case of R. v. Secretary of State for Defence, ex parte Perkins (13 July 1998), read, in so far as relevant, as follows:

"The policy of the Ministry of Defence is that the special nature of homosexual life precludes the acceptance of homosexuals and homosexuality in the armed forces. The primary concern of the armed forces is the maintenance of an operationally effective and efficient force and the consequent need for strict maintenance of discipline. [The Ministry of Defence] believes that the presence of homosexual personnel has the potential to undermine this.

The conditions of military life, both on operations and within the service environment, are very different from those experienced in civilian life. … The [Ministry of Defence] believes that these conditions, and the need for absolute trust and confidence between personnel of all ranks, must dictate its policy towards homosexuality in the armed forces. It is not a question of a moral judgement, nor is there any suggestion that homosexuals are any less courageous

than heterosexual personnel; the policy derives from a practical assessment of the implications of homosexuality for fighting power."

D. The report of the Homosexuality Policy Assessment Team – February 1996

1. General

51. Following the decision in the case of R. v. Ministry of Defence, ex parte Smith and Others 2 Weekly Law Reports 305, the Homosexuality Policy Assessment Team ("HPAT") was established by the Ministry of Defence in order to undertake an internal assessment of the armed forces' policy on homosexuality. The HPAT was composed of Ministry of Defence civil servants and representatives of the three services. The HPAT's assessment was to form the basis of the Ministry's evidence to the next Parliamentary Select Committee (as confirmed in the affidavit of Air Chief Marshal Sir John Frederick Willis referred to at paragraph 50 above). The HPAT was to consult the Ministry of Defence, the armed forces' personnel of all ranks, service and civilian staff responsible for carrying out the policy together with members of the legal adviser's staff. It was also to examine the policies of other nations (Annex D to the HPAT report).

The report of the HPAT was published in February 1996 and ran to approximately 240 pages, together with voluminous annexes. The starting-point of the assessment was an assumption that homosexual men and women were in themselves no less physically capable, brave, dependable and skilled than heterosexuals. It was considered that any problems to be identified would lie in the difficulties which integration of declared homosexuals would pose to the military system which was largely staffed by heterosexuals. The HPAT considered that the best predictors of the "reality and severity" of the problems of the integration of homosexuals would be the service personnel themselves (paragraph 30 of the report).

2. The methods of investigation used

52. There were eight main areas of investigation (paragraph 28 of the report):

(a) The HPAT consulted with policy-makers in the Ministry of Defence. The latter emphasised the uniqueness of the military environment and the distinctly British approach to service life and the HPAT found little disagreement with this general perspective from the service people it interviewed (paragraph 37);

(b) A signal was sent to all members of the services, including the reserve forces, requesting any written views on the issues. By 16 January 1996 the HPAT had received 639 letters. 587 of these letters were against any change in the policy, 58 of which were multiply signed. Only 11 of those letters were anonymous (paragraphs 46-48);

(c) The HPAT attitude survey consisted of a questionnaire administered to a total of 1,711 service personnel chosen as representative of the services. The questionnaires were administered in examination-type conditions and were to be completed anonymously. The results indicated that there was "overwhelming support across the services" for the policy excluding homosexuals from the armed forces. Service personnel viewed homosexuality as clearly more acceptable in civilian than in service life (paragraphs 49-59 and Annex G);

(d) During the HPAT's visit to ten military bases in late 1995 in order to administer the above questionnaire, individual one-to-one interviews were conducted with personnel who had completed the attitude questionnaire. 180 interviewees randomly selected from certain ranks and occupational areas were selected from each of the ten units visited. Given the small number of interviewees, the responses were analysed qualitatively rather than quantitatively (Annex G);

(e) A number of single-service focus group discussions were held with randomly selected personnel from representative ranks and functions (Annex G refers to 36 such discussions whereas paragraph 61 of the report refers to 43). The purpose of the group discussions was to

examine the breadth and depth of military views and to provide insights that would complement the survey results. The HPAT commented that the nature of the discussions showed little reticence in honestly and fully putting forward views; there was an "overwhelming view that homosexuality was not 'normal' or 'natural' whereas women and ethnic minorities were 'normal'". The vast majority of participants believed that the present ban on homosexuals should remain (paragraphs 61-69 and Annex G);

(f) One sub-team of the HPAT went to Australia, Germany and France and the other visited the United States, Canada and the Netherlands. The HPAT interviewed an eminent Israeli military psychologist since the Israeli military would not accept the HPAT visit (paragraphs 70-77 and Annex H). It is also apparent that the HPAT spoke to representatives of the police, the fire service and the merchant navy (paragraphs 78-82);

(g) Tri-service regional focus discussion groups were also held to examine the breadth and depth of the personnel's views. The groups were drawn from the three services and from different units. Three such discussion groups were held and overall the results were the same as those from the single-service focus groups (paragraphs 83-84 and Annex G);

(h) Postal single-service attitude surveys were also completed by a randomly selected sample of personnel stratified by rank, age and gender. The surveys were distributed to 3,000 (6%) of the Royal Navy and Royal Marines personnel, to 6,000 (5.4%) of the Army personnel and to 4,491 (6%) of the Royal Air Force personnel. On average over half of the surveys were returned (paragraphs 65-86 and Annex G).

3. The impact on fighting power

53. The HPAT report defined "fighting power" (often used interchangeably with combat effectiveness, operational efficiency or operational effectiveness) as the "ability to fight" which is in turn made up of three components. These are the "conceptual" and "physical"

components together with the "moral component", the latter being defined as "the ability to get people to fight including morale, comradeship, motivation, leadership and management".

54. The focus throughout the assessment was upon the anticipated effects on fighting power and this was found to be the "key problem" in integrating homosexuals into the armed forces. It was considered well-established that the presence of known or strongly suspected homosexuals in the armed forces would produce certain behavioural and emotional responses and problems which would affect morale and, in turn, significantly and negatively affect the fighting power of the armed forces.

These anticipated problems included controlling homosexual behaviour and heterosexual animosity, assaults on homosexuals, bullying and harassment of homosexuals, ostracism and avoidance, "cliquishness" and pairing, leadership and decision-making problems including allegations of favouritism, discrimination and ineffectiveness (but excluding the question of homosexual officers taking tactical decisions swayed by sexual preference), sub-cultural friction, privacy/decency issues, increased dislike and suspicions (polarised relationships), and resentment over imposed change especially if controls on heterosexual expression also had to be tightened (see Section F.II of the report).

4. Other issues

55. The HPAT also assessed other matters it described as "subsidiary" (Section G and paragraph 177 of the report). It found that, while cost implications of changing the policy were not quantifiable, it was not considered that separate accommodation for homosexuals would be warranted or wise and, accordingly, major expenditures on accommodation were considered unlikely (paragraphs 95-97). Wasted training as regards discharged homosexuals was not considered to be a significant argument against maintaining the policy (paragraphs 98-99). Should the wider social and legal position change in relation to civilian homosexual couples, then entitlements for homosexual partners would have to be accepted (paragraph 101). Large amounts of money or time were unlikely to be devoted to homosexual awareness

training, given that it was unlikely to be effective in changing attitudes. It was remarked that, if required, tolerance training would probably be best addressed as "part of an integrated programme for equal opportunities training in the military" (paragraph 102). There were strong indications that recruitment and retention rates would go down if there was a change in policy (paragraphs 103-04).

56. Concerns expressed about the fulfilment of the forces' loco parentis responsibilities for young recruits were found not to stand up to close examination (paragraph 111).

5. Medical and security concerns

57. Medical and security concerns were considered separately (Sections H and I, respectively, and paragraph 177 of the report). While it was noted that medical concerns of personnel (in relation to, inter alia, Aids) were disproportionate to the clinical risks involved, it was considered that these concerns would probably need to be met with education packages and compulsory Aids testing. Otherwise, real acceptance and integration of homosexuals would be seriously prejudiced by emotional reactions and resentments and by concerns about the threat of Aids. The security issues (including the possibility of blackmail of those suspected of being homosexual) raised in defence of the policy were found not to stand up to close examination.

6. The experience in other countries and in civilian disciplined services

58. The HPAT observed that there were a wide variety of official positions and legal arrangements evolving from local legal and political circumstances and ranging from a formal prohibition of all homosexual activity (the United States), to administrative arrangements falling short of real equality (France and Germany), to a deliberate policy to create an armed force friendly to homosexuals (the Netherlands). According to the HPAT, those countries

which had no legal ban on homosexuals were more tolerant, had written constitutions and therefore a greater tradition of respect for human rights. The report continued:

"But nowhere did HPAT learn that there were significant numbers of open homosexuals serving in the Forces … . Whatever the degree of official toleration or encouragement, informal pressures or threats within the military social system appeared to prevent the vast majority of homosexuals from choosing to exercise their varying legal rights to open expression of their active sexual identity in a professional setting. … It goes without saying that the continuing reticence of military homosexuals in these armed forces means that there has been little practical experience of protecting them against ostracism, harassment or physical attack.

Since this common pattern of a near absence of openly homosexual personnel occurs irrespective of the formal legal frameworks, it is reasonable to assume that it is the informal functioning of actual military systems which is largely incompatible with homosexual self-expression. This is entirely consistent with the pattern of British service personnel's attitudes confirmed by the HPAT."

59. In January 1996 there were over 35,000 British service personnel (25% approximately of the British armed forces) deployed overseas on operations, more than any other NATO country in Europe (paragraph 43).

The HPAT concluded, nevertheless, that the policy had not presented significant problems when working with the armed forces of allied nations. The HPAT remarked that British service personnel had shown a "robust indifference" to arrangements in foreign forces and no concern over what degree of acceptance closely integrated allies give to homosexuals. This is because the average service person considers that those others "are not British, have different standards, and are thus only to be expected to do things differently" and because personnel from different nations are accommodated apart. It was also due to the fact that homosexuals in foreign forces, where they were not formally banned, were not open about their sexual

orientation. Consequently, the chances were small of the few open homosexuals happening to be in a situation where their sexual orientation would become a problem with British service personnel (paragraph 105).

60. Important differences were considered by the HPAT to exist between the armed forces and civilian disciplined services in the United Kingdom including the police, the fire brigade and the merchant navy which did not operate the same policy against homosexuals. It considered that:

"None of these occupations involves the same unremittingly demanding and long-term working environment as the Armed Forces, or requires the same emphasis on building rapidly interchangeable, but fiercely committed and self-supporting teams, capable of retaining their cohesion after months of stress, casualties and discomfort …" (paragraph 203)

7. Alternative options to the current policy

61. Alternative options were considered by the HPAT including a code of conduct applicable to all, a policy based on the individual qualities of homosexual personnel, lifting the ban and relying on service personnel reticence, the "don't ask, don't tell" solution offered by the USA and a "no open homosexuality" code. It concluded that no policy alternative could be identified which avoided risks for fighting power with the same certainty as the present policy and which, in consequence, would not be strongly opposed by the service population (paragraphs 153-75).

8. The conclusions of the HPAT (paragraphs 176-91)

62. The HPAT found that:

"the key problem remains and its intractability has indeed been re-confirmed. The evidence for an anticipated loss in fighting power has been set out in section F and forms the centrepiece of this assessment. The various steps in the argument and the overall conclusion

have been shown not only by the Service authorities but by the great majority of Service personnel in all ranks."

Current service attitudes were considered unlikely to change in the near future. While clearly hardship and invasion of privacy were involved, the risk to fighting power demonstrated why the policy was, nevertheless, justified. It considered that it was not possible to draw any meaningful comparison between the integration of homosexuals and of women and ethnic minorities into the armed forces since homosexuality raised problems of a type and intensity that gender and race did not.

The HPAT considered that, in the longer term, evolving social attitudes towards homosexuality might reduce the risks to fighting power inherent in change but that their assessment could "only deal with present attitudes and risks". It went on:

"… certainly, if service people believed that they could work and live alongside homosexuals without loss of cohesion, far fewer of the anticipated problems would emerge. But the Ministry must deal with the world as it is. Service attitudes, in as far as they differ from those of the general population, emerge from the unique conditions of military life, and represent the current social and psychological realities. They indicate military risk from a policy change

… after collecting the most exhaustive evidence available, it is also evident that in the UK homosexuality remains in practice incompatible with service life if the armed services, in their present form, are to be maintained at their full potential fighting power. ... Furthermore, the justification for the present policy has been overwhelmingly endorsed by a demonstrated consensus of the profession best able to judge it. It must follow that a major change to the Ministry's current Tri-service Guidelines on homosexuality should be contemplated only for clearly stated non-defence reasons, and with a full acknowledgement of the impact on Service effectiveness and service people's feelings."

E. The armed forces' policy on sexual and racial harassment and bullying and on equal opportunities

63. The Defence Council's "Code of Practice on Race Relations" issued in December 1993 declared the armed forces to be equal opportunity employers. It stated that no form of racial discrimination, harassment or abuse would be tolerated, that allegations would be investigated and, if proved, disciplinary action would be taken. It provided for a complaints procedure in relation to discrimination or harassment and it warned against the victimisation of service personnel who made use of their right of complaint and redress.

64. In January 1996 the army published an Equal Opportunities Directive dealing with racial and sexual harassment and bullying. The policy document contained, as a preamble, a statement of the Adjutant- General which reads as follows:

"The reality of conflict requires high levels of teamwork in which individual soldiers can rely absolutely on their comrades and their leaders. There can, therefore, be no place in the Army for harassment, bullying and discrimination which will affect morale and break down the trust and cohesion of the group.

It is the duty of every soldier to ensure that the Army is kept free of such behaviour which would affect cohesion and efficiency. Army policy is clear: all soldiers must be treated equally on the basis of their ability to perform their duty.

I look to each one of you to uphold this policy and to ensure that we retain our acknowledged reputation as a highly professional Army."

The Directive provided definitions of racial and sexual harassment, indicated that the army wanted to prevent all forms of offensive and unfair behaviour in these respects and pointed

out that it was the duty of each soldier not to behave in a way that could be offensive to others or to allow others to behave in that way. It also defined bullying and indicated that, although the army fosters an aggressive spirit in soldiers who will have to go to war, controlled aggression, self-sufficiency and strong leadership must not be confused with thoughtless and meaningless use of intimidation and violence which characterise bullying. Bullying undermines morale and creates fear and stress both in the individual and the group being bullied and in the organisation. The army was noted to be a close-knit community where team work, cohesion and trust are paramount. Thus, high standards of personal conduct and respect for others were demanded from all.

The Directive endorsed the use of military law by commanders. Supplementary leaflets promoting the Directive were issued to every individual soldier. In addition, specific equal opportunities posts were created in personnel centres and a substantial training programme in the Race Relations Act 1976 was initiated.

F. The reports of the Parliamentary Select Committee

65. Every five years an Armed Forces' Bill goes through Parliament and a Select Committee conducts a review in connection with that bill.

66. The report of the Select Committee dated 24 April 1991 noted, under the heading "Homosexuality":

"That the present policy causes very real distress and the loss to the services of some men and women of undoubted competence and good character is beyond dispute. Society outside the armed forces is now much more tolerant of differences in sexual orientation than it was, and this may also possibly be true of the armed forces. Nevertheless, there is considerable force to the [Ministry of Defence's] argument that the presence of people known to be homosexual can cause tension in a group of people required to live and work sometimes under great stress

and physically at very close quarters, and thus damage its cohesion and fighting effectiveness. It may be that this will change particularly with the integration of women into hitherto all-male units. We are not yet persuaded that the time has come to require the armed forces to accept homosexuals or homosexual activity."

67. The 1996 Select Committee report (produced after that committee's review of the Armed Forces Act 1996) referred to evidence taken from members of the Ministry of Defence and from homosexual support groups and to the HPAT report. Once again, the committee did not recommend any change in the government's policy. It noted that, since its last report, a total of 30 officers and 331 persons of other rank had been discharged or dismissed on grounds of homosexuality. The committee was satisfied that no reliable lessons could as yet be drawn from the experience of other countries. It acknowledged the strength of the human rights arguments put forward, but noted that there had to be a balance struck between individual rights and the needs of the whole. It was persuaded by the HPAT summary of the strength of opposition throughout the armed services to any relaxation of the policy. It accepted that the presence of openly homosexual servicemen and women would have a significant adverse impact on morale and, ultimately, on operational effectiveness. The matter was then debated in the House of Commons and members, by 188 votes to 120, rejected any change to the existing policy.

G. Information to persons recruited into the armed forces

68. Prior to September 1995, applicants to the armed forces were informed about the armed forces' policy as regards homosexuals in the armed forces by means of a leaflet entitled "Your Rights and Responsibilities". To avoid any misunderstanding and so that each recruit to each of the armed services received identical information, on 1 September 1995 the armed forces introduced a Service Statement to be read and signed before enlistment. Paragraph 8 of that statement is headed "Homosexuality" and states that homosexuality is not considered compatible with service life and "can lead to administrative discharge".

The law

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

69. The applicants complained that the investigations into their homosexuality and their subsequent discharge from the Royal Air Force on the sole ground that they were homosexual, in pursuance of the Ministry of Defence's absolute policy against homosexuals in the British armed forces, constituted a violation of their right to respect for their private lives protected by Article 8 of the Convention. That Article, in so far as is relevant, reads as follows:

"1. Everyone has the right to respect for his private … life …

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, … for the prevention of disorder …"

A. Whether there was an interference

70. The Government accepted, in their written observations, that there had been interferences with the applicants' right to respect for their private lives. However, noting that neither of the applicants denied knowledge during the relevant period of the policy against homosexuals in the armed forces, the Government made no admissions as to the dates from which the applicants also appreciated that they were homosexual. During the hearing before the Court the Government, referring in particular to Ms Smith, clarified that, if the applicants were aware of the policy and of their homosexuality on recruitment, then their discharge would not have amounted to an interference with their rights guaranteed by Article 8 of the Convention.

The applicants argued that they were not complaining about being refused entry to the armed forces and that they had not been dismissed for lying during recruitment. In any event, the protection afforded by Article 8 could not depend on the degree of knowledge of the applicants of their sexual orientation when they were young men or women.

71. The Court notes that the Government have not claimed that the applicants waived their rights under Article 8 of the Convention when they initially joined the armed forces. It also notes that the applicants were not dismissed for failure to disclose their homosexuality on recruitment. Further, it finds from the evidence that Ms Smith only came to realise that she was homosexual after recruitment.

In these circumstances, the Court is of the view that the investigations by the military police into the applicants' homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of their sexual orientation also constituted an interference with that right (see the Dudgeon v. the United Kingdom judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and, mutatis mutandis, the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 23, § 44).

B. Whether the interferences were justified

72. Such interferences can only be considered justified if the conditions of the second paragraph of Article 8 are satisfied. Accordingly, the interferences must be "in accordance with the law", have an aim which is legitimate under this paragraph and must be "necessary in a democratic society" for the aforesaid aim (see the Norris v. Ireland judgment of 26 October 1988, Series A no. 142, p. 18, § 39).

1. “In accordance with the law”

73. The parties did not dispute that there had been compliance with this element of Article 8 § 2 of the Convention. The Court notes that the Ministry of Defence policy excluding homosexuals from the armed forces was confirmed by the Court of Appeal in the present case to be lawful, in terms of both domestic and applicable European Community law. The policy was given statutory recognition and approval by the Sexual Offences Act 1967 and, more recently, by the Criminal Justice and Public Order Act 1994. The Court, accordingly, finds this requirement to be satisfied.

2. Legitimate aim

74. The Court observes that the essential justification offered by the Government for the policy and for the consequent investigations and discharges is the maintenance of the morale of service personnel and, consequently, of the fighting power and the operational effectiveness of the armed forces (see paragraph 95 below). The Court finds no reason to doubt that the policy was designed with a view to ensuring the operational effectiveness of the armed forces or that investigations were, in principle, intended to establish whether the person concerned was a homosexual to whom the policy was applicable. To this extent, therefore, the Court considers that the resulting interferences can be said to have pursued the legitimate aims of “the interests of national security” and “the prevention of disorder”.

The Court has more doubt as to whether the investigations continued to serve any such legitimate aim once the applicants had admitted their homosexuality. However, given the Court’s conclusion at paragraph 111 below, it does not find it necessary to decide whether this element of the investigations pursued a legitimate aim within the meaning of Article 8 § 2 of the Convention.

3. “Necessary in a democratic society”

75. It remains to be determined whether the interferences in the present cases can be considered "necessary in a democratic society" for the aforesaid aims.

(a) The Government's submissions

76. The Government accepted from the outset that neither the applicants' service records nor their conduct gave any grounds for complaint and that there was no evidence that, prior to the discovery of their sexual orientation, such orientation adversely affected the performance by them or by their colleagues of their duties. Nor was it contended by the Government that homosexuals were less physically capable, brave, dependable or skilled than heterosexuals.

77. However the Government emphasised, in the first place, the special British armed forces' context of the case. It was special because it was intimately connected with the nation's security and was, accordingly, central to a State's vital interests. Unit cohesion and morale lay at the heart of the effectiveness of the armed forces. Such cohesion and morale had to withstand the internal rigours of normal and corporate life, close physical and shared living conditions together with external pressures such as grave danger and war, all of which factors the Government argued applied or could have applied to each applicant. In this respect, the armed forces were unique and there were no genuine comparables in terms of the civilian disciplined forces, such as the police and the fire brigade.

In such circumstances, the Government, while accepting that members of the armed forces had the right to the Convention's protection, argued that different, and stricter, rules applied in this context (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 24, § 57; the Grigoriades v. Greece judgment of 25 November 1997, Reports of Judgments and Decisions 1997-VII, pp. 2589-90, § 45; and the Kalaç v. Turkey judgment of 1 July 1997, Reports 1997-IV, p. 1209, § 28). Moreover, given the national security dimension to the present case a wide margin of appreciation was properly open to the State (see the

Leander v. Sweden judgment of 26 March 1987, Series A no. 116, p. 25, § 59). Accordingly, the narrow margin of appreciation which applied to cases involving intimate private-life matters could not be transposed unaltered to the present case.

In support of their argument for a broad margin of appreciation, the Government also referred to the fact that the issue of homosexuals in the armed forces has been the subject of intense debate in recent years in the United Kingdom, suggesting that the sensitivity and special context of the question meant that the decision was largely one for the national authorities. It was true that the degree of risk to fighting power was not consistent over time, given that attitudes and opinions, and, consequently, domestic law on the subject of homosexuality had developed over the years. Nevertheless, the approach to such matters in an armed forces' context had to be cautious given the inherent risks. The process of review was ongoing and the Government indicated their commitment to a free vote in Parliament on the subject after the next Parliamentary Select Committee review of the policy in 2001.

78. Secondly, the Government argued that admitting homosexuals to the armed forces at this time would have a significant and negative effect on the morale of armed forces' personnel and, in turn, on the fighting power and the operational effectiveness of the armed forces. They considered that the observations and conclusions in the HPAT report of February 1996 (and, in particular, Section F of the report) provided clear evidence of the risk to fighting power and operational effectiveness. The Government submitted that the armed forces' personnel (on whose views the HPAT report was based) were best placed to make this risk assessment and that their views should therefore be afforded considerable weight. Moreover, the relatively recent analyses completed by the HPAT, by the domestic courts (in R. v. Ministry of Defence, ex parte Smith and Others 2 Weekly Law Reports 305) and by the Parliamentary Select Committee all led to the conclusion that the policy should be maintained.

The Government considered that the choice between establishing a code of conduct and maintaining the present policy lay at the heart of the judgment to be made in this matter. However, the view in the United Kingdom was that such a code would not at present be sufficient to meet the risks identified because it was the knowledge or suspicion of the fact

that a person was homosexual, and not the conduct of that person, which would cause damage to morale and effectiveness. Even assuming that the attitudes on which the HPAT report was based were at least in part based on a lack of tolerance or on insufficient broadmindedness, the reality of the risk to effectiveness remained. It was true that many European armed forces no longer excluded homosexuals but the relevant changes had been adopted in those countries too recently to yield any valuable lessons.

As to the applicants' submission about the alleged lack of evidence of past problems caused by the presence of homosexuals in the armed forces, the Government pointed out that the discharge of all persons of established homosexual orientation before such damage occurred meant that concrete evidence establishing the risks identified by the HPAT might not be available. In any event, the Government noted that the risks envisaged would result from the general relaxation of the policy, rather than its modification in any particular instance.

79. Thirdly, and as to the charge made by the applicants that the views expressed to the HPAT by the clear majority of serving personnel could be labelled as "homophobic prejudice", the Government pointed out that these views represented genuine concerns expressed by those with first-hand and detailed knowledge of the demands of service life. Most of those surveyed displayed a clear difference in attitude towards homosexuality in civilian life. Conclusions could not be drawn from the fact that women and racial minorities were admitted while homosexuals were not because women and men were segregated in recognition of potential problems that might arise, whereas such arrangements were simply not possible in the case of same-sex orientation. The concerns about homosexuals were of a type and intensity not engendered by women or racial minorities.

80. Once there was a suspicion of homosexuality, an investigation was carried out. According to the Government, the extent of such investigation would depend on the circumstances but an investigation usually implied questioning the individual and seeking corroborative evidence. If homosexuality was denied, investigations were necessary and even if it was admitted, attempts were made to find relevant evidence through interviews and, depending on the circumstances, other inquiries. The aim of the investigations was to verify the homosexuality

of the person suspected in order to detect those seeking an administrative discharge based on false pretences. During the hearing, the Government gave two recent examples of false claims of homosexuality in the Army and in the Royal Air Force and three recent examples of such false claims in the Royal Navy. The investigations were also necessary given certain security concerns (in particular, the risk of blackmail of homosexual personnel), in light of the greater risk from the Aids virus in the homosexual community and for disciplinary reasons (homosexual acts might be disciplined in certain cases including, for example, where they resulted from an abuse of authority). The Government maintained that the applicants freely chose, in any event, to answer the questions put to them. Both were told that they did not have to answer the questions and that they could have legal advice.

While the bulk of the questioning was, in the submission of the Government, justified by the reasons for the investigation outlined above, the Government did not seek to defend the question put to Ms Smith as to whether she or her partner had had a sexual relationship with their foster daughter. However, they argued that this indefensible, but specific, aspect of the questioning did not tilt the balance in favour of a finding of a violation.

(b) The applicants' submissions

81. The applicants submitted that the interferences with their private lives, given the subject matter, nature and extent of the intrusions at issue, were serious and grave and required particularly serious reasons by way of justification (see the Dudgeon judgment cited above, p. 21, § 52). The subject matter of the interferences was a most intimate part of their private lives, made public by the Ministry of Defence policy itself. The applicants also took issue with the detailed investigations carried out by the service police and with, in particular, the prurient questions put during the interviews, the interviews with third parties, the search of Mr Grady's accommodation and the seizure of his personal affairs. Referring also to their years of service, to their promotions (past and imminent), to their exemplary service records and to the fact that there was no indication that their homosexuality had in any way affected their work or service life, the applicants emphasised that they were, nevertheless, deprived of a career in

which they excelled on the basis of "unsuitability for service" by reason of a blanket policy against homosexuals in the armed forces.

The applicants added, in this context, that a blanket policy was not adopted by the armed forces in any other context. It was not adopted in the case of personal characteristics or traits such as gender, race or colour. Indeed, the Ministry of Defence actively promoted equality and tolerance in these areas. Nor was there a blanket policy against those whose actions could or did affect morale and service efficiency such as those involved in theft or adultery or those who carried out dangerous acts under the influence of drugs or alcohol. In the latter circumstances, the individual could be dismissed, but only after a consideration of all the circumstances of the case. Moreover, no policy against homosexuals existed in comparable British services such as the Merchant Navy, the Royal Fleet Auxiliary, the police, the fire brigade and the nursing profession.

82. The applicants also argued that the Government's core argument as to the risk to morale and, consequently, to fighting power and operational effectiveness was unsustainable for three main reasons.

83. In the first place, the applicants considered that the Government could not, consistently with Article 8, rely on and pander to the perceived prejudice of other service personnel. Given the absence of any rational basis for armed forces' personnel to behave any differently if they knew that an individual was a homosexual, the alleged risk of adverse reactions by service personnel was based on pure prejudice. It was the responsibility of the armed forces by reason of Article 1 of the Convention to ensure that those they employed understood that it was not acceptable for them to act by reference to pure prejudice. However, rather than taking steps to remedy such prejudice, the armed forces punished the victims of prejudice. The applicants considered that the logic of the Government's argument applied equally to the contexts of racial, religious and gender prejudice; the Government could not seriously suggest that, for example, racial prejudice on the part of armed forces' personnel would be sufficient to justify excluding coloured persons from those forces.

Moreover, Convention jurisprudence established that the Government could not rely on pure prejudice to justify interference with private life (see, inter alia, application no. 25186/94, Sutherland v. the United Kingdom, Commission's report of 1 July 1997, unreported, §§ 56, 57, 62, 63 and 65). Furthermore, the applicants pointed out that the Court has found (in its Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, p. 17, §§ 36 and 38) that the demands of "pluralism, tolerance and broadmindedness" apply as much to service personnel as to other persons and that fundamental rights must be protected in the army of a democratic State just as in the society that such an army serves. They argued that the Court's reasoning in that case was based on a vital principle equally applicable in the present case – the armed forces of a country exist to protect the liberties valued by a democratic society, and so the armed forces should not be allowed themselves to march over, and cause substantial damage to, such principles.

84. Secondly, the applicants argued that such perceived prejudice would not have occurred but for the actions of the Ministry of Defence in adopting and applying the policy. The Government accepted that the applicants had worked efficiently and effectively in the armed forces for years without any problems arising by reason of their sexual orientation. The Government's concern related to the presence of openly homosexual service personnel; the private lives of the present applicants were indeed private and would have remained so but for the policy. There was, accordingly, no reason to believe that any difficulty would have arisen had it not been for the policy adopted by the Government.

85. Thirdly, the applicants submitted that the Government were required to substantiate their concerns about the threat to military discipline (see the Vereinigung demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38) but had not produced any objective evidence to support their submission as to the risk to morale and operational effectiveness.

In this respect, they argued that the HPAT report was inadequate and fundamentally flawed. The assessment was not carried out by independent consultants. It was, moreover, conducted against the background of the publicly voiced hostility of the armed forces' authorities to a change in the policy and followed the circulation of an army consultation document which suggested that senior army personnel thought that the purpose of the HPAT review was to gather evidence in support of the current policy on homosexuality. Indeed the majority of the questions in the HPAT questionnaire expressed hostile attitudes to homosexuality or suggested negative responses. In addition, the report contained no concrete evidence of specific problems caused by the presence of homosexual personnel in the armed forces of the United Kingdom or overseas. Furthermore, it was based on a statistically insignificant response rate and those responding were not guaranteed anonymity.

86. As to the dismissal by the HPAT of the experience of other countries which did not ban homosexuals from their armed forces, the applicants considered that the statement in the report that armed forces' personnel of such other countries were more tolerant was not supported by any evidence. In any event, even if those other countries had written constitutions and, consequently, a longer tradition of respect for human rights, the Government were required to comply with their Convention obligations. Whether there was a lack of openly homosexual personnel serving in the armed forces of those countries or not, the fact remained that sexual orientation was part of an individual's private life and no conclusions could be drawn from the fact that homosexuals serving in foreign armed forces might have chosen to keep their sexuality private as they were entitled to do. The applicants also pointed to the number of United Kingdom service personnel who had worked and were currently working alongside homosexual personnel in the armed forces of other NATO countries without any apparent problems.

As to the assertion that investigations were necessary to avoid false declarations of homosexuality by those wishing to leave the armed forces, the applicants pointed to the lack of evidence of such false declarations presented by the Government and to the fact that they themselves had clearly wished to stay in the armed forces. In addition, they submitted that they felt obliged to answer the questions in the interviews because otherwise, as the

Government accepted, their private and intimate affairs would have been the subject of wider and less discreet investigations elsewhere.

As to the Government's reliance on the Court's Kalaç judgment, the applicants pointed out that the case related to the sanctioning of public conduct and not of an individual's private characteristics.

(c) The Court's assessment

(i) Applicable general principles

87. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued (see the Norris judgment cited above, p. 18, § 41).

Given the matters at issue in the present case, the Court would underline the link between the notion of "necessity" and that of a "democratic society", the hallmarks of the latter including pluralism, tolerance and broadmindedness (see the Vereinigung demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 36, and the Dudgeon judgment cited above, p. 21, § 53).

88. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (see the Dudgeon judgment cited above, pp. 21 and 23, §§ 52 and 59).

89. Accordingly, when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention (see the Dudgeon judgment cited above, p. 21, § 52).

When the core of the national security aim pursued is the operational effectiveness of the armed forces, it is accepted that each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect (see the Engel and Others judgment cited above, p. 25, § 59). The Court also considers that it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk to operational effectiveness must be "substantiated by specific examples" (see, mutatis mutandis, the Vereinigung demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, §§ 36 and 38, and the Grigoriades judgment cited above, pp. 2589-90, § 45).

(ii) Application to the facts of the case

90. It is common ground that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required (see paragraph 89 above). In the case of the present applicants, the Court finds the interferences to have been especially grave for the following reasons.

91. In the first place, the investigation process (see the Guidelines at paragraph 49 above and the Government's submissions at paragraph 80) was of an exceptionally intrusive character.

Anonymous telephone calls to Ms Smith and to the service police, and information supplied by the nanny of Mr Grady's commander, prompted the investigations into their sexual orientation, a matter which, until then, each applicant had kept private. The investigations were conducted by the service police, whose investigation methods were, according to the HPAT, based on criminal procedures and whose presence the HPAT described as widely publicised and strongly resented among the forces (see paragraph 49 above).

Once the matter was brought to the attention of the service authorities, Mr Grady was required to return immediately (without his wife or children) to the United Kingdom. While he was in the United Kingdom, detailed investigations into his homosexuality began in the United States and included detailed and intrusive interviews about his private life with his wife, a colleague, the latter's husband and the nanny who worked with his commander's family.

Both applicants were interviewed and asked detailed questions of an intimate nature about their particular sexual practices and preferences. Certain lines of questioning of both applicants were, in the Court's view, particularly intrusive and offensive and, indeed, the Government conceded that they could not defend the question put to Ms Smith about whether she had had a sexual relationship with her foster daughter.

Ms Smith's partner was also interviewed. Mr Grady's accommodation was searched, many personal items (including a letter to his homosexual partner) were seized and he was later questioned in detail on the content of these items. After the interviews, a service police report was prepared for the air force authorities on each applicant's homosexuality and related matters.

92. Secondly, the administrative discharge of the applicants had, as Sir Thomas Bingham MR described, a profound effect on their careers and prospects.

Prior to the events in question, both applicants enjoyed relatively successful service careers in their particular field. Ms Smith had over five years' service in the air force; she had been recommended for promotion, had been accepted for a training course which would facilitate this promotion and was about to complete the course final examinations. Her evaluations prior to and after her discharge were very positive. Mr Grady had served in the air force for fourteen years, being promoted to sergeant and posted to a high-security position in Washington in 1991. His evaluations prior to and after his discharge were also very positive with recommendations for further promotion. The Government accepted in their observations that neither the service records nor the conduct of the applicants gave any grounds for complaint and the High Court described their service records as "exemplary".

The Court notes, in this respect, the unique nature of the armed forces (underlined by the Government in their pleadings before the Court) and, consequently, the difficulty in directly transferring essentially military qualifications and experience to civilian life. The Court recalls in this respect that one of the several reasons why the Court considered Mrs Vogt's dismissal from her post as a schoolteacher to be a "very severe measure", was its finding that schoolteachers in her situation would "almost certainly be deprived of the opportunity to exercise the sole profession for which they have a calling, for which they have been trained and in which they have acquired skills and experience" (Vogt judgment cited above, p. 29, § 60). In this regard, the Court accepts that the applicants' training and experience would be of use in civilian life. However, it is clear that the applicants would encounter difficulty in obtaining civilian posts in their areas of specialisation which would reflect the seniority and status which they had achieved in the air force.

93. Thirdly, the absolute and general character of the policy which led to the interferences in question is striking (see the Dudgeon judgment cited above, p. 24, § 61, and the Vogt judgment cited above, p. 28, § 59). The policy results in an immediate discharge from the armed forces once an individual's homosexuality is established and irrespective of the

individual's conduct or service record. With regard to the Government's reference to the Kalaç judgment, the Court considers that the compulsory retirement of Mr Kalaç is to be distinguished from the discharge of the present applicants, the former having been dismissed on grounds of his conduct while the applicants were discharged on grounds of their innate personal characteristics.

94. Accordingly, the Court must consider whether, taking account of the margin of appreciation open to the State in matters of national security, particularly convincing and weighty reasons exist by way of justification for the interferences with the applicants' right to respect for their private lives.

95. The core argument of the Government in support of the policy is that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government rely in this respect on the report of the HPAT and, in particular, on Section F of the report.

Although the Court acknowledges the complexity of the study undertaken by the HPAT, it entertains certain doubts as to the value of the HPAT report for present purposes. The independence of the assessment contained in the report is open to question given that it was completed by Ministry of Defence civil servants and service personnel (see paragraph 51 above) and given the approach to the policy outlined in the letter circulated by the Ministry of Defence in August 1995 to management levels in the armed forces (see paragraph 33 above). In addition, on any reading of the report and the methods used (see paragraph 52 above), only a very small proportion of the armed forces' personnel participated in the assessment. Moreover, many of the methods of assessment (including the consultation with policy-makers in the Ministry of Defence, one-to-one interviews and the focus group discussions) were not anonymous. It also appears that many of the questions in the attitude survey suggested answers in support of the policy.

96. Even accepting that the views on the matter which were expressed to the HPAT may be considered representative, the Court finds that the perceived problems which were identified in the HPAT report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. The Court observes, in this respect, that no moral judgment is made on homosexuality by the policy, as was confirmed in the affidavit of the Vice Chief of the Defence Staff filed in the Perkins' proceedings (see paragraph 50 above). It is also accepted by the Government that neither the records nor conduct of the applicants nor the physical capability, courage, dependability and skills of homosexuals in general are in any way called into question by the policy.

97. The question for the Court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue.

The Court observes from the HPAT report that these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour.

98. The Government emphasised that the views expressed in the HPAT report served to show that any change in the policy would entail substantial damage to morale and operational effectiveness. The applicants considered these submissions to be unsubstantiated.

99. The Court notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail. Thorpe LJ in the Court of Appeal found that there was no actual or significant evidence of such damage as a result of

the presence of homosexuals in the armed forces (see paragraph 40 above), and the Court further considers that the subsequent HPAT assessment did not, whatever its value, provide evidence of such damage in the event of the policy changing. Given the number of homosexuals dismissed between 1991 and 1996 (see paragraph 67 above), the number of homosexuals who were in the armed forces at the relevant time cannot be said to be insignificant. Even if the absence of such evidence can be explained by the consistent application of the policy, as submitted by the Government, this is insufficient to demonstrate to the Court's satisfaction that operational-effectiveness problems of the nature and level alleged can be anticipated in the absence of the policy (see the Vereinigung demokratischer Soldaten Österreichs and Gubi judgment cited above, p. 17, § 38).

100. However, in the light of the strength of feeling expressed in certain submissions to the HPAT and the special, interdependent and closely knit nature of the armed forces' environment, the Court considers it reasonable to assume that some difficulties could be anticipated as a result of any change in what is now a long-standing policy. Indeed, it would appear that the presence of women and racial minorities in the armed forces led to relational difficulties of the kind which the Government suggest admission of homosexuals would entail (see paragraphs 63 and 64 above).

101. The applicants submitted that a strict code of conduct applicable to all personnel would address any potential difficulties caused by negative attitudes of heterosexuals. The Government, while not rejecting the possibility out of hand, emphasised the need for caution given the subject matter and the armed forces context of the policy and pointed out that this was one of the options to be considered by the next Parliamentary Select Committee in 2001.

102. The Court considers it important to note, in the first place, the approach already adopted by the armed forces to deal with racial discrimination and with racial and sexual harassment and bullying (see paragraphs 63-64 above). The January 1996 Directive, for example, imposed both a strict code of conduct on every soldier together with disciplinary rules to deal with any inappropriate behaviour and conduct. This dual approach was supplemented with

information leaflets and training programmes, the army emphasising the need for high standards of personal conduct and for respect for others.

The Government, nevertheless, underlined that it is "the knowledge or suspicion of homosexuality" which would cause the morale problems and not conduct, so that a conduct code would not solve the anticipated difficulties. However, in so far as negative attitudes to homosexuality are insufficient, of themselves, to justify the policy (see paragraph 97 above), they are equally insufficient to justify the rejection of a proposed alternative. In any event, the Government themselves recognised during the hearing that the choice between a conduct code and the maintenance of the policy lay at the heart of the judgment to be made in this case. This is also consistent with the Government's direct reliance on Section F of the HPAT's report where the anticipated problems identified as posing a risk to morale were almost exclusively problems related to behaviour and conduct (see paragraphs 53-54 above).

The Government maintained that homosexuality raised problems of a type and intensity that race and gender did not. However, even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules which have been found to be effective in the latter case would not equally prove effective in the former. The "robust indifference" reported by the HPAT of the large number of British armed forces' personnel serving abroad with allied forces to homosexuals serving in those foreign forces serves to confirm that the perceived problems of integration are not insuperable (see paragraph 59 above).

103. The Government highlighted particular problems which might be posed by the communal accommodation arrangements in the armed forces. Detailed submissions were made during the hearing, the parties disagreeing as to the potential consequences of shared single-sex accommodation and associated facilities.

The Court notes that the HPAT itself concluded that separate accommodation for homosexuals would not be warranted or wise and that substantial expenditure would not, therefore, have to be incurred in this respect. Nevertheless, the Court remains of the view that it has not been shown that the conduct codes and disciplinary rules referred to above could not adequately deal with any behavioural issues arising on the part either of homosexuals or of heterosexuals.

104. The Government, referring to the relevant analysis in the HPAT report, further argued that no worthwhile lessons could be gleaned from the relatively recent legal changes in those foreign armed forces which now admitted homosexuals. The Court disagrees. It notes the evidence before the domestic courts to the effect that the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (see the Dudgeon judgment cited above, pp. 23-24, § 60).

105. Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

106. While the applicants' administrative discharges were a direct consequence of their homosexuality, the Court considers that the justification for the investigations into the applicants' homosexuality requires separate consideration in so far as those investigations continued after the applicants' admissions of homosexuality. In Ms Smith's case her admission was immediate and Mr Grady admitted his homosexuality when his interview of 26 May 1994 commenced.

107. The Government maintained that investigations, including interviews and searches, were necessary in order to detect false claims of homosexuality by those seeking administrative discharges from the armed forces. The Government cited five examples of individuals in the

armed forces who had relatively recently made such false claims in order to obtain discharge. However, and despite the fact that Mr Grady's family life could have led to some doubts about the genuineness of the information received as to his homosexuality, it was and is clear, in the Court's opinion, that at the relevant time both Ms Smith and Mr Grady wished to remain in the air force. Accordingly, the Court does not find that the risk of false claims of homosexuality could, in the case of the present applicants, provide any justification for their continued questioning.

108. The Government further submitted that the medical, security and disciplinary concerns outlined by the HPAT justified certain lines of questioning of the applicants. However, the Court observes that, in the HPAT report, security issues relating to those suspected of being homosexual were found not to stand up to close examination as a ground for maintaining the policy. The Court is, for this reason, not persuaded that the risk of blackmail, being the main security ground canvassed by the Government, justified the continuation of the questioning of either of the present applicants. Similarly, the Court does not find that the clinical risks (which were, in any event, substantially discounted by the HPAT as a ground for maintaining the policy) justified the extent of the applicants' questioning. Moreover, no disciplinary issue existed in the case of either applicant.

109. The Government, referring to the cautions given to the applicants at the beginning of their interviews, further argued that the applicants were not obliged to participate in the interview process. Moreover, Ms Smith was asked to consent to her partner being interviewed and Mr Grady agreed to the search of his accommodation and to hand over his electronic diary. The Court considers, however, that the applicants did not have any real choice but to cooperate in this process. It is clear that the interviews formed a standard and important part of the investigation process which was designed to verify to "a high standard of proof" the sexual orientation of the applicants (see the Guidelines at paragraph 49 above and the Government's submissions at paragraph 80). Had the applicants not cooperated with the interview process, including with the additional elements of this process outlined above, the Court is satisfied that the authorities would have proceeded to verify the suspected homosexuality of the applicants by other means which were likely to be less discreet. That

this was the alternative open to the applicants in the event of their failing to cooperate was made clear to both applicants, and in particularly forthright terms to Mr Grady.

110. In such circumstances, the Court considers that the Government have not offered convincing and weighty reasons justifying the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the air force authorities.

111. In sum, the Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention.

112. Accordingly, there has been a violation of Article 8 of the Convention.

II. alleged violation of Article 14 of the Convention taken in conjunction with Article 8

113. The applicants also invoked Article 14 of the Convention taken in conjunction with Article 8 in relation to the operation of the Ministry of Defence policy against them. Article 14 reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] 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."

114. The Government argued that no separate issue arose under Article 14 of the Convention and the applicants relied on their submissions outlined in the context of Article 8 above.

115. The Court considers that, in the circumstances of the present case, the applicants' complaints that they were discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence, amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 of the Convention (see the Dudgeon judgment cited above, pp. 25-26, §§ 64-70).

116. Accordingly, the Court considers that the applicants' complaints under Article 14 in conjunction with Article 8 do not give rise to any separate issue.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION taken alone and in conjunction with Article 14

117. The applicants also complained, under Article 3 of the Convention taken alone and in conjunction with Article 14, that the policy excluding homosexuals from the armed forces and the consequent investigations and discharges amounted to degrading treatment. Article 3 reads, in so far as relevant, as follows:

"No one shall be subjected to … degrading treatment or punishment."

118. The Government submitted that, given the serious and reasonable basis and aim of the policy (maintaining the fighting power and operational effectiveness of the armed forces) and the absence of any intention to degrade or humiliate, the policy cannot be categorised as degrading. They argued that the East African Asians case (applications nos. 4403/70 et sqq., East African Asians v. the United Kingdom, Commission's report of 14 December 1973, Decisions and Reports 78-A, p. 5) to which the applicants referred, was not relevant as it dealt with racial discrimination. They agreed that the investigation process was not pleasant but

argued that, given the matter at issue, intimate questions were inevitable and that the aim was not to humiliate persons but to deal with cases as quickly and as discreetly as possible. The Government again pointed out that the applicants chose to participate in the interviews.

119. The applicants maintained that their discriminatory treatment, based on crude stereotyping and prejudice, denied and caused affront to their individuality and dignity and, as such, amounted to treatment contrary to Article 3. The distinction made by the Government in relation to the above-cited East African Asians case was a technical one since the applicants were labelled and categorised, a process which debased and denigrated each applicant's existence and character. Moreover, treatment contrary to Article 3 could not be justified. As to the suggestion that they could have chosen not to participate in the interviews, they submitted that their complaint related to the entire investigation and dismissal process; the caution given was in fact the standard caution given to a criminal suspect and the very fact that questions were put was hurtful and degrading. The absence of a legal obligation to answer the questions in no way mitigated that effect since they had to cooperate in order to keep the investigations as discreet as possible. In any event, the questions extended significantly beyond an inquiry into sexual orientation in that they were questioned after they admitted their sexual orientation and many questions were prurient and offensive.

120. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 162).

It is also recalled that treatment may be considered degrading if it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see the Ireland v. the United Kingdom judgment cited above, pp. 66-67, § 167). Moreover, it is sufficient if the victim is humiliated in his or her own eyes (see the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, p. 16, § 32).

121. The Court has outlined above why it considers that the investigation and discharge together with the blanket nature of the policy of the Ministry of Defence were of a particularly grave nature (see paragraphs 90‑93 above). Moreover, the Court would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3 (see, mutatis mutandis, the Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985, Series A no. 94, p. 42, §§ 90-91).

122. However, while accepting that the policy, together with the investigation and discharge which ensued, were undoubtedly distressing and humiliating for each of the applicants, the Court does not consider, having regard to all the circumstances of the case, that the treatment reached the minimum level of severity which would bring it within the scope of Article 3 of the Convention.

123. Accordingly, the Court concludes that there has been no violation of Article 3 of the Convention taken alone or in conjunction with Article 14.

IV. ALLEGED VIOLATION OF ARTICLE 10 of the convention taken alone and in CONjunction with Article 14

124. The applicants further complained under Article 10 of the Convention, taken alone and in conjunction with Article 14, about the limitation imposed by the existence and operation of the policy of the Ministry of Defence on their right to give expression to their sexual identity. Article 10, in so far as relevant, reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority …

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, … for the prevention of disorder …"

125. The Government maintained that freedom of expression was not an issue in these cases. They submitted that the applicants were free to express information and ideas and to inform others of their sexual orientation. The investigations and their discharges were not the result of any expression of information or ideas but rather a consequence of the fact of their homosexuality which, until they came under investigation, they had chosen to conceal. In any event, any interference with the applicants' freedom of expression was justified for the reasons outlined in the context of Article 8 and, accordingly, no separate issue arose under Article 10.

126. The applicants argued that the right to give expression to one's sexuality encapsulated opinions, ideas and information essential to an individual and his or her identity. The policy of the Ministry of Defence forced them to live secret lives denying them the simple opportunity to communicate openly and freely their own sexual identity which, in turn, had a chilling effect on them and was a powerful inhibiting factor in their right to express themselves. For the reasons outlined in the context of Article 8, the applicants submitted that the interference with their right to freedom of expression did not comply with the requirements of the second paragraph of Article 10 of the Convention. They added that any restriction on freedom of expression, including the expression of one's sexual orientation, must be narrowly interpreted and the Government's reliance solely on the justification offered for the interferences with their Article 8 rights was, therefore, insufficient in the Article 10 context. Given the fact that expression which might shock, offend or disturb was protected, the mere fact that members of the armed forces would, as the Government submitted, have been upset by the presence of known homosexuals was insufficient justification for an interference under Article 10 of the Convention.

Finally, the applicants maintained that the Government's submission as to their freedom to express their homosexuality was hardly credible. If the applicants had done so, they would have been immediately investigated and discharged; that was what effectively happened.

127. The Court would not rule out that the silence imposed on the applicants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of the Ministry of Defence policy, could constitute an interference with their freedom of expression.

However, the Court notes that the subject matter of the policy and, consequently, the sole ground for the investigation and discharge of the applicants, was their sexual orientation which is "an essentially private manifestation of human personality" (see the Dudgeon judgment cited above, p. 23, § 60). It considers that the freedom of expression element of the present case is subsidiary to the applicants' right to respect for their private lives which is principally at issue (see, mutatis mutandis, the Kokkinakis v. Greece judgment of 25 May 1993, Series A no. 260-A, p. 23, § 55, and the Larissis and Others v. Greece judgment of 24 February 1998, Reports 1998-I, p. 383, § 64).

128. Consequently, the Court considers that it is not necessary to examine the applicants' complaints under Article 10 of the Convention, either taken alone or in conjunction with Article 14.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

129. Finally, the applicants complained of a violation of Article 13 of the Convention, in that they had no effective remedy before a national authority in respect of the violations of the Convention of which they were victims. Article 13 reads, in so far as relevant, as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority …"

130. The Government maintained, referring to the Vilvarajah case (Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215), that proceedings by way of judicial review afforded an effective remedy to the applicants. The applicants were able to, and did, advance the substance of the Convention arguments before the domestic courts which were, in turn, relied upon by the applicants before this Court. Any difference between the judicial review test and the test under the Convention was not central to the issues in this case and the essential reasoning of the Court of Appeal mirrored that which underpinned the Convention margin of appreciation. Both the domestic courts and the Convention organs retained a supervisory role to ensure that the State did not abuse its powers or exceed its margin of appreciation.

131. The applicants submitted that Article 13 contained two minimum requirements. First, the relevant national authority had to have jurisdiction to examine the substance of an individual's complaint by reference to the Convention or other corresponding provisions of national law and, secondly, that authority had to have jurisdiction to grant a remedy if it accepted that the individual's complaint was well-founded. Moreover, the precise scope of the obligations under Article 13 would depend on the nature of the individual's complaint. The context of the present case was the application of a blanket policy which interfered with the Article 8 rights of a minority group and not an assessment of an individual extradition or expulsion in the context of Article 3 as in the Soering and Vilvarajah cases (Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, and the Vilvarajah and Others judgment cited above).

132. In the applicants' view, the judicial review remedy did not meet the first of these requirements of Article 13 for two connected reasons. Since the Ministry of Defence policy was a blanket policy admitting of no exceptions, it was impossible for the domestic courts to

consider the merits of the applicants' individual complaints. However, the impact of the policy on them varied from case to case. In contrast, the domestic courts could and indeed were bound to apply the "most anxious scrutiny" to the individual facts in the above-mentioned extradition and expulsion cases of Soering and Vilvarajah. Secondly, the domestic courts could not ask themselves whether a fair balance had been struck between the general interest and the applicants' rights. The domestic courts were confined to asking themselves whether it had been shown that the policy as a whole was irrational or perverse and the burden of proving irrationality was on the applicants. They were required to show that the policy-maker had "taken leave of his senses" and the applicants had to show that this high threshold had been crossed before the domestic courts could intervene. Moreover, the applicants pointed to the comments of the High Court and of the Court of Appeal as the best evidence that those courts lacked jurisdiction to deal with the substance of the applicants' Convention complaints. In this context, the Soering and Vilvarajah cases cited above could be distinguished because the test applied in judicial review proceedings concerning proposed extraditions and expulsions happened to coincide with the Convention test.

133. The applicants further contended that their judicial review proceedings did not comply with the second requirement of Article 13 because the domestic courts were not able to grant a remedy even though four out of the five judges who examined the applicants' case considered that the policy was not justified.

134. Although the applicants invoked Article 13 of the Convention in relation to all of their complaints, the Court recalls that it is the applicants' right to respect for their private lives which is principally at issue in the present case (see paragraph 127 above). In such circumstances, it is of the view that the applicants' complaints under Article 13 of the Convention are more appropriately considered in conjunction with Article 8.

135. The Court recalls that Article 13 guarantees the availability of a remedy at national level to enforce the substance of Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. Thus, its effect is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance

of the relevant Convention complaint and to grant appropriate relief. However, Article 13 does not go so far as to require incorporation of the Convention or a particular form of remedy, Contracting States being afforded a margin of appreciation in conforming with their obligations under this provision. Nor does the effectiveness of a remedy for the purposes of Article 13 depend on the certainty of a favourable outcome for the applicant (see the Vilvarajah and Others judgment cited above, p. 39, § 122).

136. The Court has found that the applicants' right to respect for their private lives (see paragraph 112 above) was violated by the investigations conducted and by the discharge of the applicants pursuant to the policy of the Ministry of Defence against homosexuals in the armed forces. As was made clear by the High Court and the Court of Appeal in the judicial review proceedings, since the Convention did not form part of English law, questions as to whether the application of the policy violated the applicants' rights under Article 8 and, in particular, as to whether the policy had been shown by the authorities to respond to a pressing social need or to be proportionate to any legitimate aim served, were not questions to which answers could properly be offered. The sole issue before the domestic courts was whether the policy could be said to be "irrational".

137. The test of "irrationality" applied in the present case was that explained in the judgment of Sir Thomas Bingham MR: a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where the court was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker. In judging whether the decision-maker had exceeded this margin of appreciation, the human rights context was important, so that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable.

It was, however, further emphasised that, notwithstanding any human rights context, the threshold of irrationality which an applicant was required to surmount was a high one. This is, in the view of the Court, confirmed by the judgments of the High Court and the Court of Appeal themselves. The Court notes that the main judgments in both courts commented

favourably on the applicants' submissions challenging the reasons advanced by the Government in justification of the policy. Simon Brown LJ considered that the balance of argument lay with the applicants and that their arguments in favour of a conduct-based code were powerful (see paragraph 30 above). Sir Thomas Bingham MR found that those submissions of the applicants were of "very considerable cogency" and that they fell to be considered in depth with particular reference to the potential effectiveness of a conduct-based code (see paragraph 37 above). Furthermore, while offering no conclusive views on the Convention issues raised by the case, Simon Brown LJ expressed the opinion that "the days of the policy were numbered" in light of the United Kingdom's Convention obligations (see paragraph 31 above), and Sir Thomas Bingham MR observed that the investigations and the discharge of the applicants did not appear to show respect for their private lives. He considered that there might be room for argument as to whether there had been a disproportionate interference with their rights under Article 8 of the Convention (see paragraph 38 above).

Nevertheless, both courts concluded that the policy could not be said to be beyond the range of responses open to a reasonable decision-maker and, accordingly, could not be considered to be "irrational".

138. In such circumstances, the Court considers it clear that, even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.

The present applications can be contrasted with the cases of Soering and Vilvarajah cited above. In those cases, the Court found that the test applied by the domestic courts in applications for judicial review of decisions by the Secretary of State in extradition and

expulsion matters coincided with the Court's own approach under Article 3 of the Convention.

139. In such circumstances, the Court finds that the applicants had no effective remedy in relation to the violation of their right to respect for their private lives guaranteed by Article 8 of the Convention. Accordingly, there has been a violation of Article 13 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

140. Article 41 of the Convention provides:

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

141. The applicants submitted detailed claims for compensation in respect of pecuniary and non-pecuniary damage and for the reimbursement of their costs and expenses. However, they required further information from the Government before they could complete their proposals.

142. The Government argued at the hearing that a finding of a violation would be sufficient just satisfaction or, in the alternative, that the submissions of the applicants were inflated. The Government also required further time to respond in detail to the applicants' definitive proposals.

143. The Court has already agreed to provide further time to the parties to submit their definitive just satisfaction proposals. Accordingly, the Court considers that the question raised under Article 41 is not yet ready for decision. It is, accordingly, necessary to reserve it and to

fix the further procedure, account being taken of the possibility of an agreement between the parties (Rule 75 § 4 of the Rules of Court).

The Court's decision

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;

3. Holds that there has been no violation of Article 3 of the Convention taken either alone or in conjunction with Article 14;

4. Holds that it is not necessary to examine the applicants' complaints under Article 10 of the Convention taken either alone or in conjunction with Article 14;

5. Holds that there has been a violation of Article 13 of the Convention;

6. Holds that the question of the application of Article 41 of the Convention is not ready for decision;

Consequently,

(a) reserves the said question;

(b) invites the parties to notify the Court of any agreement they may reach;

(c) reserves the further procedure and delegates to the President the power to fix the same if need be.

Case of Perkins and R. v. The United Kingdom [7]

Procedure

1. The case originated in two applications (nos. 43208/98 and 44875/98) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two United Kingdom nationals, Mr Terence Perkins and Ms R. ("the applicants"), on 13 July 1998 and 15 September 1998, respectively.

2. The applicants were represented by Mr S. Grosz, a solicitor practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office.

3. The applicants alleged that an investigation into their sexuality and their discharge from the Royal Navy on the basis of their homosexuality as a result of the absolute policy against the presence of homosexuals in the armed forces that existed at the time violated their rights under Article 8, alone and in conjunction with Article 14 of the Convention.

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

[7] Applications nos. 43208/98 and 44875/98) Judgment Strasbourg 22 October 2002; final 22/01/2003

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

6. On 23 February 1999 the Chamber decided to join the proceedings in the applications (Rule 43 § 1). Following a request from the second applicant, the President of the Third Section decided that her identity should be kept confidential.

7. The applications were declared admissible by the Court on 5 September 2000.

8. The Chamber decided that no hearing on the merits was required (Rule 59 § 2 in fine).

9. The applicants' claims for just satisfaction pursuant to Article 41 of the Convention were received on 6 November 2000 and on 16 January 2001 the Government's observations on those claims were received. Thereafter there was a further exchange of comments between the parties in correspondence.

10. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

The facts

I. THE CIRCUMSTANCES OF THE CASE

11. The applicants were born in 1969 and 1972 and live in London and Surrey respectively.

A. The first applicant

12. On 11 February 1991 the first applicant joined the Royal Navy as a medical assistant and worked in a Royal Navy hospital. He signed on for 22 years of service. Between 1992 and 1995 he passed several professional examinations, described as being "for advancement and sub-specialisation". His naval character was assessed as being "very good" for every year that he served in the Royal Navy and he was granted a good conduct badge on 11 February 1995. On his 'Efficiency Record' he was noted to have "made an excellent initial impression" and to be "very capable" during 1992; in 1993 it was noted that he "needs to show more initiative"; and in 1994 it was recorded that he was "still quiet but improving", had "good computer skills" and was a "good worker". His efficiency assessments between 1992 and 1995 rated him as "satisfactory" on four occasions and as "superior" on two occasions.

13. On 1 August 1995 the first applicant was interviewed by the Special Investigations Branch ("SIB") of the Royal Navy, as a result of the receipt of information by the naval authorities that he was homosexual.

14. The first applicant confirmed at the outset that the interview took place with his consent and that he was homosexual. Thereafter, the interview continued for about a further 10 minutes. During that time the first applicant was questioned about his sexual practices with, and about the age of, his current partner. He was asked whether his partner was a civilian and about the identities of his former partners in the service (a number of questions were raised in this respect). The interviewers then explained to the first applicant that the purpose of the interview was to see if any 'offences' had been committed and they continued questioning him. He was asked, inter alia, whether he had committed sexual acts with anyone under 18 years of age, how long he had known that he was homosexual, how many relationships he had had, whether he had been induced to become a practising homosexual since he joined the navy and about his sexual practices with his past and current partners. The first applicant was further asked whether he was HIV positive and if he knew whether his current partner was HIV positive.

15. After the interview the first applicant was informed that he would be discharged pursuant to the Ministry of Defence's policy against homosexuals serving in the armed forces. The discharge took effect on 24 October 1995. At the time of his discharge the first applicant held the position of leading medical assistant.

16. On 24 January 1996 the first applicant applied for leave to take judicial review proceedings on the basis that the blanket policy against homosexuals serving in the armed forces was "irrational", that it was in breach of Articles 8 and 14 of the European Convention on Human Rights and that it was contrary to the EU Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion and Working Conditions 76/207/EEC ("the Equal Treatment Directive").

17. His application was stayed pending the outcome of the case of R. v. Ministry of Defence, ex parte Smith and Others ([1996] 2 WLR 305) which raised similar issues and was determined on 19 March 1996, when the House of Lords dismissed petitions for leave to appeal.

18. The first applicant renewed his application for leave to take judicial review proceedings following the decision, on 30 April 1996, of the European Court of Justice ("ECJ") that transsexuals were protected from discrimination on grounds of their transsexuality under European Community law (P. v. S. and Cornwall County Council [1996] Industrial Relations Law Reports 347).

19. On 3 July 1996 the applicant was granted leave to take judicial review proceedings.

20. On 7 March 1997, at the substantive judicial review application, the first applicant argued that a reference to the ECJ pursuant to former Article 177 of the Treaty of Rome should be made. In its judgment of 13 March 1997 the High Court stayed the first applicant's judicial review application and referred questions to the ECJ on the Equal Treatment Directive. The High Court questioned whether Article 2.1 of that directive (prohibiting discrimination "on grounds of sex") applied to discrimination on grounds of sexual orientation and, if so, whether the policy of the Ministry of Defence against homosexuals was capable in law of justification under Article 2.2 of that directive (R. v. the Secretary of State for Defence, ex parte Perkins, judgment of 13 March 1997).

21. On 17 February 1998 the ECJ found that Article 119 of the Treaty of Rome and the Equal Pay Directive (EU Council Directive 75/117/EEC, also prohibiting discrimination "on grounds of sex") did not apply to discrimination on grounds of sexual orientation (Grant v. South West Trains Ltd [1998] ICR 449).

22. On 2 March 1998, in the light of the decision in Grant, the Administrator of the ECJ wrote to the High Court enquiring whether the High Court wished to withdraw its reference to the ECJ in the first applicant's case. On 13 July 1998, following a hearing between the parties, the High Court ordered the withdrawal of its reference in the first applicant's case. Leave to appeal that decision was refused by the High Court. On 15 July 1998, two Queen's Counsel advised the first applicant against an appeal to the Court of Appeal on the grounds that such an appeal did not have any prospects of success.

B. The second applicant

23. On 30 July 1990 the second applicant joined the Royal Navy. She signed on for 22 years of service. Following basic training, she trained as a radio operator. In May 1991 she passed a course described as "specialist courses of civilian value" in basic ships fire fighting. In June 1992 she passed a professional qualifying examination for wren radio operator first class, described as a "highest service examination". Her naval character was assessed as being "very good" for each year in which she served in the Royal Navy and her efficiency was noted to be "satisfactory".

24. In or around September 1993, the second applicant, who was working on a submarine base in Scotland and was suffering from a great deal of emotional distress relating to her father's illness, confided in a colleague that she had had a brief lesbian relationship with a civilian whilst on leave. The second applicant discussed this with no one else. That colleague reported the second applicant to the naval authorities.

25. On 10 September 1993 the second applicant was woken up and interrogated by an officer from the SIB for two hours. The interview focussed on matters of an intimate sexual nature. A thorough and intimate search of the second applicant's personal belongings was then conducted. The second applicant was asked whether she had any electrical items. She understood the question to refer to particular items of a sexual nature, which understanding was not contradicted by the investigating officer. A number of the second applicant's personal belongings, including personal letters, a video, a poster and a film, were confiscated. It is the second applicant's belief that her personal letters were read by the officers investigating her case.

26. On 13 September 1993 she was sent home to inform her parents that she was being investigated with a view to being discharged and, on her return to base, she was moved to a different room so as not to share with the colleague who had informed on her. She was also moved out of direct working contact with that colleague. On 31 October 1993 she was informed that she was going to be discharged and that she had 48 hours to pack her belongings and leave the base. The second applicant was then interviewed by an official of the Ministry of Defence in London in order to assess whether or not she would be a security risk once she had left the armed forces. The second applicant also stated that she was obliged to read the statements of those persons who had been interviewed in connection with her and to sign those statements in order to indicate that she had read them.

27. The second applicant's discharge came into effect on 26 November 1993. Her character on her 'Certificate of Discharge' was recorded to be "exemplary". Her certificate of qualifications which she received on discharge pointed out that the second applicant had:

"...displayed an above average level of intelligence and an ability to absorb and use new information quickly. She is of good appearance, has a sociable nature and works well as a member of a team. She has shown the potential to be considered for officer training and the drive required to learn and work under her own volition.

She is a competent and reliable Communications rating with good keyboard skills and an understanding of Mainframe Computer Operations. [The second applicant] has potential and drive which should make her a sought after asset by a future employer."

28. Given the second applicant's distress relating to her discharge and to her father's illness she did not immediately issue any domestic proceedings. The second applicant stated that, in any event, national law in relation to discrimination on grounds of sexual orientation was such that at that time she did not have any realistic prospect of succeeding in any such proceedings.

29. However, in view of, inter alia, the above-cited judgment of the ECJ on 30 April 1996 in the Cornwall County Council case and the reference under former Article 177 to the ECJ by the High Court in the first applicant's case in March 1997, the second applicant lodged, on 27 January 1998, an application in the Industrial Tribunal alleging unfair dismissal (although this complaint was later withdrawn) and sexual discrimination contrary to the provisions of the Sex Discrimination Act 1975 and the Equal Treatment Directive. She also requested the Industrial Tribunal to stay her case pending the outcome of the afore-mentioned Article 177 reference in the first applicant's case.

30. On 26 March 1998 the Chairman of the Industrial Tribunal, nevertheless, considered the second applicant's case and found that, in the light of the subsequent above-cited decision of

the ECJ on 17 February 1998 in the Grant case, the second applicant's case did not appear to be very strong. He also decided, having regard to the judgment in the Grant case and because the second applicant could have lodged her proceedings earlier, that he would not extend time to allow the second applicant's claim to proceed.

31. Since the Article 177 reference in the first applicant's case had not yet been determined, the second applicant appealed that decision to the Employment Appeal Tribunal on 22 May 1998. However, following the withdrawal by the High Court of that Article 177 reference on 13 July 1998, the second applicant requested the withdrawal of her own appeal. On 23 July 1998 the Employment Appeal Tribunal dismissed her appeal on the basis that it had been withdrawn.

II. RELEVANT DOMESTIC LAW AND PRACTICE

32. The domestic law and practice relevant to the present applications is described in the judgments of the Court in the cases of Lustig-Prean and Beckett v. the United Kingdom (nos. 31417/96 and 32377/96, §§ 22-34 and 37-61, 27 September 1999, unreported) and Smith and Grady v. the United Kingdom (nos. 33985/96 and 33986/96, §§ 29-41 and 44-68, 27 September 1999, ECHR 1999-VI).

The law

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION, ALONE AND IN CONJUNCTION WITH ARTICLE 14

33. The applicants complained that the investigations into a most intimate part of their private lives (including, in the case of the second applicant, the search and confiscation of her personal belongings) and their subsequent discharge from the Royal Navy pursuant to the absolute policy against homosexuals in the armed forces that existed at the time constituted a

violation of their right to respect for their private lives protected by Article 8 of the Convention, both alone and in conjunction with Article 14 of the Convention.

34. Article 8 of the Convention reads, in relevant part, as follows:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety ... "

35. Article 14 reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] 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."

A. The parties' submissions

36. By their letter to the Court dated 14 January 2000, the Government stated that they did not believe that the Court's consideration of the present cases should lead to conclusions on the substantive issues under Articles 8 and 14 of the Convention different from those reached in the above-cited cases of Lustig-Prean and Beckett and Smith and Grady.

37. The applicants maintained their complaints and, in their letter to the Court dated 19 October 1999, agreed that they did not consider that their cases were materially different from the Lustig-Prean and Beckett and Smith and Grady cases cited above.

B. The Court's assessment

38. The Court recalls that in its judgments in the above-cited cases of Lustig-Prean and Beckett (§§ 63-68 and 80-105) and Smith and Grady (§§ 70-75 and 87-112) it found that the investigation of the applicants' sexual orientation, and their discharge from the armed forces on the grounds of their homosexuality pursuant to the absolute policy of the Ministry of Defence against the presence of homosexuals in the armed forces, constituted direct interferences with the applicants' right to respect for their private lives which could not be justified under the second paragraph of Article 8 of the Convention as being "necessary in a democratic society". A violation of Article 8 was therefore found.

39. The Court further recalls that, in those cases, it considered (at §§ 108 and 115, respectively) that the applicants' complaints under Article 14 of the Convention that they had been discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence amounted in effect to the same complaint, albeit seen from a different angle, that the Court had already considered in relation to Article 8 of the Convention.

40. The Court does not consider there to be any material difference between those cases and the present one.

41. Accordingly, the Court finds that in the present case there has been a violation of Article 8 of the Convention in respect of each applicant. In addition, the Court does not consider that the applicants' complaints under Article 14 of the Convention in conjunction with Article 8 give rise to any separate issue.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. Article 41 of the Convention provides:

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

43. The applicants claimed compensation for pecuniary and non-pecuniary losses and the reimbursement of legal costs and expenses.

A. Non-pecuniary loss

44. The applicants submitted that their interviews by the SIB included questioning which was an insulting intrusion into an intimate aspect of their private lives. They emphasised that, by their discharge, they had been deprived of the opportunity of pursuing their chosen careers in a profession in which they executed their duties to the full satisfaction of their superiors and from which they derived considerable job satisfaction. They submitted that they had good service records and that they were destined for further promotion. They pointed out that there was no suggestion that they had ever conducted themselves other than entirely properly and that they were discharged, not because of any conduct on their parts, but purely as a result of a facet of their private lives which they had desired to keep private.

45. The applicants referred to the judgments in Lustig-Prean and Beckett v. the United Kingdom (just satisfaction), nos. 31417/96 and 32377/96, § 12, 25 July 2000, unreported ("Lustig-Prean and Beckett (just satisfaction)") and Smith and Grady v. the United Kingdom (just satisfaction), nos. 33985/96 and 33986/96, § 13, 25 July 2000, ECHR 2000-IX ("Smith and Grady (just satisfaction)"), in which the Court made an award of 19,000 pounds sterling

(GBP) to each of the applicants as compensation for non-pecuniary loss. The applicants submitted that the Court should make an identical award to each of them in the present case as a result of its similarity to the aforementioned cases.

46. The Government accepted that an award of GBP 19,000 should be made to each of the applicants in respect of non-pecuniary loss.

47. The Court recalls its awards in the above-cited Lustig-Prean and Beckett (just satisfaction) and Smith and Grady (just satisfaction) cases and, in particular, the reasons as to why the interferences with the applicants' private lives were considered to be especially grave: the investigation process was particularly intrusive; the discharge of the applicants had a profound effect upon them and their careers; and the absolute and general character of the policy led to the discharge of the applicants on the grounds of an innate personal characteristic irrespective of their conduct or service records.

48. The Court finds that similar considerations apply to the present applicants. Accordingly, the Court awards, on an equitable basis, 30,300 euros (EUR) to each applicant in compensation for non-pecuniary loss.

B. Pecuniary loss

1. The applicants' submissions

49. The pecuniary loss claims of both applicants were based upon the difference between their civilian income and benefits and their service income and benefits had they not been discharged. The period used to calculate any past loss was taken from the date of their discharges to 31 October 2000, from which date their claims for future losses were calculated. Both applicants based their claims for pecuniary loss upon assumptions about the future course of their naval careers had they not been discharged.

(a) Career assumptions

50. The first applicant commenced his career with the Royal Navy on 11 February 1991, at 22 years of age. At the date of his dismissal on 24 October 1995 he held the position of leading medical assistant. He submitted that his service record indicated that he was destined to be promoted and that, had he not been dismissed, he would ultimately have retired in 2013, after 22 years of service, in the position of Chief Petty Officer. He would not now, however, want to return to service given that he had been summarily discharged on the grounds of his sexuality.

51. The second applicant submitted that, upon commencing her naval career at 18 years of age on 30 July 1990, she signed on for 22 years' service with the possibility of an extension if she were promoted. She pointed out that at the date of her dismissal on 26 November 1993 she held the position of radio operator first class and had an exemplary service record. She provided a detailed career forecast, submitting that, but for her dismissal, she would have been promoted through the ranks at regular intervals during her career, retiring in 2022 after 32 years of service, with a 60% likelihood of having attained the position of Captain by that time.

52. The second applicant argued that her career forecast was realistic. In relation to her length of service she pointed out that the Royal Navy had been her passion from an early age and that she would have completed her first 22-year open engagement had she not been forced to leave. She contended that the Government had not produced the statistics upon which they relied to contradict her in relation to this and that, in any event, the direct application of those statistics to her was questionable, as, unlike heterosexual colleagues, she would neither have left early to have children nor have been tempted to take advantage of an early resettlement grant as she would not have had a family. She assessed the likelihood of her being offered a second engagement beyond her first 22 years' service at 60%.

53. In relation to her promotion prospects she emphasised that she had achieved consistently above average examination results, appraisals and recommendations during her time in the

Royal Navy, which indicated that she was almost certain to be commissioned to officer level. She further argued that her civilian career since discharge had been one of steady and measurable progression (by May 2001 she was in charge of a department providing desktop, telecommunications and network support for 300 users), which supported her contention that she would have made similar progress within the Royal Navy.

(b) Past pecuniary loss

54. Neither applicant made any claim for past pecuniary loss. Both applicants provided financial information demonstrating that their civilian incomes for the total period from the date of their discharges to 31 October 2000 exceeded (by GBP 1,779 and GBP 12,878 respectively) that which they submitted that they would have received had they remained in the Royal Navy during the same period.

(c) Future loss of earnings

55. The first applicant calculated that from 31 October 2000 to 11 February 2013 he would earn GBP 66,552 more in civilian employment than he would have done had he remained in the Royal Navy. He therefore did not make any claim under this head.

56. The second applicant calculated her claim for future loss of earnings from 31 October 2000 to 31 October 2022 to be GBP 264,304. She submitted that her naval career forecast was conservative, as it was based upon her retiring in the position of Commander as opposed to her prediction of Captain. She contrasted her predicted earnings in the Royal Navy during this period, ranging from GBP 27,783 to GBP 49,369, with her predicted civilian earnings, ranging from GBP 21,000 to GBP 32,000 in the same period. She emphasised that throughout this period it was very probable that she would have been earning one third more in the Royal Navy than she could earn in civilian employment.

(d) Future loss of pension

57. The first applicant calculated this loss as being GBP 204,247.

58. He utilised his career forecast outlined above (pension being directly related to position on retirement) and a predicted life expectancy of 75 years of age. He submitted that his service pension would have totalled GBP 289,402 had he not been discharged.

59. The first applicant submitted that his future pension will now comprise a smaller service pension (GBP 19,555), a pension contributed towards by his civilian employer (GBP 31,300) and one privately funded by him (projected value of GBP 34,300 in 2019, based upon current net monthly payments of GBP 121.70).

60. He submitted that he was currently having to use his own resources to fund a pension scheme, whereas his service pension resulted from a non-contributory scheme. He referred to the Court's acceptance in Lustig-Prean and Beckett (just satisfaction), cited above, that the contributions which would be required in order to achieve an equivalent level of pension from a private pension scheme, when contrasted with a non-contributory scheme, were likely to be considerable. He noted that in Lustig-Prean and Beckett (just satisfaction) and Smith and Grady (just satisfaction), amounts of GBP 30,000, 14,000, 14,000 and 15,000, respectively had been made for this head of loss.

61. The second applicant calculated her future loss of pension to be GBP 109,203.

62. She relied upon her career assumptions set out above and argued that her pension claim was conservative as it assumed that she would have retired in 2022 in the position of

Lieutenant (as opposed to Commander or Captain). She predicted her life expectancy to be 80 years of age and submitted that her service pension would have totalled GBP 303,732 had she not been discharged.

63. The second applicant submitted that her future pension will now comprise a smaller service pension (GBP 13,093) and that her civilian pension will amount to GBP 181,436. The latter figure was based upon gross monthly contributions of GBP 46.68 being made out of her annual civilian salary in the year 2000 of GBP 21,000.

64. The second applicant repeated the submissions made by the first applicant in relation to the loss to her of the benefit of the service non-contributory pension scheme.

2. The Government's submissions

(a) Career assumptions

65. As to the first applicant the Government submitted that it was not certain that he would have served for 22 years in the Royal Navy. They noted that he now stated that he would not wish to return and that any forecast of his likely period of service must also take account of the "exigencies of life".

66. As to the second applicant, the Government submitted that her career assumptions were speculative and wholly unrealistic. They emphasised that, according to the Royal Navy's statistics, there was only a 25% chance that she would have remained in the service beyond 2003, at which time she would have been able to take advantage of the armed forces' resettlement grant. They further submitted that statistical evidence indicated that only 17.52% of those in the position of the second applicant after 3 years went on to complete a full 22 years service. As to her promotion prospects, the Government did not accept her argument

that she had attained consistently above average examination results, appraisals and recommendations, pointing out that, although one commanding officer had commented that she had the potential "to be considered" for officer training, she was marked "satisfactory" (average) in her reports, none of which assessed her as "superior-above average" or "exceptional-outstanding". The Government described the second applicant's career forecast as "wildly optimistic" and "untenable". They argued that, if she had remained in the Royal Navy beyond 2003, she would have left as a Chief Petty Officer in 2012. They submitted that there was no realistic prospect that she would have attained officer status or risen to a Commander or Captain in the future and that she would not have been eligible for a second open engagement beyond 22 years' service.

(b) Future loss of earnings

67. The Government submitted that the second applicant had not made out any claim for future loss of earnings. They repeated their submissions in relation to her career forecast and argued that there was no evidence that she would always have earned more in the Royal Navy than in civilian employment, noting that within 5 years of leaving the service she was earning a salary which was one third more than her final naval salary.

(c) Future loss of pension

68. The Government referred to their submissions in relation to the career forecasts of both applicants. They further emphasised the speculation involved in assessing this part of the applicants' claims and the need to take into account the exigencies of life in evaluating their likely career paths and life expectancies.

69. Furthermore, in relation to the first applicant, the Government noted that, in the year to 5 April 2000, he earned substantially more than he would have done had he remained in the Royal Navy. The Government pointed out that employers in the United Kingdom usually

provide their own pension schemes to employees with salaries at that level and, moreover, that the first applicant's substantially increased earning capacity would enable him to take out his own private pension scheme which would result in at least, and probably substantially more than, the level that he would have enjoyed had he remained in the Royal Navy.

70. As to the second applicant, the Government submitted that she was now earning more in civilian employment than she would have done had she remained in the Royal Navy, and that in the light of her civilian earnings she would be able to replicate the level of pension that she would have received had she remained in the Royal Navy.

71. The Government therefore submitted that neither applicant had made out any claim for future loss of pension.

3. The Court's assessment

(a) Applicable principles

72. The Court recalls that, in principle, a judgment in which the Court finds a violation of the Convention imposes on the respondent State a legal obligation to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. However, in cases such as the present, a precise calculation of the sums necessary to make complete reparation (restitutio in integrum) in respect of the pecuniary losses suffered by the applicants is prevented by the inherently uncertain and speculative character of the damage flowing from the violation. This is particularly so in relation to the question of how long the applicants would have remained in the armed forces had it not been for their dismissal. Furthermore, the greater the interval from the discharge of the applicant to the loss claimed, the more uncertain the damage becomes.

73. Accordingly, the Court considers that the question to be decided is the level of just satisfaction, in respect of both past and future pecuniary loss, which it is necessary to award to each applicant, the matter to be determined by the Court at its discretion, having regard to what is equitable (the above-cited cases of Lustig-Prean and Beckett (just satisfaction), §§ 22-23, and Smith and Grady (just satisfaction), §§ 18-19). The Court has also had regard to paragraphs 24 and 20, respectively of those judgments on just satisfaction, where the Court underlined the emotional and psychological impact on those applicants of their dismissals from the armed forces, the differences between service and civilian life and qualifications and the consequent difficulty in finding civilian careers equivalent to their service careers.

(b) Past pecuniary loss

74. Neither applicant made any claim for past pecuniary loss. Accordingly the Court does not make any award under this head of loss.

(c) Future loss of earnings

75. The Court notes that the first applicant did not make any claim for future loss of earnings. Accordingly the Court does not make any award to him under this head of loss.

76. As to the second applicant, the Court notes that the parties fundamentally disagreed on the assumptions upon which the assessment of the future pecuniary loss claim depended and, in particular, on her service career prospects had she not been discharged. The Court considers that the level of disagreement renders particularly speculative the assessment of this part of the claim.

77. However, the Court notes that it is not disputed that the second applicant joined the Royal Navy in July 1990 with a 22 year engagement and was discharged in November 1993 in the

position of radio operator first class, earning GBP 15,000 annually. It also recalls that there was no suggestion that either her service record or her conduct gave rise to any grounds for complaint while she was in the Royal Navy and that her character was recorded on her Certificate of Discharge to be "exemplary".

78. The Court also finds the following arguments of the parties to be significant. The second applicant submitted that she had wanted to join the Royal Navy from an early age, that she had derived considerable job satisfaction from her service and that she would not have voluntarily left the service early. While the Court has had regard to the statistical evidence of the Government in relation to the likely length of the second applicant's naval career, it finds her submissions about her individual circumstances to be a relevant counter-consideration, in particular her assertion that she would not have had a family and that she was therefore less likely than others to take advantage of a resettlement grant after 12 years of service.

79. The Court has noted the Government's submission that the second applicant's efficiency was assessed as "satisfactory" as opposed to superior or exceptional. However, the Court considers significant the description of the second applicant on her certificate of qualifications, set out at paragraph 27 above and, in particular, that she had "shown the potential to be considered for officer training". Moreover, the Court considers that the second applicant has had a reasonably successful civilian career path since her discharge, notwithstanding that she is no longer pursuing her profession of first choice, and that this supports her contention that she had the capacity to make progress within the Royal Navy.

80. The Court concludes that, in all the circumstances, some compensation should be made to the second applicant for her net future loss of earnings.

81. Accordingly, and on an equitable basis, the Court awards the second applicant the sum of EUR 20,700 for future loss of earnings.

(d) Future loss of pension

82. As to the first applicant, the Court notes that, even assuming his career and income predictions to be correct, he earned significantly more in civilian employment in the year ending 5 April 2000, the last year for which figures are available (GBP 40,554 contrasted with his predicted naval earnings of GBP 22,352) and he calculated that in the period from 31 October 2000 to 11 February 2013 he would earn GBP 66,552 more than he would have done had he remained in the Royal Navy.

83. The position in the current case therefore contrasts with that in the above-cited Lustig-Prean and Beckett (just satisfaction) and Smith and Grady (just satisfaction) cases in which significant claims were made, and compensation was awarded, for future loss of earnings. The Court awarded compensation for loss of future pension in those cases (§§ 26 and 22, respectively) on the basis, inter alia, that the contributions which would have been required to achieve an equivalent level of pension from a private pension scheme, when contrasted with a non-contributory service pension scheme, would have been likely to have been considerable.

84. In the present case, the Court notes that the first applicant's predicted considerable gain in future earnings of GBP 66,552 is more than double the highest award that was made to compensate the applicants for future loss of pension in the Lustig-Prean and Beckett (just satisfaction) and Smith and Grady (just satisfaction) cases. The Court further notes that the first applicant has taken out a private pension plan and that he could, should he so wish, choose in addition to invest the remaining increased income, at least in part, into further private pension schemes or otherwise. While the Court is not persuaded that the first applicant's current lack of desire to return to the Royal Navy demonstrates that it was unlikely that he would have served in the armed forces for 22 years, it recognises that it is not possible to be certain about either his life expectancy or what the length and course of his naval career would have been.

85. As to the second applicant, the Court refers to the considerations which it outlined above in relation to her future loss of earnings claim. In addition, the Court has had particular regard to the loss to her of the benefit of the non-contributory service pension scheme and accepts that the contributions which would be required in order to achieve an equivalent level of pension from a different pension scheme would be likely to be considerable. However, the Court further takes into account that her civilian pension contributions are likely to increase as her salary increases, in line with her own career predictions, thus yielding a larger retirement fund than she predicted in her submissions and thereby reducing the amount of her overall claim for pension loss.

86. The Court considers that, in all the circumstances, some compensation should be paid to the second applicant in relation to future loss of pension, notwithstanding that the assessment of that award necessarily involves a significant degree of speculation depending as it does on, inter alia, the period during which she would have remained in service and on her rank at the time of leaving service.

87. The Court further notes, in particular, that had the applicants for any reason left the armed forces before they were entitled to receive an immediately payable pension (ordinarily after 22 years service), they would have been entitled only to a deferred pension, payable at 60 years of age, which would have significantly reduced the amount of their pension loss claims.

88. In all the circumstances, the Court, in its discretion, does not find it necessary to make any award to the first applicant in respect of his claim for future loss of pension. On an equitable basis, the Court awards the second applicant the sum of EUR 22,300 for future loss of pension.

(e) Summary

89. The Court does not find it necessary to make any award for pecuniary loss to the first applicant.

90. The Court awards the second applicant EUR 20,700 for future loss of earnings and EUR 22,300 for future loss of pension giving a total award of compensation for pecuniary loss to the second applicant of EUR 43,000.

C. Costs and Expenses

91. The first applicant claimed GBP 3,039 for the legal costs of the Convention proceedings, inclusive of value-added tax (VAT). This figure represented work completed by a partner (6 hours and 33 minutes at GBP 195 plus VAT per hour), a solicitor (3 hours and 27 minutes at GBP 130 plus VAT per hour) and a trainee solicitor (11 hours and 30 minutes at GBP 75 plus VAT per hour). The first applicant noted that the Government did not take issue with the hourly rate claimed by the partner responsible for the case. He pointed out that, while the solicitors representing him had also represented Mr Lustig-Prean, it was still necessary for them to take instructions from the applicant in relation to both the substantive issues and the Article 41 claim, consider the documents, provide advice, correspond with the applicant, the Government and the Court, and prepare submissions. The first applicant further pointed out that, while a more senior fee earner might have completed the work in less time, it was more cost-effective to use a trainee solicitor to the extent indicated.

92. The second applicant claimed GBP 1,611.47 for the legal costs of her domestic proceedings, calculated as having involved a partner for 10 hours and 10 minutes at a charging rate of GBP 100 plus VAT per hour. She further claimed GBP 4,134.45 for the legal costs of her Convention proceedings, calculated as having involved a partner for 6 hours and 50 minutes, a solicitor for 6 hours and 40 minutes and a trainee for 17 hours and 51 minutes at the same rates as set out for the first applicant above. The second applicant explained that since her Article 41 claim was calculated first, the trainee had taken more time to work out the manner in which the claim was to be presented. This preliminary work did not require

repetition in the case of the first applicant. She otherwise repeated the submissions in relation to costs made by the first applicant.

93. The Government submitted that the applicants were represented by the same firm of solicitors that represented Mr Lustig-Prean in his case before the Court and that the arguments in the present cases replicated the ones used in that case. In those circumstances, the Government did not consider the amount of time that was spent on the cases to have been reasonably and necessarily incurred. The Government further submitted that the charging rate for the trainee was high and pointed out that different time periods had been spent by the trainee on the preparation of the cases, notwithstanding that they were of the same complexity. The Government suggested that the amounts of GBP 2,500 and GBP 3,500 respectively (both figures inclusive of VAT) would be reasonable.

94. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (the above-cited judgments of Lustig-Prean and Beckett (just satisfaction), § 32, Smith and Grady (just satisfaction), § 28). The Court further recalls that the costs of the domestic proceedings can be awarded if they are incurred by applicants in order to try to prevent the violation found by the Court or to obtain redress therefor (see, among other authorities, the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 18 October 1982, Series A no. 54, § 17) and that costs in respect of the domestic proceedings were in fact awarded at paragraphs 30-33 of the above-cited case of Lustig-Prean and Beckett (just satisfaction).

95. The Court considers that, notwithstanding the similarity of the submissions that were made in the current case with those made on behalf of Mr Lustig-Prean, the applicants' solicitors still had to assess and prepare the different facts involved in the current case and, in particular, the different evidence, calculations and submissions required in relation to the Article 41 claim. As such, the Court finds that both the time spent and the division of labour used on the first applicant's case was reasonable. The Court, has, however, taken into account the Government's submission that the charging rate of GBP 75 plus VAT for a trainee was

high. The Court further considers that, notwithstanding the second applicant's contention that her case was prepared first, the number of hours spent on the preparation of her Convention proceedings appears high. In relation to the second applicant's domestic proceedings, the Court notes that a total of 10 hours and 10 minutes at a charging rate of GBP 100 plus VAT per hour amounts to less than the GBP 1,611.47 that she claimed and that she has not provided any evidence of any other costs incurred.

96. Accordingly, the Court concludes that the legal costs and expenses for which the applicants claim reimbursement cannot all be considered to have been necessarily incurred or to be reasonable as to quantum.

97. In the circumstances, and deciding on an equitable basis, the Court awards each applicant EUR 4,300 for the legal costs and expenses of their Convention proceedings. It further awards the second applicant EUR 1,900 in respect of the legal costs and expenses of her domestic proceedings. All sums are inclusive of VAT.

D. Default interest

98. As the award is expressed in euros to be converted into the national currency at the date of settlement, the Court considers that the default interest rate should also reflect the choice of the euro as the reference currency. It considers it appropriate to take as the general rule that the rate of the default interest to be paid on outstanding amounts expressed in euro should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

The Court's decision

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;

3. Holds

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted to pounds sterling at the date of settlement:

(i) EUR 30,300 (thirty thousand three hundred euros) in respect of non-pecuniary damage;

(ii) EUR 4,300 (four thousand three hundred euros) in respect of costs and expenses;

(b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

4. Holds

(a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted to pounds sterling at the date of settlement:

(i) EUR 30,300 (thirty thousand three hundred euros) in respect of non-pecuniary damage;

(ii) EUR 43,000 (forty three thousand euros) in respect of pecuniary damage;

(iii) EUR 1,900 (one thousand nine hundred euros) in respect of the costs and expenses of the domestic proceedings;

(iv) EUR 4,300 (four thousand three hundred euros) in respect of the costs and expenses of the Convention proceedings;

(b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

5. Dismisses the remainder of the applicants' claim for just satisfaction.

Case of Beck, Copp and Bazeley v. The United Kingdom [8]

Procedure

1. The case originated in three applications (nos. 48535/99, 48536/99 and 48537/99) against the United Kingdom lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three United Kingdom nationals, Mr John Beck, Mr Howard Copp and Mr Kevin Bazeley ("the applicants"), on 11, 12 and 11 January 1999, respectively.

2. The applicants were represented by Ms J. Gould, a solicitor practising in Birmingham, England. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley, of the Foreign and Commonwealth Office.

3. The applicants alleged that an investigation into their sexuality and their discharge from the armed forces on the basis of their homosexuality as a result of the absolute policy against the presence of homosexuals in the armed forces that existed at the time, violated their rights under Articles 3, 8 and 10 of the Convention, read on their own and in conjunction with Article 14. They further contended that they did not have any effective remedy in the domestic courts in relation to those violations, in violation of Article 13 of the Convention.

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

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[8] Applications nos. 48535/99, 48536/99 and 48537/99 Judgment Strasbourg 22 October 2002 FINAL 22/01/2003

5. On 5 October 1999 the Chamber decided to join the proceedings in the applications (Rule 43 § 1).

6. Legal aid was granted to the first applicant on 31 January 2000.

7. By a decision of 5 September 2000 the Court declared the applications admissible.

8. The Chamber decided that no hearing on the merits was required (Rule 59 § 2 in fine).

9. The applicants' claims for just satisfaction pursuant to Article 41 of the Convention were received on 15 January 2001 and on 13 March 2001 the Government's observations on those claims were received.

10. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Fourth Section.

The facts

I. THE CIRCUMSTANCES OF THE CASE

11. The applicants were born in 1959, 1957 and 1967 and live in Lancashire, Tyne and Wear and Worcester, respectively.

A. The first applicant

12. On 4 May 1976 the first applicant joined the Royal Air Force ("RAF"). By 1993 he had reached the rank of sergeant in the Electronic Warfare Operational Support Establishment ("EWOSE") where he was employed as a communications systems analyst and he submitted

that he was well placed for promotion. During his service he was awarded the Air Officer Commanding Commendation for Meritorious Service and the Long Service and Good Conduct medal. The first applicant was divorced in 1988.

13. The first applicant's service evaluations covering the period June 1990 to January 1993 all recorded his conduct as exemplary and, for the most part, his trade proficiency, supervisory ability and personal qualities were assessed at 8 out of 10. He was highly recommended for promotion during each assessment. The detailed evaluations were all positive. In a report in early 1993, the first reporting officer (with whom the second and third reporting officers essentially agreed) noted, in his final evaluation, that the first applicant was an intelligent, caring, self-assured and mature senior non-commissioned officer who continued to work extremely hard; while his forthright opinions could detract from his popularity, the first applicant always seemed to have the best interests of his subordinates at heart and he was highly recommended for promotion without hesitation. He was said to be "widely recognised as one of the most experienced [senior non-commissioned officers] in the trade".

14. By 1993 the first applicant was studying theology and was considering ordination. From 7 to 9 May 1993 he attended a course designed to help individuals assess their suitability for ordination. During that course the first applicant claimed that he realised that he could no longer deny his homosexuality and that he felt morally bound to reveal his sexual orientation as he was aware of the policy against homosexuals in the armed forces. He discussed his homosexuality with the Station Padre and told him that he had decided that he could no longer live a lie.

15. Accordingly, on 10 May 1993 the first applicant informed the EWOSE security officer that he was homosexual and he made it clear that he had always been a celibate homosexual. Since he considered his discharge inevitable, he requested that it take place as soon as possible. Later that day he saw his immediate superior to whom he also admitted his homosexuality. On 11 May 1993 the first applicant was interviewed by the officer

commanding EWOSE. On 12 May 1993 security services were advised. He was suspended from his duties from 17 May 1993.

16. A service police investigation commenced on 20 May 1993 which included their completing a Character Defect Enquiry ("CDE") on the first applicant. The CDE report was dated 8 June 1993, briefly described the first applicant and his service career noting that he was currently engaged to serve until February 2006 and outlined the detailed observations made by a number of persons to the service police, which are summarised below.

17. The EWOSE security officer to whom the first applicant had spoken on 10 May 1993 described the first applicant's visit to his Squadron Leader when the first applicant had admitted his homosexuality. The security officer reported on information provided by the first applicant on his family and on how he had lived his homosexuality in the armed forces and he proffered the view that the first applicant was, in fact, homosexual and not attempting to secure early release. That officer also described the first applicant's visit to a medical officer, said to be as a result of being in a highly charged emotional state, and, on referral, to a visiting psychiatrist, the latter of whom had indicated that the first applicant was not suffering from a clinical disorder.

18. The submissions of the officer who had interviewed the first applicant on 11 May 1993 were also noted in the CDE report. He considered that the first applicant was genuinely homosexual and was not making the claim in order to obtain early discharge. The report also recorded the information received from the first applicant's immediate superior who had described the first applicant's character and his interest in theology and who had proffered the view that he was not surprised that the first applicant had claimed to be homosexual. However, that officer confirmed that the first applicant had not given any indication that he was homosexual and that, while he believed him, he had not seen or heard anything that would substantiate the first applicant's story. He also described the first applicant's admission to him that he was homosexual and the first applicant's reasons for his admitting his sexual identity at that stage.

19. The statements of two colleagues of the first applicant were also recorded in the CDE report. The first had been a close friend of the first applicant and the first applicant had admitted his homosexuality to him two weeks before he did so to the armed forces' authorities. That colleague described his relationship with the first applicant and the first applicant's wish to be ordained and also spoke about the first applicant's financial problems. The second colleague described a striking change in the first applicant's personality a few weeks after he arrived in the Sergeant's Mess (he had become miserable and withdrawn). This change could now be explained, according to that colleague, by the first applicant's admission. Both colleagues described the first applicant as a 'man's man' who gave no indication of his homosexuality.

20. The Station Padre's evidence to the service police was also recorded in the CDE report. His meeting with the first applicant on 9 May 1993 was detailed in the report, the first applicant's religious studies and ambitions were also outlined as was the Station Padre's conversation about the first applicant with another Padre who had been involved in the course from 7 to 9 May 1993. The Station Padre's views on the likelihood of the first applicant being accepted into the priesthood were also set out together with the opinion that the first applicant was a clever individual who would attempt to get what he wanted, the way he wanted.

21. The first applicant's ex-wife (also in the armed forces) provided a detailed statement to the service police which was recorded in the CDE report. She described her hesitations in marrying the first applicant, their marital difficulties, their financial difficulties, their separation in 1987 and their divorce in 1988.

22. The CDE report concluded that no signs of homosexual tendencies were identified by the first applicant's ex-wife, colleagues or friends, that the only evidence was the first applicant's own admission and that the enquiry had not revealed anything to rebut the first applicant's submissions that he had not had a homosexual physical relationship. Various identified matters could imply that the first applicant had mercenary reasons for wishing to be

discharged and it was noted that he had threatened to go to the press if he was not treated properly. It was recommended that the first applicant's financial problems should be included in any further personal security report.

23. The Unit Commander's recommendation for administrative disposal of the matter was dated 18 June 1993 and included the first applicant's conduct and trade assessments from 1982 to January 1993. His conduct throughout his career was recorded as exemplary and he had been highly recommended for promotion since October 1986. It dealt briefly with his relationships with his family members, noting that his brother was a practising homosexual. It went on to record that:

"[The first applicant] has been a loyal and trustworthy serviceman for 17 years and has worked hard to become a [senior non-commissioned officer]. Despite grave emotional and personal problems, [the first applicant's] performance as a tradesman and supervisor has remained unaffected until his disclosure on 10 May 1993 ... Despite the devious and deliberate concealment of his homosexual tendencies, [the first applicant's] honesty and character have caused him finally to admit to the truth. [The first applicant] is five years away from a substantial gratuity and pension, which he has now lost together with his career ... The fact that [the first applicant] has lost so much in material terms to gain some inner personal peace should be seen as a mitigating factor. ... [The first applicant] has few friendships outside his working environment and those remaining will now be under much strain. He has nowhere to live outside the Sergeant's Mess ... As such this lonely and solitary individual, who has had to face up to a situation not of his own making, deserves to be treated in a compassionate and dignified manner. ... [The first applicant] has had to cope with extreme personal difficulties which have not previously impacted on the Service. These difficulties, which have been beyond his control, have caused him to become a lonely and solitary man, and finally to admit to his true personality. His homosexual tendencies cannot be reconciled easily in the Royal Air Force and his continued retention is not consistent with good discipline or morale. Nevertheless, [the first applicant] has earned the right to be treated in a dignified manner and should be given all possible assistance in reconciling his situation."

24. A statement of the first applicant was attached to the above recommendation in which he took exception to the reference to the sexual orientation of his brother which he considered to be of no concern to the RAF and which he found offensive. He also objected to the reference to "devious and deliberate concealment" which he regarded as a disgraceful attack on his personal integrity. He also noted that since the outset of the case he had been treated "with very considerable kindness by all concerned" and that "it would be quite wrong if I did not mention this fact", the first applicant commending in particular the EWOSE security officer (to whom he had spoken on 10 May 1993) for his kindness and human approach to the matter. In his additional remarks, the Unit Commander noted:

"With the current official policy on homosexuality, the simple fact is that [the first applicant] cannot be retained. This is a sad case and I am very keen to see that [the first applicant] is treated as fairly and with as much dignity as can be afforded. He should be discharged as soon as is administratively possible and hence I strongly advise that this case is processed with all haste. Furthermore, I believe very strongly that he should receive his full entitlement of resettlement training/leave, and terminal leave. His dedicated and diligent service over many years warrants a sympathetic and understanding approach to his final weeks in the Service."

25. On 10 August 1993, a Board of the RAF, two of whose members thought it apt to liken the first applicant's case to "a murder inquiry without a body" in that he confessed to being a homosexual "without any evidence to confirm or deny his claim", recommended his administrative discharge on grounds of his homosexuality.

26. Further to the intervention of the first applicant's Member of Parliament, the Parliamentary Under-Secretary of State for Defence apologised for the delay in processing the first applicant's case and, on 27 November 1993, the first applicant was discharged from the RAF on grounds of his homosexuality. His certificate of discharge indicated that his services were no longer required, the first applicant being unable to meet his service obligations because of circumstances beyond his control.

B. The second applicant

27. The second applicant joined the Royal Army Medical Corps on 1 June 1978 and was indexed as a pupil nurse on 12 November 1979. He passed his autumn assessment in 1981. At the time of his discharge on 29 January 1982 he was a Private, training as a pupil nurse in a military hospital.

28. In his assessment dated 14 January 1982 he was recommended for promotion and rated above the standard required of his rank and service. The reporting officer in that evaluation noted that he was a conscientious and reliable young man with good nursing potential, that he had a polite and cheerful manner and got on well with his colleagues. It was considered that he carried out his regimental duties satisfactorily and was ready for immediate promotion.

29. In June 1981 the second applicant commenced a homosexual relationship with a civilian. Six months later he received a posting order to Germany and applied for a home posting as he wished to remain in the United Kingdom with his partner. His application was refused. He submitted that he then realised that he could not lead a double life or face separation from his partner. Although he knew that revealing his homosexuality would lead to his discharge, he informed his nurse tutor. The latter informed the personnel officer who conducted four interviews with the second applicant on the subject of his homosexuality.

30. The second applicant was then required to undergo a psychiatric assessment and was advised that this was necessary in order to ascertain whether he was, in fact, homosexual. The psychiatrist's clinical notes dated 25 January 1982 indicated that it was felt that the second applicant was not suffering from any psychiatric disorder, that there were no reasons to doubt his allegation that he was homosexual and that there was, therefore, no psychiatric contra-indication to his being discharged on grounds of homosexuality. He was discharged from the army on 29 January 1982 on grounds of his homosexuality.

31. The reasons for discharge were outlined in a note from the second applicant's commanding officer dated 26 January 1982 where it was confirmed that the second applicant had admitted to homosexual acts with civilians. It was also noted that there was no evidence of such activity with soldiers and it was considered that at no time had good order and military discipline been affected. It was felt that, while his "work has as yet not deteriorated", the "problems of his relationship" would affect his work and reliability in the near future. It was further noted that he had not yet lost the respect of his superiors nor suffered ridicule at the hands of his contemporaries but that this could well be so if his "problem" were to become common knowledge.

32. The assessment of his military conduct and character contained in his certificate of service signed on his discharge noted his conduct as exemplary, describing the second applicant as conscientious and reliable with good nursing potential. A letter dated 7 December 1984 from Army Medical Services noted that ward reports throughout the second applicant's training showed that he was an "above average nurse" who was well liked by his colleagues and patients. He was described as a keen and intelligent worker who applied himself well to all aspects of nursing.

C. The third applicant

33. The third applicant joined the RAF on 10 November 1985 and commenced officer training at the RAF college. He was commissioned as Acting Petty Officer on 27 March 1986, achieved the rank of Flight Lieutenant in September 1991 and served as a second navigator at a RAF base in Scotland.

34. In his evaluation covering the period July 1993 to March 1994, the first reporting officer pointed out that the third applicant, who had recently changed posting, was progressing satisfactorily in his current post and that, with more experience, he should be a contender to become a first navigator in due course. Although he was not yet recommended for further promotion, he was considered to have good potential for the future if he could resolve his domestic difficulties. The second and third reporting officers also spoke of the impact on the

third applicant of the breakdown of his marriage, considering that he should rather consolidate his current position. Accordingly, none of the three reporting officers recommended him for further promotion. Two out of the three reporting officers referred to him as being prone to air sickness in the posting that he held at that time.

35. In August 1994 the third applicant's credit card holder, which he had previously lost, was found by an officer of the service police in the latter's internal mail and its contents aroused suspicion that the third applicant might be homosexual. On 3 August 1994 the third applicant was interviewed by an officer of the service police and he was shown two membership cards of homosexual clubs which were in his name. The third applicant confirmed that the cards were his and that he was homosexual. During that interview he was pressed to give names of service personnel with whom he had had a sexual relationship. He stated that his homosexual activity was limited to members of the civilian population and that he had never had a sexual relationship with a member of the service.

36. A report dated August 1994 from the service police described the above interview and indicated that there was no evidence whatsoever to suggest that there was an abuse of rank, that the circumstances were particularly "deviant, sordid or persistent" or that "assault, violence, ill-treatment or other criminal or disciplinary offences" were involved. Accordingly, the third applicant had not been interviewed under caution and was "content to make a voluntary statement". That statement, dated 3 August 1994, confirmed that he was homosexual and pointed out that he had realised he was homosexual in 1992 and that, in hindsight, this was a major contributory factor in the break-up of his marriage. He indicated that his wife knew at the time of his statement of his homosexuality and he confirmed the statements made during his interview as to his previous homosexual relationships. He made it clear that he did not wish to provide the names of those persons with whom he had had a homosexual relationship and stated that he had not made the statement to get a discharge from service.

37. On 24 August 1994 the third applicant was suspended from his normal primary duties with immediate effect. A report was prepared recommending that he be ordered to resign his commission on the grounds of unsuitability.

38. On 31 August 1994 the third applicant lodged a petition challenging this recommendation. On 6 January 1995 the decision of the Air Force Board, rejecting the third applicant's petition, was promulgated. On 19 May 1995 he was informed that the decision of the Air Force Board would not be reviewed. On 4 September 1995 he was discharged from the RAF on grounds of his homosexuality.

D. The domestic proceedings

39. On 24 January 1996 Mr Perkins, who had also been dismissed from the Royal Navy in 1995 on grounds of his homosexuality, applied to the High Court for leave to take judicial review proceedings on the basis that the Ministry of Defence policy against homosexuals serving in the armed forces was "irrational", that it was in breach of Articles 8 and 14 of the European Convention on Human Rights and that it was contrary to the EU Council Directive on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion and Working Conditions 76/207/EEC ("the Equal Treatment Directive").

40. On 30 April 1996 the European Court of Justice ("ECJ") decided that transsexuals were protected from discrimination on grounds of their transsexuality under European Community law (P. v. S. and Cornwall County Council [1996] Industrial Relations Law Reports 347). On 3 July 1996 Mr Perkins was granted leave by the High Court.

41. On 13 March 1997 the High Court referred the question of the applicability of the Equal Treatment Directive to differences of treatment based on sexual orientation to the ECJ

pursuant to former Article 177 of the Treaty of Rome (R. v. Secretary of State for Defence, ex parte Perkins, 13 March 1997).

42. On 17 February 1998 the ECJ found that the Equal Pay Directive 75/117/EEC (which, like the Equal Treatment Directive, prohibited discrimination "on grounds of sex") did not apply to discrimination on grounds of sexual orientation (Grant v. South West Trains Ltd [1998] ICR 449). Consequently, on 2 March 1998 the ECJ enquired of the High Court in the Perkins case whether it wished to maintain the Article 177 reference. After a hearing between the parties, the High Court decided to withdraw the question from the ECJ (R. v. Secretary of State for Defence, ex parte Perkins, 13 July 1998). Leave to appeal was refused.

43. The applicants issued proceedings, along with a number of other individuals, in the Industrial Tribunal claiming unfair dismissal and sexual discrimination on 10 August 1995, in September 1995 and in October 1995 respectively. They argued, inter alia, in favour of the applicability of the Equal Treatment Directive to a difference of treatment based on sexual orientation. Following a hearing before the Industrial Tribunal in August 1996, their cases together with a series of similar cases, were stayed pending the outcome of the above-described Perkins case then pending before the High Court. That stay was renewed in May 1997 and in June 1998. However, further to the High Court decision of 13 July 1998 in the Perkins case, the applicants, following legal advice, withdrew their applications before the Industrial Tribunal, which tribunal consequently dismissed their applications on 23 December 1998.

II. RELEVANT DOMESTIC LAW AND PRACTICE

44. The domestic law and practice relevant to the present applications is described in the judgments of the Court in the cases of Lustig-Prean and Beckett v. the United Kingdom (nos. 31417/96 and 32377/96, §§ 22-34 and 37-61, 27 September 1999, unreported) and Smith and Grady v. the United Kingdom (nos. 33985/96 and 33986/96, §§ 29-41 and 44-68, 27 September 1999, ECHR 1999-VI).

The law

I. ALLEGED VIOLATION OF ARTICLES 3, 8 AND 10 OF THE CONVENTION, ALONE AND IN CONJUNCTION WITH ARTICLE 14, AND OF ARTICLE 13 OF THE CONVENTION

45. The applicants complained about both the intrusive investigations into their private lives and about their subsequent discharges from the armed forces pursuant to the absolute policy of the Ministry of Defence against homosexuals in the armed forces. They invoked Article 8, both alone and in conjunction with Article 14 of the Convention.

46. They also considered that they were treated in a manner inconsistent with Article 3, either taken alone or in conjunction with Article 14 of the Convention. They referred both to the intrusive investigations into their private lives and to their being singled out for investigation and discharge because of their homosexuality.

47. The applicants further complained about the decision to adopt and apply the policy against homosexuals in the armed forces, about the investigations conducted and about their having been discharged because of their homosexuality, invoking Article 10, both alone and in conjunction with Article 14 of the Convention.

48. Finally, the applicants invoked Article 13 of the Convention, arguing that they had no effective domestic remedy in relation to the above violations of the Convention.

49. The relevant Articles of the Convention read, in so far as relevant, as follows:

Article 3:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 8:

“1. Everyone has the right to respect for his private ... life, ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety...”

Article 10:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, ...”

Article 13:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ...”

Article 14:

“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.”

A. The parties' submissions

50. By their letter to the Court dated 14 January 2000 the Government stated that they did not believe that the Court's consideration of the present cases should lead to conclusions on the substantive issues different from those reached in the above-cited cases of Lustig-Prean and Beckett and Smith and Grady. By their letter to the Court dated 18 February 2000 the applicants confirmed that they agreed with the Government on this point.

B. The Court's assessment

1. Article 8 of the Convention, alone and in conjunction with Article 14

51. The Court recalls that in its judgments in the above-cited cases of Lustig-Prean and Beckett (§§ 63-68 and 80-105) and Smith and Grady (§§ 70-75 and 87-112) it found that the investigation of the applicants' sexual orientation, and their discharge from the armed forces on the grounds of their homosexuality pursuant to the absolute policy of the Ministry of Defence against the presence of homosexuals in the armed forces, constituted direct interferences with the applicants' right to respect for their private lives which could not be justified under the second paragraph of Article 8 of the Convention as being "necessary in a democratic society". A violation of Article 8 was therefore found.

52. The Court further recalls that, in those cases, it considered (at §§ 108 and 115, respectively) that the applicants' complaints under Article 14 of the Convention that they had been discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence amounted in effect to the same complaint, albeit seen from a different angle, that the Court had already considered in relation to Article 8 of the Convention.

53. The Court does not consider there to be any material difference between those cases and the present one. Accordingly, the Court finds that in the present case there has been a violation of Article 8 of the Convention in respect of each applicant. In addition, the Court

does not consider that the applicants' complaints under Article 14 of the Convention in conjunction with Article 8 give rise to any separate issue.

2. Article 3 of the Convention, alone and in conjunction with Article 14

54. The Court further recalls that in its above-cited judgment in Smith and Grady (§§ 122-123) it found no violation in respect of the applicants' complaints under Article 3, taken either alone or in conjunction with Article 14 of the Convention. It considered that, while the policy of the Ministry of Defence together with the investigation and discharge which ensued were undoubtedly distressing and humiliating for the applicants, the treatment did not reach, in the circumstances of the cases, the minimum level of severity which would bring it within the scope of Article 3 of the Convention.

55. The Court does not find that there is any material difference between that case and the present one. Accordingly, the Court concludes that in the present case there has been no violation of Article 3 of the Convention, taken alone or in conjunction with Article 14.

3. Article 10 of the Convention, alone and in conjunction with Article 14

56. The Court further considered in its above-cited Smith and Grady judgment (§§ 127-128) that it was not necessary to examine Ms Smith and Mr Grady's complaints under Article 10 of the Convention, either alone or in conjunction with Article 14. It did not rule out that the policy of the Ministry of Defence could constitute an interference with the applicants' freedom of expression. However, it noted that the sole ground for the investigation and discharge of the applicants was their sexual orientation which was an essentially private manifestation of human personality and it considered that the freedom of expression element of the present case was subsidiary to the applicants' right to respect for their private lives which was principally at issue.

57. The Court does not find that there is any material difference between that case and the present one. Accordingly, the Court concludes that in the present case it is not necessary to examine the applicants' complaints under Article 10 of the Convention, either taken alone or in conjunction with Article 14.

4. Article 13 of the Convention

58. In its above-cited Smith and Grady judgment (§§ 135-139), having reviewed the domestic remedies available to the applicants including judicial review proceedings, the Court found that the applicants had no effective remedy in relation to the violation of their right to respect for their private lives guaranteed by Article 8 of the Convention and that there had been, accordingly, a violation of Article 13 of the Convention.

59. The Court does not find that there is any material difference between that case and the present one. Consequently, the Court concludes that in the present case there has been a violation of Article 13 in conjunction with Article 8 of the Convention on the basis that the applicants did not have any effective remedy in relation to the violation of their right to respect for their private lives.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

60. Article 41 of the Convention provides:

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

61. The applicants claimed compensation for pecuniary and non-pecuniary losses and the reimbursement of legal costs and expenses.

A. Non-pecuniary loss

62. The applicants submitted that the investigations into their sexuality, notwithstanding their admissions of homosexuality, and their resulting discharges, were serious, insulting and unnecessary intrusions into their personal lives. They emphasised the negative effects that their investigations and discharges had had upon them. Each applicant claimed just satisfaction for non-pecuniary loss of 19,000 pounds sterling (GBP).

63. The Government accepted that an award of GBP 19,000 should be made to each of the applicants in respect of non-pecuniary loss.

64. The Court recalls its judgments in Lustig-Prean and Beckett v. the United Kingdom (just satisfaction), nos. 31417/96 and 32377/96, § 12, 25 July 2000, unreported ("Lustig-Prean and Beckett (just satisfaction)") and Smith and Grady v. the United Kingdom (just satisfaction), nos. 33985/96 and 33986/96, § 13, 25 July 2000, ECHR 2000-IX ("Smith and Grady (just satisfaction)"), in which it gave its reasons as to why the interferences with the applicants' private lives were considered to be especially grave: the investigation process was particularly intrusive; the discharge of the applicants had a profound effect upon them and their careers; and the absolute and general character of the policy led to the discharge of the applicants on the grounds of an innate personal characteristic irrespective of their conduct or service records. In those cases an award of GBP 19,000 was made to each applicant.

65. The Court finds that similar considerations apply to the present applicants. Accordingly, the Court awards, on an equitable basis, 30,300 euros (EUR) to each applicant in compensation for non-pecuniary loss.

B. Pecuniary loss

1. The applicants' submissions

66. The pecuniary loss claims of the applicants were based upon the difference between their civilian income and benefits and their service income and benefits had they not been discharged. The period used to calculate past loss was taken from the date of their discharges to 5 April 2001, from which date their claims for future losses were calculated. Each of the applicants based their claims for pecuniary loss upon assumptions about the future course of their service careers had they not been discharged.

(a) Career assumptions

67. Notwithstanding that each of the applicants believed that they would in fact have retired in higher ranks (Warrant Officer, Captain and Wing Commander, respectively) and, in the case of the first and third applicants, served for longer (until they were 55 years of age), they submitted that just satisfaction would be achieved if compensation for pecuniary loss were based upon the following, more modest, career assumptions. In the case of the first applicant, that he would have been promoted to Chief Technician in 1995 and retired in that rank in February 2006. In the case of the second applicant, that he would have been promoted to Lance Corporal in 1982 and Corporal in 1984, in which rank he would have retired in December 2000. In the case of the third applicant, that he would have remained a Flight Lieutenant until his retirement in July 2005.

(b) Past pecuniary loss

68. All three applicants relied upon Ministry of Defence data to calculate what their earnings in the armed forces would have been had it not been for their discharges.

69. The first applicant submitted that, following his discharge, his self-esteem had been badly affected, he had not received any emotional support to assist him in re-establishing himself in civilian life and he suffered from ongoing psychological and emotional problems. He argued that he made every effort to mitigate his loss, finding a secretarial job in London between 1994 and 1996. However, he contended that he had to leave London as he could not afford to live there on his salary. He therefore moved back to the area in which his family lived in Lancashire, a place of high unemployment where he submitted that he had been unable to find any further paid work, had received only state benefits from 1996 onwards and had continued to look for work. The first applicant submitted that his RAF earnings from November 1993 to April 2001 would have ranged from GBP 19,578.60 to GBP 29,433.60 and that his loss of earnings during that period had been GBP 137,210.98. He further calculated compound interest thereon to be GBP 46,910.45.

70. The second applicant submitted that, following his discharge, he started work in the National Health Service ("NHS") as an enrolled nurse in October 1982. As a result of an accident at work in 1986, he took ill-health early retirement in 1994, after which he received benefits and undertook some agency work. For the period prior to 1994, as he had not retained records of his earnings, he relied upon national salary figures provided by the Royal College of Nursing ("RCN"). Where RCN figures were not available for a particular year, he provided an estimate based upon figures which were ascertainable for surrounding years. The second applicant accepted that he could only claim for losses which were directly attributable to the Convention violations. For the period from 1994 onwards, he therefore based his claim only upon the average annual difference between his military and civilian earnings during the period from 1982 to 1994 (approximately GBP 3,500). He accepted that any loss which he had suffered over and above that amount was attributable to his accident at work and not to the Convention violations. He submitted that his armed forces earnings from 1982 to 2000 would have ranged from GBP 6,679.25 to GBP 20,415.48 and calculated his past loss of earnings to be GBP 63,743.85, with compound interest thereon of GBP 52,062.18.

71. The third applicant submitted that he started work as an accountant following his discharge in 1995 on a much reduced salary to that which he had earned in the RAF. His earnings as an accountant had ranged from GBP 15,671.37 to GBP 30,499.92 from 1995 to

2001, whereas he submitted that those in the RAF would have ranged from GBP 33,456.06 to GBP 43,245.20 during the same period. He calculated his past loss of earnings to be GBP 97,444.43, with compound interest thereon of GBP 32,071.48.

(c) Future loss of earnings

72. The first applicant submitted that he would continue to be unemployed in the near future given that unemployment remained high in his region and that he still experienced emotional and psychological difficulties resulting from the lengthy investigation carried out by the RAF. By reference to his average annual past loss of earnings calculations, he submitted that his future loss of earnings would be in the region of GBP 20,000 per annum. To calculate his loss from April 2001 to February 2006, he multiplied GBP 20,000 by six to claim a loss of GBP 120,000.

73. The second applicant submitted that, had he been allowed to serve his full term of engagement, he would have retired voluntarily in 2000. He therefore did not make any claim for future loss of earnings.

74. The third applicant submitted that the average annual difference between what he could have earned in the RAF and his civilian earnings was approximately GBP 16,000 between 1995 and 2001. He multiplied this average annual figure by four to calculate his future loss of earnings from 2001 to 2005, which he claimed to be GBP 64,000.

(d) Loss of pension benefits

75. All three applicants relied upon the expert report of an actuary, which contained, inter alia, the following general features. The reports contrasted the immediate military pensions to which the applicants would have been entitled upon their retirement had they not been discharged, with the deferred military pensions which they would now receive upon reaching 60 years of age and any civilian pension benefits which had accrued to them following their discharges. In adopting a "multiplier" to reflect the deduction to be made to allow for the

early receipt of the pension benefits and for mortality rates, the reports applied two alternative "rates of return" (the net real rate of interest that would accrue upon the investment of any award made) of 2%, which the expert recommended, ("recommended basis") and 4%, which the expert regarded as a reasonable alternative ("alternative basis"). The reports acknowledged that the House of Lords had held in a personal injury case that the rate of return to be used should be 3% (Wells v. Wells [1999] 1 AC 345). The amounts claimed for loss of pension benefits were presented as round figures, the reports stating that they were based upon a number of assumptions about the future and that it was therefore important not to impute a false sense of accuracy to the eventual results. The reports further emphasised that they did not allow for contingencies other than the early receipt of the benefits and mortality rates, such as the applicants not remaining in the armed forces for as long as they had predicted.

76. The reports contained, inter alia, the following specific features. The first applicant's report was based upon the assumption that he would have been unemployed from the date of his discharge in 1993 until the date on which he would have ordinarily retired from the RAF in 2006, save for his period of employment between 1994 and 1996. The only deduction made for civilian pension benefits was therefore for those accrued during that latter period (which amounted to a State Earnings Related Pension of GBP 83 per annum, payable at 65 years of age). His loss of pension benefits was calculated to be GBP 140,000 (recommended basis) or GBP 107,900 (alternative basis).

77. The second applicant's report made an allowance for the pension benefits which had accrued to him during his army service from 1978 to 1982. It did so by calculating and deducting the value of those benefits had they been paid out by way of a standard deferred military pension, once the second applicant reached 60 years of age. The report noted that the second applicant had, in fact, transferred his army pension benefits to the NHS pension scheme that he joined in 1982. However, it stated that, because any loss or gain resulting from that transfer was not caused directly by his discharge, it had ignored it for the purposes of calculating the value of those benefits and had instead adopted the method described above. The report calculated the second applicant's overall pension loss to be GBP 115,800 (recommended basis) or GBP 101,400 (alternative basis).

78. The third applicant's report calculated the civilian pension benefits that he would have received from his discharge in 1995 to his forecasted date of retirement from the RAF in 2005 by reference to the three employers that he would have in that period. In the case of the first employer, the benefits were calculated by reference to the value of a pension scheme which would be payable to him when he reached 60 years of age. In the case of the second and third employers, the benefits were calculated by reference to the total value of the pension contributions made by those employers into their company pension schemes on the third applicant's behalf from 1997 to 2005. His overall pension loss was calculated to be GBP 156,000 (recommended basis) or GBP 114,100 (alternative basis).

(e) Loss of additional benefits

79. All three applicants submitted that, as members of the armed forces, they were entitled to free health and dental care similar to that available with private health insurance. They further submitted that they were entitled to subsidised accommodation and meals, free travel warrants and free sports facilities. They contended that the annual cost of replacing those benefits was approximately GBP 5,000. They claimed losses under this head of GBP 60,000, GBP 90,000 and GBP 50,000 respectively.

2. The Government's submissions

(a) Career assumptions and general observations

80. The Government attached a career forecast for the first applicant which they accepted was in some respects more generous than that relied upon by him, as it allowed for him to have attained the rank of Warrant Officer and to have retired at 55 years of age. However, the Government submitted that it was more likely that he would have served only until he was 47 years of age in 2006 and that it was quite possible that he would have left the RAF before that

time. They further estimated that the first applicant would not have been promoted to Chief Technician until 1997 and, even then, that was only a strong possibility rather than a certainty.

81. The Government submitted that it was most unlikely that the second applicant would have served for 22 years. They referred to army records which showed only six male soldiers entering his cadre, of whom only one, who qualified one year later than the second applicant, was still serving in February 2001. They argued that it was much more reasonable to assume that the second applicant would have left, in common with many others, upon becoming eligible for a resettlement grant after 12 years. The Government attached a career forecast and rates of pay for the second applicant to their submissions, which were based upon his being discharged after having completed 22 years service (described in the career forecast as "likely") and being promoted twice further (to Sergeant and Staff Sergeant) after obtaining the rank of Corporal in 1987.

82. As to the third applicant, the Government attached a career forecast which stated that he would not have progressed beyond the rank of Flight Lieutenant and would have been likely to leave the RAF in around 2005. The Government noted that he had a problem with air sickness, which they submitted would have been particularly serious for him as a navigator.

83. In relation to the claims for pecuniary loss as a whole by all three applicants, the Government submitted that they were excessive. In particular, they contended that the applicants had failed properly to mitigate their loss and that, where the claims involved future loss, they did not allow for any discount where the amounts will be received earlier than they otherwise would have been.

(b) Past pecuniary loss

84. As to the first applicant, the Government contended that he had overstated his rates of pay and they provided rates they submitted would have been applicable to him, ranging from GBP

19,578.60 to GBP 26,769.10 from 1993 to 2001. They further submitted that he had failed to mitigate his loss. They pointed out that his service record was excellent, that he left the armed forces with skills in information technology ("IT") which are highly marketable and that he therefore could and should have obtained a salary commensurate with his earnings in the RAF.

85. As to the second applicant, the Government did not accept that he had substantiated the amount he had claimed. They submitted that his loss of earnings claim was based, in part, upon estimated civilian earnings, did not take account of any industrial injury compensation awarded in relation to his accident at work and was unclear as to whether the figures provided included sick pay prior to his ill-health retirement. For the reasons stated at paragraph 81 above they emphasised that it was most unlikely that he would have remained in the army for 22 years in any event.

86. As to the third applicant, the Government noted that his reported earnings as a qualified accountant appeared to be low. They pointed out that the average earnings of an accountant were stated to be over GBP 33,000 per annum in 2000, that it had not been explained why his earnings in his second and third years as an accountant were lower than those in his first year and that he was under a duty to mitigate his loss. They further provided details of what they submitted were the correct rates of pay that the third applicant would have received had he remained in the RAF between 1995 and 2001, ranging from GBP 30,304.00 to GBP 42,007.85.

87. In the above circumstances, the Government submitted that no award for past pecuniary loss should be made to the first applicant and suggested that awards under this head of GBP 10,000 and GBP 15,000, inclusive of interest, would be reasonable in relation to the second and third applicants respectively.

(c) Future loss of earnings

88. As to the first applicant, the Government submitted that his claim of GBP 20,000 per annum ignored any discount which should be made as a result of his receiving the amount early. They further argued that it was wholly unreasonable for him to put forward a claim on the basis that he would not be able to find future employment at or about the average wage of in the region of GBP 25,000 for someone with comprehensive IT knowledge. The Government contended that, as a result of his failure to mitigate his loss, the first applicant should not be made any award under this head.

89. As to the second applicant, the Government noted that he did not make any claim for future loss of earnings.

90. As to the third applicant, the Government submitted that one would expect that his earnings would increase over the four years claimed for future loss, as he established himself in his profession. They suggested that it would be more reasonable to calculate the figure for annual future loss as being GBP 2,500. They further submitted that it was not appropriate to multiply any alleged annual loss by four, as a multiplier needed to be used to reflect the early receipt of the sum and other contingencies. They submitted that the appropriate award to be made to the third applicant under this head of loss was GBP 8,900.

(d) Loss of pension benefits

91. As to the claims of all three applicants for loss of pension benefits, the Government confirmed that the pensions which had accrued to them from their service at the time of their discharges were index-linked and payable at 60 years of age. They further submitted that the appropriate rate of return to use in relation to the multiplier was 3%.

92. As to the first applicant, the Government confirmed, in line with the figures used in his actuarial report, that, on discharge, he had accrued a terminal grant of GBP 12,070.38 and a pension of GBP 4,023.46 per annum and that, had he served until 2006, those sums would

have amounted to an immediately payable GBP 31,776 and GBP 10,592 respectively. They submitted that there was only a chance, and no certainty, that he would have served for 22 years and that if he had mitigated his loss by securing full-time civilian employment after his discharge it was very probable that he would have joined a company pension scheme.

93. As to the second applicant, the Government did not provide any details of the benefits he was awarded at his discharge and the figures that they provided to represent his immediate terminal benefits had he retired in 2000 related to the rank of Staff Sergeant. (The second applicant had estimated his deferred benefits on discharge as a Private to have amounted to a terminal grant of GBP 854.31 and a pension of GBP 284.77 per annum and he had used Ministry of Defence data to state that his pension benefits would have amounted to an immediately payable terminal grant of GBP 20,253 and a pension of GBP 6,751 per annum had he retired as a Lance Corporal in 2000). The Government submitted that it was unlikely that the second applicant would have served for 22 years until 2000 and that the figures given in the actuarial report to represent his future civilian pension were too low in that they did not include the benefits of his military pension which had accrued from 1978 to 1982 and which he had transferred into his NHS pension scheme.

94. As to the third applicant, the Government confirmed, in line with the figures used in his actuarial report, that, on discharge, he had accrued a terminal grant of GBP 8,805.36 and a pension of GBP 2,935.12 per annum and that, had he served until 2005, those sums would have amounted to an immediately payable GBP 28,884 and GBP 9,628 respectively. The Government submitted that they would have expected that after his return to civilian life, particularly as an accountant, he would have mitigated his loss by participating in his company pension scheme or by purchasing a personal pension scheme.

95. The Government submitted that a reasonable sum to be awarded to each applicant for loss of pension benefits would be GBP 15,000.

(e) Loss of additional benefits

96. The Government did not accept that any award should be made for loss of additional benefits. They did not agree that the medical and dental services provided to the armed services were comparable with those provided by private health insurers. They emphasised that assisted travel was provided to service personnel to undertake periodic journeys from their unit to their home, and was not therefore relevant to a serviceman who had returned to civilian life. They contended that it was not possible to quantify the value of any sports facilities that were provided and that, in any event, many civilian employers provide free sports facilities. They further argued that, although food and accommodation was supplied to members of the armed forces, this resulted from the nature of their service and was not relevant once they had returned to civilian life. The Government emphasised that, in the case of the third applicant, it would have been expected that, as an officer, he would have purchased a property in which to live or rent out.

3. The Court's assessment

(a) Applicable principles and general observations

97. The Court recalls that, in principle, a judgment in which the Court finds a violation of the Convention imposes on the respondent State a legal obligation to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. However, in cases such as the present, a precise calculation of the sums necessary to make complete reparation (restitutio in integrum) in respect of the pecuniary losses suffered by the applicants is prevented by the inherently uncertain and speculative character of the damage flowing from the violation. This is particularly so in relation to the question of how long the applicants would have remained in the armed forces had it not been for their dismissal. Furthermore, in respect of future loss, the greater the interval since the discharge of the applicant the more uncertain the damage becomes.

98. Accordingly, the Court considers that the question to be decided is the level of just satisfaction which it is necessary to award to each applicant, the matter to be determined by

the Court at its discretion, having regard to what is equitable (the above-cited cases of Lustig-Prean and Beckett (just satisfaction), §§ 22-23 and Smith and Grady (just satisfaction), §§ 18-19). The Court has also had regard to paragraphs 24 and 20, respectively of those judgments on just satisfaction, where the Court underlined the emotional and psychological impact on those applicants of their dismissals from the armed forces, the differences between service and civilian life and qualifications and the consequent difficulty in finding civilian careers equivalent to their service careers.

99. Furthermore, the Court gives credit to the applicants for the modest manner in which they have presented their career assumptions for the purposes of assessing their claims for just satisfaction. The Court notes that, in certain respects, the career forecasts provided by the Government were more generous than those used by the applicants to calculate their losses.

(b) Past pecuniary loss

100. As to the first applicant, the Court recalls that it is not in dispute that he joined the RAF on 4 May 1976 or that, at the time of his discharge on 27 November 1993, he was a Sergeant. But for his discharge, the Government accepted that there was a strong possibility that he would have been promoted to Chief Technician, the parties disagreeing as to whether this promotion would have been in 1995 or 1997. For the purposes of assessing just satisfaction, the parties also agreed that he would not have been further promoted until he left the RAF. The Court has assumed that the applicant would have been promoted to Chief Technician in 1996.

101. The first applicant has been unemployed since his discharge, except for a period between 1994 and 1996. The Court recognises that the investigation and discharge would have had a profoundly negative effect upon him, he would have undoubtedly faced difficulties in re-adjusting to civilian life and it would not be unexpected that at least an initial period of unemployment would have followed his discharge. Nevertheless, the first applicant has not provided any evidence (medical, employment, job applications or otherwise) to support his

contention that in over 7 years after his discharge it was impossible for him to obtain work other than the secretarial job he completed from 1994 to 1996. The Court also notes that the first applicant had attributes which should have been of assistance to him in finding employment, namely a successful career in the RAF and experience, inter alia, as a communications systems analyst. In all the circumstances, the Court is not persuaded that he has fully mitigated his loss.

102. However, and in the absence of relevant supporting evidence, the Court is not convinced by the Government's assertion that the first applicant should have been capable of earning an amount equal to his remuneration in the RAF which on the Government's own figures would have ranged from GBP 19,578.60 to GBP 26,769.10 during the relevant period. While the Court may have expected further mitigation from the applicant as noted above, it is prepared to accept that any such civilian remuneration may well have amounted to less than his above-cited RAF earnings during the equivalent period.

103. As to the second applicant, the Court recalls that it is not in dispute that he joined the armed forces on 1 June 1978 and, at the time of his discharge on 29 January 1982, he was a Private who was likely to have been promoted to the rank of Corporal. For the purposes of assessing just satisfaction, having regard to the career assessments provided by both parties, the Court regards it as equitable to assume that the second applicant would have been promoted to Corporal in 1984 and remained in that rank until he left the armed forces. The Court further regards it as reasonable to assume that, subject to contingencies which can only be a matter of speculation, it is likely that the second applicant would, but for his discharge, have remained in the armed forces for a substantial period. In coming to that conclusion, the Court notes that the dispute between the Government and the second applicant related to whether he would have left after 12 or 22 years. It has further taken into account that, notwithstanding their primary submission on the point, the career forecast provided by the Government was based upon the second applicant having served for 22 years, which was described in that forecast as "likely".

104. The Court notes that the Government did not directly challenge the rates of army pay upon which the second applicant relied to calculate what he would have earned, but for his discharge, from 1982 to 2000 (which ranged from GBP 6,679.25 to GBP 20,415.48 per annum). The Court further finds that the estimates used by the second applicant as to his civilian pay where actual figures were not available appear reasonable and that he made specific allowance for his accident at work in his calculations, as described at paragraph 70 above.

105. As to the third applicant, the Court recalls that it is not in dispute that he joined the RAF on 10 November 1985 and that, at the time of his discharge on 4 September 1995, he was a Flight Lieutenant who would, for the purposes of assessing just satisfaction, have remained in that rank during his claimed period of loss. The Court accepts the rates of pay provided by the Government, ranging from GBP 30,304 to GBP 42,007.85 per annum from 1995 to 2001, as an accurate statement of what his RAF salary would have been. The Court finds that the third applicant has mitigated his loss. It notes that he engaged in an alternative career as soon as his discharge from the RAF took effect and that he has worked continuously thereafter. The Court considers it reasonable that his annual salary was likely to be lower than the national average for an accountant initially (stated by the Government to be GBP 33,000), while noting that it had risen to a figure approaching that amount after only six years in civilian life.

106. In relation to the past loss of earnings claims of all three applicants, the Court notes that they were based upon gross earnings and that an appropriate deduction is therefore required to represent payments that would have been made by them in taxation and national insurance contributions.

107. The Court also finds that the applicants are entitled to claim interest on their past loss of earnings.

108. In the above circumstances, on an equitable basis, the Court awards EUR 67,700, EUR 63,400 and EUR 87,700 to the first, second and third applicants, respectively for their past pecuniary losses. Each award is made inclusive of interest.

(c) Future loss of earnings

109. As to the first applicant, the Court refers to its reasoning above in relation to his claim for past pecuniary loss. It finds that, had the first applicant fully mitigated his loss, it is reasonable to assume that his civilian earnings would have increased as he became more established in his career. The Court also notes that the period from April 2001 to February 2006, in respect of which future loss is claimed, is a period of less than five years, as opposed to a six year period on which the first applicant based his future loss calculations.

110. The Court notes that the second applicant did not make any claim for future loss of earnings.

111. As to the third applicant, the Court has had regard to the loss experienced by him in the most recent year for which figures are available (GBP 11,507.93 for the year ended 2001). The Court regards it as reasonable to assume that this loss would narrow further over the four ensuing years, in respect of which future loss is claimed, as the third applicant became more established in his civilian career.

112. In relation to the claims of the first and third applicants, the Court has made an appropriate deduction from their gross loss claimed to represent the amounts that they would have had to pay in taxation and national insurance contributions. A further deduction has been made to reflect that the applicants will now be receiving these amounts earlier than they otherwise would have done.

113. In the above circumstances, on an equitable basis, the Court awards the first and third applicants EUR 23,900 and EUR 25,500, respectively for future loss of earnings.

(d) Loss of pension benefits

114. The Court considers significant the loss to the applicants of the non-contributory service pension scheme and accepts that the contributions which would be required in order to achieve an equivalent level of pension from a different pension scheme would be likely to be considerable. It is therefore of the view that they can reasonably claim some compensation to represent their pension loss. The amount of that loss is necessarily speculative, depending as it does on, inter alia, the period during which the applicants would have remained in service and on their rank at the time of leaving service. The Court notes, in particular, that had the applicants for any reason left the armed forces before they were entitled to receive an immediately payable pension (after 22 years service in the case of the first two applicants and after 20 years service in the case of the third), they would have been entitled only to a deferred pension, payable at 60 years of age, which would have significantly reduced the amount of their pension loss.

115. In addition, the Court finds the following more specific points to be of relevance in assessing the applicants' claims for loss under this head. As to the first applicant, the Court takes into account that he was only five years away from being entitled to an immediately payable pension at the time of his dismissal. It also refers to its above reasoning in relation to his claim for past pecuniary loss and regards it as appropriate to assume that he could have benefited from a company or private pension scheme had he fully mitigated his loss by obtaining some form of employment.

116. As to the second applicant and to the Government's submission that his civilian pension loss calculation failed to take account of the benefits of the military pension which had accrued to him from 1978 to 1982 and which he had transferred into his NHS pension scheme, the Court notes that an allowance was made for those military pension benefits, albeit

that the actuarial report filed on behalf of the second applicant did so by calculating what the value of those benefits ordinarily would have been once they became due to him had he not transferred them into his NHS pension scheme (see paragraph 77 above). The Court also regards as significant the fact that the second applicant had only served for just over three and a half years at the time of his discharge, which increases the speculation involved in assessing whether he would have remained in the armed forces to become entitled to an immediately payable pension after 22 years.

117. As to the third applicant, the Court notes that his civilian pension benefits were calculated, in part, by reference only to the pension contributions made by his employers as opposed to what the value of the pension fund will be when he reaches retirement age. It further notes that the actuarial report submitted on his behalf does not allow for increased pension contributions, by the third applicant or his employers, as his salary increases in the future.

118. Finally, the Court notes that the applicants' pension loss calculations used a multiplier to make allowance for their early receipt. In relation to that multiplier, in the circumstances of the case, the Court finds that it is reasonable to use a 3% rate of return.

119. Accordingly, and on an equitable basis, the Court awards the applicants EUR 39,800, EUR 23,900 and EUR 31,900, respectively for loss of pension benefits.

(e) Loss of additional benefits

120. The Court does not have any information from which to conclude that the medical and dental services provided by the armed forces were akin to those provided by private health insurers. Furthermore, the Court does not consider that the travel provided by the armed services to enable its personnel to undertake journeys from their units to their homes has a direct equivalent or need in civilian life. Moreover, in the absence of any details or supporting

evidence from the applicants demonstrating that they have suffered any actual loss in relation to food, accommodation or sports-related expenses, the Court finds this part of their claim to be unsubstantiated.

121. In the circumstances, the Court does not regard it as necessary to award just satisfaction to the applicants under this head of loss.

(f) Summary

122. The Court awards the first applicant EUR 67,700 for past pecuniary loss, EUR 23,900 for future loss of earnings and EUR 39,800 for loss of pension benefits, making a total award of compensation for pecuniary loss of EUR 131,400.

123. The Court awards the second applicant EUR 63,400 for past pecuniary loss and EUR 23,900 for loss of pension benefits, making a total award of compensation for pecuniary loss of EUR 87,300.

124. The Court awards the third applicant EUR 87,700 for past pecuniary loss, EUR 25,500 for future loss of earnings and EUR 31,900 for loss of pension benefits, making a total award of compensation for pecuniary loss of EUR 145,100.

C. Costs and expenses

125. The applicants claimed GBP 491.11, GBP 906.29 and GBP 1,024.24, respectively in respect of their domestic proceedings. In relation to the Convention proceedings, they claimed GBP 5,074.43, GBP 5,280.64 and GBP 5,925.13, respectively for solicitors' and other costs incurred up to and including the submission of their claims for just satisfaction. Included

within those figures were the costs of the actuarial reports in each case, which were charged at GBP 1,903.50, GBP 2,088.56 and GBP 2,350.00, respectively. Also included, in each case, were counsel's fees of GBP 195.83. The applicants further claimed GBP 35,837.50 each for "anticipated costs...to final hearing" following the submission of their claims for just satisfaction. All costs claimed were inclusive of value-added tax (VAT).

126. The Government submitted that, in accordance with its usual practice, the Court should not make any award for the costs of the domestic proceedings.

127. In relation to costs claimed for the Convention proceedings up to and including the claim for just satisfaction, the Government did not dispute the fee rates charged. However, they submitted that, while the hours spent on each individual application appeared reasonable, there was a very considerable degree of overlap between the three applications and that the overall award of costs should therefore be scaled down to reflect this. They further submitted that it was not clear why counsel had charged GBP 500 three times over. They submitted that a reasonable total award for legal costs and expenses would be GBP 10,000, inclusive of VAT.

128. In relation to the "anticipated costs ... to final hearing" claimed for the Convention proceedings, the Government submitted that no award should be made as they could not see any reason why any further costs should be incurred.

129. The Court recalls that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (the above-cited judgments of Lustig-Prean and Beckett (just satisfaction), § 32, and Smith and Grady (just satisfaction), § 28). The Court further recalls that the costs of the domestic proceedings can be awarded if they are incurred by applicants in order to try to prevent the violation found by the Court or to obtain redress therefor (see, among other authorities, the Le Compte, Van Leuven and De Meyere v. Belgium judgment of 18 October 1982, Series A no. 54, § 17) and that costs in respect of the domestic proceedings were in fact

awarded at paragraphs 30-33 of the above-cited case of Lustig-Prean and Beckett (just satisfaction).

130. As to the applicants' domestic proceedings, the Court finds that the actions issued in the Industrial Tribunal sought to obtain redress for the violations of the Convention which have been found in this judgment. It notes that the Government have not challenged the figures claimed, which appear to the Court, from the detailed schedules provided by the applicants' solicitors, to be reasonable. The Court therefore awards the applicants EUR 783, EUR 1,444 and EUR 1,632, respectively in respect of their domestic proceedings.

131. As to the applicants' Convention proceedings up to and including their claims for just satisfaction, the Court accepts the Government's submission that, while the period of time spent on each application appears reasonable, there was an overlap between the cases which should have enabled the three claims, taken together, to have been prepared in less time. The Court finds that this applies, in particular, to the preparation of the actuarial reports. The Court also notes that the fee note submitted in relation to counsel's charges is headed "Re: [Industrial Tribunal] and [Judicial Review] Proceedings re: lesbian and homosexual service women and men v. [Ministry of Defence]." In the absence of further information, these fees therefore appear to relate to the applicants' domestic proceedings and the fee charged appears to include amounts payable in respect of individuals additional to the present applicants. As such counsel's fees cannot be said to have been actually and necessarily incurred in relation to the applicants' Convention proceedings and are not allowed.

132. As to the applicants' claim for "anticipated costs...to final hearing" following the submission of their claims for just satisfaction, the Court emphasises that there has not been any oral hearing in the current case and that it does not consider that it should have been necessary for the applicants to have incurred any more than minimal costs, if any, since the submission of their claims for just satisfaction.

133. Accordingly, and deciding on an equitable basis, the Court awards the applicants the sums of EUR 5,600, EUR 6,100 and EUR 7,000, respectively in respect of the costs and expenses of their Convention proceedings. The sums are inclusive of VAT. The Court observes that, while legal aid was granted to the first applicant (paragraph 6 above), no legal aid payment has been made to him.

D. Default interest

134. As the award is expressed in euros to be converted into the national currency at the date of settlement, the Court considers that the default interest rate should also reflect the choice of the euro as the reference currency. It considers it appropriate to take as the general rule that the rate of the default interest to be paid on outstanding amounts expressed in euro should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

The Court's decision

1. Holds that there has been a violation of Article 8 of the Convention;

2. Holds that no separate issue arises under Article 14 of the Convention taken in conjunction with Article 8;

3. Holds that there has been no violation of Article 3 of the Convention taken either alone or in conjunction with Article 14;

4. Holds that it is not necessary to examine the applicants' complaints under Article 10 of the Convention taken either alone or in conjunction with Article 14;

5. Holds that there has been a violation of Article 13 of the Convention;

6. Holds

(a) that the respondent State is to pay the first applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted to pounds sterling at the date of settlement:

(i) EUR 30,300 (thirty thousand three hundred euros) in respect of non-pecuniary damage;

(ii) EUR 131,400 (one hundred and thirty one thousand four hundred euros) in respect of pecuniary damage;

(iii) EUR 783 (seven hundred and eighty three euros) in respect of the costs and expenses of the domestic proceedings;

(iv) EUR 5,600 (five thousand six hundred euros) in respect of the costs and expenses of the Convention proceedings;

(b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

7. Holds

(a) that the respondent State is to pay the second applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted to pounds sterling at the date of settlement:

(i) EUR 30,300 (thirty thousand three hundred euros) in respect of non-pecuniary damage;

(ii) EUR 87,300 (eighty seven thousand three hundred euros) in respect of pecuniary damage;

(iii) EUR 1,444 (one thousand four hundred and forty four euros) in respect of the costs and expenses of the domestic proceedings;

(iv) EUR 6,100 (six thousand one hundred euros) in respect of the costs and expenses of the Convention proceedings;

(b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

8. Holds

(a) that the respondent State is to pay the third applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts to be converted to pounds sterling at the date of settlement:

(i) EUR 30,300 (thirty thousand three hundred euros) in respect of non-pecuniary damage;

(ii) EUR 145,100 (one hundred and forty five thousand one hundred euros) in respect of pecuniary damage;

(iii) EUR 1,632 (one thousand six hundred and thirty two euros) in respect of the costs and expenses of the domestic proceedings;

(iv) EUR 7,000 (seven thousand euros) in respect of the costs and expenses of the Convention proceedings;

(b) that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

9. Dismisses the remainder of the applicants' claim for just satisfaction.

Chapter III Freedom of assembly and association

Case of Bączkowski and others v. Poland [9]

Procedure

1. The case originated in an application (no. 1543/06) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Tomasz Bączkowski, Mr Robert Biedroń, Mr Krzysztof Kliszczyński, Ms Inga Kostrzewa, Mr Tomasz Szypuła and by the Foundation for Equality (Fundacja Równości), on 16 December 2005.

2. The applicants were represented before the Court by Professor Zbigniew Hołda, a lawyer practising in Warsaw.

3. The respondent Government were represented by their Agent, Mr Jakub Wołąsiewicz of the Ministry of Foreign Affairs.

4. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied relevant domestic law to their case. They alleged that they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date of the planned assemblies. They also complained that they had been treated in a discriminatory manner in that they had been refused permission to organise the assemblies whilst other persons had received such permission.

5. By a decision of 5 December 2006, the Court declared the application admissible. It decided to join to the merits of the case the examination of the Government's preliminary objections.

6. The applicants filed further written observations (Rule 59 § 1).

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[9] Application no. 1543/06 Judgment Strasbourg 3 May 2007 FINAL 24/09/2007

The facts

I. THE CIRCUMSTANCES OF THE CASE

1. Preparation of the assemblies

7. The applicants, a group of individuals and the Foundation for Equality (of whose executive committee the first applicant is also a member empowered to act on its behalf in the present case), wished to hold, within the framework of Equality Days organised by the Foundation and planned for 10‑12 June 2005, an assembly (a march) in Warsaw with a view to alerting public opinion to the issue of discrimination against minorities – sexual, national, ethnic and religious – and also against women and disabled persons.

8. On 10 May 2005 the organisers held a meeting with the Director of the Safety and Crisis Management Unit of Warsaw City Council. During this meeting an initial agreement was reached as to the itinerary of the planned march.

9. On 11 May 2005 Mr Bączkowski obtained an instruction of the Warsaw Mayor's Office on "requirements which organisers of public assemblies have to comply with under the Road Traffic Act" should the assembly be regarded as an "event" (impreza) within the meaning of Article 65 of that Act.

10. On 12 May 2005 the organisers applied to the City Council Road Traffic Office for permission to organise the march, the itinerary of which would lead from the Parliament buildings (Sejm) to Assembly Square (Plac Defilad) in the centre of Warsaw.

11. On 3 June 2005 the Traffic Officer, acting on behalf of the Mayor of Warsaw, refused permission for the march, relying on the organisers' failure to submit a "traffic organisation plan" ("projekt organizacji ruchu") within the meaning of Article 65 (a) of the Road Traffic Act, which they had allegedly been ordered to submit.

12. On the same day the applicants informed the Mayor of Warsaw about stationary assemblies they intended to hold on 11 June 2005 in seven different squares in Warsaw. Four of these assemblies were intended to protest about discrimination against various minorities

and to support actions of groups and organisations combating discrimination. The other three planned assemblies were to protest about discrimination against women.

13. On 9 June 2005 the Mayor issued decisions banning the stationary assemblies to be organised by Mr Bączkowski, Mr Biedroń, Mr Kliszczyński, Ms Kostrzewa, Mr Szypuła, and another person, Mr N. (who is not an applicant), who are active in various non-governmental organisations acting for the benefit of persons of homosexual orientation. In his decision the Mayor relied on the argument that assemblies held under the provisions of the Assemblies Act of 1990 (Ustawa o zgromadzeniach) had to be organised away from roads used for road traffic. If they were to use roads, more stringent requirements applied. The organisers wished to use cars carrying loudspeakers. They had failed to indicate where and how these cars would park during the assemblies so as not to disturb the traffic, and how the movement of persons and these cars between the assembly sites would be organised.

14. Moreover, as a number of requests had been submitted to organise other assemblies on the same day the tenor of which ran counter to the ideas and intentions of the applicants, permission had to be refused in order to avoid any possible violent clashes between participants in the various demonstrations.

15. On the same day the municipal authorities, acting on the Mayor's behalf, allowed the three planned assemblies concerning discrimination against women to be held as requested by the applicants.

16. On the same day the same authorities permitted six other demonstrations to be held on 11 June 2005. The themes of these assemblies were as follows: “For more stringent measures against persons convicted of paedophilia”, “Against any legislative work on the law on partnerships”, “Against propaganda for partnerships”, “Education in Christian values, a guarantee of a moral society”, “Christians respecting God's and nature's laws are citizens of the first rank”, “Against adoption of children by homosexual couples”.

2. Meetings held on 11 June 2005

17. On 11 June 2005, despite the decision given on 3 June 2005, the march took place. It followed the itinerary as planned in the original request of 12 May 2006. The march, attended by approximately 3,000 people, was protected by the police.

18. In addition to the march, nine stationary assemblies were held on the same day under permission granted by the Mayor on 9 June 2005 (see paragraphs 15-16 above).

3. Appeal proceedings

a) The march

19. On 28 June 2005 the applicant Foundation appealed to the Local Government Appeals Board against the decision of 3 June 2005 refusing permission for the march. It was argued that the requirement to submit "a traffic organisation plan" lacked any legal basis and that the applicants had never been requested to submit such a document prior to the refusal. It was also argued that the decision amounted to an unwarranted restriction of freedom of assembly and that it had been dictated by ideological reasons incompatible with the tenets of democracy.

20. On 22 August 2005 the Board quashed the contested decision, finding that it was unlawful. The Board observed that under the applicable provisions of administrative procedure the authorities were obliged to ensure that parties to administrative proceedings had an opportunity of effectively participating in them. In the applicant's case this obligation had not been respected in that the case file contained no evidence that the applicant Foundation had been informed of its procedural right to have access to the case file.

The Board's decision further read, inter alia:

"In the written grounds of the decision complained of, the first-instance authority refers to the fact that no traffic organisation plan is to be found in the case file. Under section 65 (a) item 3 (9) an organiser of a demonstration is obliged to develop such a plan in co-operation with the police if he or she is required to do so by the authority. However, in the case file there is no mention that the organisers were obliged to submit such a plan. (...) The document on the procedure for obtaining permission to organise an event which was served on the organisers contained no information on such an obligation either.

Having regard to the fact that the organisers' request concerned a march to be held on 11 June 2005 and that the appeal was received by the Board's Office [together with the case file] on 28 June 2005, the proceedings had already become devoid of purpose by that latter date."

b) The assemblies

21. On 10 June 2005 the applicants appealed to the Mazowsze Governor against the Mayor's refusals of 9 June 2005 of permission to hold several of the planned assemblies. They argued that the assemblies were to be entirely peaceful and that banning them breached their freedom of assembly guaranteed by the Constitution. They submitted that the assemblies did not pose any threat to either public order or morals. They contested the argument relied on in the decision that they were required to submit a document on the planned itinerary between the places where the assemblies were to be held, arguing that they only intended to organise stationary assemblies, not any movement of persons between them, and that they should not be held responsible for the organisation or supervision of such movement.

22. On 17 June 2005 the Mazowsze Governor quashed the contested 9 June 2005 refusals of authorisation to hold the assemblies .

It was first observed that these decisions breached the law in that the parties had been served only with copies of the decisions, not with originals as required by the law on administrative procedure. It was further noted that the Mayor had informed the media of his decisions before they had been served on the applicants, which was manifestly in breach of the principles of administrative procedure.

23. It was further observed that the 1990 Assemblies Act was a guarantee of freedom of assembly in respect of both the organisation of and participation in assemblies. The Constitution clearly guaranteed freedom of assembly, not a right. It was not for the State to create a right to assembly; its obligation was limited to ensuring that assemblies were held peacefully. Thus the applicable law did not provide for any permit for the holding of an assembly.

24. The Governor noted that the requirement to submit a permit to occupy a part of the road, based on the provisions of the Road Traffic Act, lacked any legal basis in the provisions of the Assemblies Act. The Mayor had assumed that the demonstration would occupy a part of the road, but had failed to take any steps to clarify whether this had really been the organisers' intention, which he was obliged to do by law.

It was further observed that a decision banning an assembly had to be regarded as a method of last resort because it radically restricted freedom of expression. The principle of proportionality required that any restriction of constitutionally protected freedoms be permitted only in so far as it was dictated by the concrete circumstances of a particular case.

25. The Governor noted in this connection that the Mayor's reliance on the threat of violence between the demonstrations organised by the applicants and the counter-demonstrations planned by other persons and organisations for the same day could not be countenanced. It was tantamount to the administration endorsing the intentions of organisations which clearly and deliberately intended to breach public order, whereas protecting the freedom of expression guaranteed by the Assemblies Act should be an essential task of the public powers.

26. He then discontinued the proceedings as they had become devoid of purpose, the assemblies having taken place on 11 June 2005.

4. Translation of an interview with the Mayor of Warsaw published in "Gazeta Wyborcza" on 20 May 2005

27. "E. Siedlecka: The Assemblies Act says that freedom of assembly can be restricted only if a demonstration might entail a danger to life or limb, or a major danger to property. Did the organisers of the march write anything in their application that indicates that there is such a danger?

Mayor of Warsaw: I don't know, I haven't read the application. But I will ban the demonstration regardless of what they have written. I am not for discrimination on the ground of sexual orientation, for example by ruining people's professional careers. But there will be no public propaganda about homosexuality.

E. S. What you are doing in this case is precisely discrimination: you are making it impossible for people to use their freedom only because of their particular sexual orientation.

MoW: I do not forbid them to demonstrate, if they want to demonstrate as citizens, not as homosexuals.

E. S.: Everything seems to suggest that – like last year – the Governor will quash your prohibition. And if the organisers appeal to the administrative court, they will win, because preventive restrictions on freedom of assembly are unlawful. But the appeal proceedings will last some time and the date for which the march is planned will pass. Is this what you want?

MoW: We will see whether they win or lose. I will not let myself be persuaded to give my permission for such a demonstration.

E. S.: Is it right that the exercise of people's constitutional rights should depend on the views of the powers that be?

MoW: In my view, propaganda about homosexuality is not to the same as exercising one's freedom of assembly."

II. RELEVANT DOMESTIC LAW AND PRACTICE

1. Relevant provisions of the Constitution

28. Article 57 of the Constitution reads:

Freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone. Limitations upon such freedoms may be imposed by statute.

29. Article 79 § 1 of the Constitution, which entered into force on 17 October 1997, provides as follows:

"In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed shall have the right to appeal to the Constitutional Court for a judgment on the conformity with the Constitution of a statute or other normative act on the basis of which a court or an administrative authority has issued a final decision on his freedoms or rights or on his obligations specified in the Constitution."

30. Article 190 of the Constitution, insofar as relevant, provides as follows:

"1. Judgments of the Constitutional Court shall be universally binding and final.

2. Judgments of the Constitutional Court, ... shall be published without delay.

3. A judgment of the Constitutional Court shall take effect from the day of its publication; however, the Constitutional Court may specify another date for the end of the binding force of a normative act. Such time-limit may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. ...

2. The Assemblies Act

31. Pursuant to section 1 of the 1990 Assemblies Act, everyone has the right to freedom of peaceful assembly. A gathering of at least fifteen persons, called in order to participate in a public debate or to express an opinion on a given issue, is to be regarded as an assembly within the meaning of the Act.

32. Under section 2, freedom of assembly can be restricted only by statute and where it is necessary for the protection of national security or public safety, for the protection of health or morals or for the protection of the rights and freedoms of others.

33. All decisions concerning the exercise of freedom of assembly must be taken by the local authorities in the municipality where the assembly is to be held. These decisions can be appealed against to the Governor.

34. Under section 3 of the Act, the municipality must be informed by the organisers of the intention to hold a public gathering in the open air for an indeterminate number of persons. Under section 7 such information must be submitted to the municipality not earlier than thirty days before the planned date of the demonstration and not later than three days before it. The information must include the names and addresses of the organisers, the aim and programme of the demonstration, its place, date and time as well as information about the itinerary if the demonstration is intended to proceed from one place to another.

35. Pursuant to section 8 the municipality shall refuse permission for the demonstration if its purpose is in breach of the Act itself or of provisions of the Criminal Code, or if the demonstration might entail a danger to life or limb, or a major danger to property.

36. A first-instance refusal of permission to hold a demonstration must be served on the organisers within three days of the date on which the relevant request was submitted and not later than three days before the planned date of the demonstration. An appeal against such a refusal must be lodged within three days of the date of its service. The lodging of such an appeal does not have a suspensive effect on the refusal of permission to hold the demonstration.

37. A decision given by the appellate authority must be served on the organisers within three days of the date on which the appeal was submitted.

3. The Road Traffic Act

38. Under section 65 of the Road Traffic Act of 1997, as amended in 2003, the organisers of sporting events, contests, assemblies and other events which may obstruct road traffic are obliged to obtain permission for the organisation of such assemblies.

39. Under section 65 read together with section 65 (a) of the Act, organisers of such events are obliged to comply with various administrative obligations specified in a list contained in that provision and numbering nineteen items, including the obligation to submit a traffic organisation plan to the authorities.

40. These provisions were repealed as a result of the judgment of the Constitutional Court, referred to below.

4. Judgment of the Constitutional Court of 18 January 2006

41. In its judgment of 18 January 2006 the Constitutional Court examined a request submitted to it by the Ombudsman to determine whether the requirements imposed on organisers of public events by the provisions of the Road Traffic Act were compatible with the Constitution in so far as they impinged on freedom of assembly, or whether they amounted to an excessive limitation of that freedom.

42. The Constitutional Court observed that the essence of the constitutional problem was whether the requirements imposed by section 65 of the Act were compatible with freedom of expression as formulated by the Constitution and developed by the Assemblies Act. It noted that the 1990 Assemblies Act was based on the premise that the exercise of this freedom did not require any authorisations or licences issued by the State. As it was a freedom, the State was obliged to refrain from hindering its exercise and to ensure that it was enjoyed by various groups despite the fact that their views might not be shared by the majority.

43. Accordingly, the Assemblies Act provided for a system based on nothing more than the registration of the proposed assembly.

The court observed that subsequently, when it enacted the Road Traffic Act, the legislature had incorporated various administrative requirements which were difficult to comply with into the procedure created for the organisation of sporting events, contests and assemblies, thus replacing the registration system by a system based on permission. In so doing, it placed assemblies within the meaning of the Assemblies Act on a par with events of a commercial character or organised for entertainment purposes. This was incompatible with the special position that freedom of expression occupied in a democratic society and rendered nugatory the special place that assemblies had in the legal system under the Constitution and the Assemblies Act. The court also had regard to the fact that the list of requirements imposed by the Road Traffic Act contained as many as nineteen sundry administrative obligations. The restrictions on freedom of assembly imposed by that Act were in breach of the requirement of proportionality applicable to all restrictions imposed on the rights guaranteed by the Constitution.

44. The court concluded that section 65 of the Road Traffic Act was incompatible with the Constitution in so far as it applied to assemblies.

The law

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Whether the applicants can claim to have the status of victims

45. The Government contended by way of a preliminary submission that the applicants could not claim to be victims of a violation of the Convention within the meaning of Article 34. It transpired from the written grounds of the second-instance administrative decisions that the appellate authorities had fully shared the applicants' arguments and had quashed the contested decisions in their entirety. The Governor, in his decision of 17 June 2005 (see paragraph 22 above), had gone even further, stressing that prohibiting an assembly on the grounds of a threat of violence between demonstrators and counter-demonstrators was tantamount to the authorities' endorsing the intentions of organisations which deliberately set out to cause a disturbance. When quashing the contested decisions, the appellate authorities had stated that their assessment had been made bearing in mind the applicants' freedom of assembly. As the impugned decisions had eventually been found unjustified, the applicants could not claim to have victim status.

46. The Government were of the view that as the applicants had not claimed to have sustained any pecuniary or non-pecuniary damage, the domestic authorities had been under no obligation to offer them any redress. A decision or measure favourable to the applicant was not in principle sufficient to deprive him of his status as a “victim” unless the national authorities had acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (Eckle v. Germany, judgment of 15 July 1982, Series A no. 51, § 66).

47. The applicants submitted that the authority relied on by the Government, the Eckle v. Germany case, was of little relevance to the case at hand. They argued that it was only when those two conditions were cumulatively satisfied that the subsidiary nature of the protective mechanism of the Convention precluded examination of an application (see Scordino v. Italy (dec.), no. 36813/97, 27 March 2003). In their case it could not be said that those two conditions had been satisfied. No redress had ever been afforded at domestic level for any of the breaches of the Convention alleged in their application.

48. The Court reiterates that in its decision on the admissibility of the application it joined to the merits of the case the examination of whether the applicants could claim to be victims of a breach of their rights (see paragraph 5 above). The Court confirms its approach.

B. Exhaustion of domestic remedies

49. The Government submitted that the applicants had had at their disposal procedures capable of remedying the alleged breach of their freedom of assembly. Section 7 of the Assemblies Act provided for time-limits which should be respected by persons wishing to organise an assembly under the provisions of that Act. A request for authorisation for an assembly to be held had to be submitted to the municipality not earlier than thirty days before the planned date of the demonstration and no later than three days before it.

50. If the applicants had considered that the provisions on the basis of which the domestic decisions in their cases had been given were incompatible with the Constitution, it had been open to them to challenge those provisions by lodging a constitutional complaint provided for by Article 79 of the Constitution. The applicants could thus have achieved the aim they sought to attain before the Court, namely an assessment of whether the contested regulations as applied to their case had infringed their rights guaranteed by the Convention.

51. The Government recalled that the Court had held that the Polish constitutional complaint could be recognised as an effective remedy where the individual decision which allegedly violated the Convention had been adopted in direct application of an unconstitutional provision of national legislation (Szott-Medyńska v. Poland (dec.), no. 47414/99, 9 October 2003). The Government concluded that the applicants should have had recourse to that remedy.

52. The applicants disagreed. They submitted that because of the specific nature of their case, a remedy that had not been capable of providing them, before 11 June 2005, with a judicial or administrative review of the ban on holding their assemblies could not be regarded as effective. Subsequent review by the Constitutional Court would have served no practical purpose.

53. In any event, even if it were to be accepted that an ex post facto review could be contemplated as a remedy to be used in their case, the applicants were of the view that it would have been ineffective also for other reasons. A constitutional complaint under Polish

law was a remedy available only when a possibility existed to apply for the re-opening of the original proceedings in the light of a favourable ruling of the Constitutional Court. This condition alone would have rendered this remedy ineffective since, in view of the specific and concrete nature of the redress sought by the applicants, the reopening of their case would have been an entirely impracticable and untimely solution. Furthermore, the quashing of the final decisions would have been futile as the decisions of 3 and 9 June 2005 had already been quashed by the Self-Government Board of Appeal and the Governor of Mazowsze Province on 22 August and 17 June 2005, respectively.

54. The Court reiterates that in its decision on the admissibility of the application it joined to the merits of the case the examination of the question of exhaustion of domestic remedies (see paragraph 5 above). The Court confirms its approach to the exhaustion issue.

II. THE MERITS OF THE CASE

A. Alleged violation of Article 11 of the Convention

55. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied the relevant domestic law to their case. They invoked Article 11 of the Convention which reads:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

1. The arguments of the parties

56. The Government were of the view that there had been no interference with the applicants' rights guaranteed by Article 11 of the Convention. They referred in this respect to their submissions concerning the applicants' victim status (see paragraphs 45-48 above).

57. The Government did not contest the fact that the second-instance decisions of the domestic authorities had been given after the date for which the assemblies had been planned. However, the applicants had been aware of the time-limits provided by the applicable laws for the submission of requests for permission to hold an assembly.

58. The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied the relevant domestic law to their case. It followed from the very character of freedom of assembly that the requirements which laws imposed on organisers of public meetings should be restricted to a reasonable minimum and to those of a technical character.

59. Under the 1990 Assemblies Act the authorities could ban the organisation of an assembly only when its purpose ran counter to provisions of criminal law or when it might entail danger to life or limb or a major danger to property. On the other hand, the requirements that could be imposed on organisers of assemblies once the authorities classified the assembly to be held as an "event" under the Road Traffic Act went much further. They lacked precision, leaving the decision as to whether the organisers satisfied them entirely to the discretion of the authorities.

60. In the applicants' view, the Mayor's refusals lacked proper justification. The assemblies to be held were of a peaceful character, their aim being to draw society's attention to the situation of various groups of persons who were discriminated against, in particular persons of homosexual orientation. The relevant requests had complied with the very limited requirements laid down by the Assemblies Act. As to the Equality March, the refusal had been motivated by the alleged failure of the applicants to submit a traffic organisation plan which the authorities had never required to be submitted prior to this refusal. These assemblies had lawful aims and there had been no special grounds, such as a major danger to property or danger to life or limb, which could justify the refusals.

2. The Court's assessment

61. As has been stated many times in the Court's judgments, not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a "democratic society" (see Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 86-89, ECHR 2003-II, and Christian Democratic Peoples Party v. Moldova, 28793/02, 14 May 2006).

62. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively (see Gorzelik and Others v. Poland [GC], no. 44158/98, § 92, 17 February 2004).

63. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see Young, James and Webster v. the United Kingdom, 13 August 1981, Series A no. 44, p. 25, § 63, and Chassagnou and Others v. France [GC], nos. 25088/95 and 28443/95, ECHR 1999-III, p. 65, § 112).

64. In Informationsverein Lentia and Others v. Austria (judgment of 24 November 1993, Series A no. 276, p. 16, § 38) the Court described the State as the ultimate guarantor of the principle of pluralism. Genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms (see Wilson & the National Union of Journalists and Others v. the United Kingdom, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V, and

Ouranio Toxo v. Greece, no. 74989/01, 20 October 2005, § 37). This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.

65. In this connection, the Court reiterates that according to the Convention organs' constant approach, the word "victim" of a breach of rights or freedoms denotes the person directly affected by the act or omission which is in issue (see Marckx v. Belgium, judgment of 13 June 1979, Series A no. 31, § 27, and Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, § 41).

66. Turning to the circumstances of the present case, the Court observes that the authorities banned the planned march and several of the stationary assemblies. The appellate authorities, in their decisions of 17 June and 22 August 2005, quashed the first‑instance decisions and criticised them for being poorly justified and in breach of the applicable laws. These decisions were given after the dates on which the applicants had planned to hold the demonstrations.

67. The Court acknowledges that the assemblies were eventually held on the planned dates. However, the applicants took a risk in holding them given the official ban in force at that time. The assemblies were held without a presumption of legality, such a presumption constituting a vital aspect of effective and unhindered exercise of freedom of assembly and freedom of expression. The Court observes that the refusals to give authorisation could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in the assemblies on the grounds that they did not have official authorisation and that, therefore, no official protection against possible hostile counter‑demonstrators would be ensured by the authorities.

68. Hence, the Court is of the view that, when the assemblies were held the applicants were negatively affected by the refusals to authorise them. The Court observes that legal remedies available to them could not ameliorate their situation as the relevant decisions were given in the appeal proceedings after the date on which the assemblies were held. The Court refers in this respect to its finding concerning Article 13 of the Convention (see paragraph 84 below). There has therefore been an interference with the applicants' rights guaranteed by Article 11 of the Convention.

69. An interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for the achievement of those aims.

70. In this connection, the Court observes that on 22 August 2005 the Local Government Appeals Board found the decision of 3 June 2005 unlawful (see paragraph 20 above). Likewise, on 17 June 2005 the Mazowsze Governor quashed the refusals of 9 June 2005, finding that they had breached the applicants' freedom of assembly (see paragraphs 22 – 26). The Court concludes that the interference with the applicants' right to freedom of peaceful assembly was therefore not prescribed by law.

71. In the context of the examination of the lawfulness of the interference complained of, the Court notes, in addition, the relevance of the judgment of the Constitutional Court given on 18 January 2006. That court found that the provisions of the Road Traffic Act as applied in the applicants' case were incompatible with the constitutional guarantees of freedom of assembly. It observed that the restrictions on the exercise of this freedom imposed by the impugned provisions were in breach of the proportionality principle applicable to all restrictions imposed on the exercise of rights guaranteed by the Constitution (see paragraphs 39‑42 above).

The Court is well aware that under the applicable provisions of the Constitution these provisions lost their binding force after the events concerned in the present case (see paragraph 30 above). However, it is of the view that the Constitutional Court's ruling that the impugned provisions were incompatible with the freedom of assembly guaranteed by the Constitution cannot but add force to its own above conclusion concerning the lawfulness of the interference complained of in the present case.

72. Having regard to this conclusion, the Court does not need to verify whether the other two requirements (legitimate aim and necessity of the interference) set forth in Article 11 § 2 have been complied with.

73. The Court therefore dismisses the Government's preliminary objection regarding the applicants' alleged lack of victim status and concludes that there has been a violation of Article 11 of the Convention.

B. Alleged violation of Article 13 of the Convention

74. The applicants further complained that Article 13 of the Convention had been breached in their case because they had not had at their disposal any procedure which would have allowed them to obtain a final decision prior to the date of the planned demonstrations.

Article 13 of the Convention reads:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

1. The arguments of the parties

75. The Government reiterated their submissions concerning the question of exhaustion of domestic remedies. In particular, the applicants should have lodged a constitutional complaint to challenge the provisions on the basis of which the decisions in their case had been given.

76. The applicants complained that, when the first-instance decisions had banned the holding of the assemblies, they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date on which it was planned to hold them. This was so because if a refusal was issued, the second-instance authority could only quash that decision and could not issue a new one. This meant that the organisers would have to start the procedure all over again. In fact, that was how the relevant procedural provisions had been applied in the applicants' case.

77. The applicants submitted that pursuant to section 7 of the Assemblies Act, a request for approval of an assembly to be organised could be submitted thirty days before the planned date at the earliest. That meant that it was impossible to submit such a request earlier. Under Polish law, if the authorities considered that the planned assembly was to be regarded as an "event" covered by the provisions of the Road Traffic Act as applicable at the relevant time, it was altogether impossible to comply with the thirty-day time-limit, given the unreasonably onerous requirements to submit numerous documents relating to the traffic organisation aspects of such an assembly which could be imposed on the organisers under that Act.

78. The applicants concluded that in any event, the State should create a procedure – a special one if need be – which would make it possible for organisers of public meetings to have the

whole procedure completed within the time-frame set out in the Act, that is to say from 30 to 3 days prior to the planned date and, importantly, before the day on which the assembly was planned to be held.

2. The Court's assessment

79. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see, among many other authorities, Chahal v. the United Kingdom, judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, pp. 1869-70, § 145).

In the present case the Court found that the applicants' rights under Article 11 were infringed (see paragraph 73 above). Therefore, they had an arguable claim within the meaning of the Court's case-law and were thus entitled to a remedy satisfying the requirements of Article 13.

80. As regards the Government's reliance on an individual constitutional complaint, the Court first notes that in the context of Polish administrative procedure, two-tiered judicial review of second-instance administrative decisions is available. Only a judgment of the Supreme Administrative Court is considered to constitute a final decision in connection with which a constitutional complaint is available. In the present case, the applicants, having obtained decisions of the second-instance administrative bodies essentially in their favour, in that they quashed the decisions refusing to allow their demonstrations, had no legal interest in bringing an appeal against these decisions to the administrative courts. Hence, the way to the Constitutional Court was not open to them.

81. Further, the Court accepts that the administrative authorities ultimately acknowledged that the first-instance decisions given in the applicants' case had been given in breach of the applicable laws. However, the Court emphasises that they did so after the dates on which the applicants planned to hold the demonstrations. The Court notes that the present case is similar to that of Stankov and the United Macedonian Organisation Ilinden v. Bulgaria (nos. 29221/95 and 29225/95, Commission decision of 29 June 1998, unreported), in which the former Commission held that "it [was] undisputed that had the applicants attempted [an appeal against the refusal of the district court to examine the appeal against the mayoral ban], the proceedings would have lasted for at least several months and any favourable outcome would have resulted long after the date of a planned meeting or manifestation". In other

words, bearing in mind that the timing of the rallies was crucial for their organisers and participants and that the organisers had given timely notice to the competent authorities, the Court considers that, in the circumstances, the notion of an effective remedy implied the possibility to obtain a ruling before the time of the planned events.

82. In this connection, the Court is of the view that such is the nature of democratic debate that the timing of public meetings held in order to voice certain opinions may be crucial for the political and social weight of such meetings. Hence, the State authorities may, in certain circumstances, refuse permission to hold a demonstration if such a refusal is compatible with the requirements of Article 11 of the Convention, but they cannot change the date on which the organisers plan to hold it. If a public assembly is organised after a given social issue loses its relevance or importance in a current social or political debate, the impact of the meeting may be seriously diminished. Freedom of assembly – if prevented from being exercised at a propitious time – can well be rendered meaningless.

83. The Court is therefore of the view that it is important for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act. The applicable laws provided for time-limits for the applicants to submit their requests for permission. In contrast, the authorities were not obliged by any legally binding time-frame to give their final decisions before the planned date of the demonstration. The Court is therefore not persuaded that the remedies available to the applicants in the present case, all of them being of a post-hoc character, could provide adequate redress in respect of the alleged violations of the Convention.

84. Therefore, the Court finds that the applicants have been denied an effective domestic remedy in respect of their complaint concerning a breach of their freedom of assembly. Consequently, the Court dismisses the Government's preliminary objection regarding the alleged non-exhaustion of domestic remedies and concludes that there has been a violation of Article 13 in conjunction with Article 11 of the Convention.

C. Alleged violation of Article 14 in conjunction with Article 11 of the Convention

85. The applicants complained that they had been treated in a discriminatory manner in that they had been refused permission to organise the march and some of the assemblies. They relied on Article 11 read together with Article 14 of the Convention, which provides:

“The enjoyment of the rights and freedoms set forth in [the] 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.”

1. The arguments of the parties

86. The Government submitted that the applicants had challenged the administrative decisions given in their cases on 3 and 9 June 2005. In the former, the Traffic Officer, acting on behalf of the Mayor of Warsaw, had refused permission for the march, relying on the organisers' failure to submit a “traffic organisation plan” within the meaning of section 65 (a) of the Road Traffic Act. In the latter decision the Mayor had relied on the argument that the applicants had failed to comply with more stringent requirements imposed by the law on organisers of assemblies held on roads used for road traffic.

87. The Government were of the view that these decisions had been sufficiently reasoned and that their reasoning had been based on section 65 of the Road Traffic Act. It could not, in their opinion, be assumed that the decisions banning the assemblies had been influenced by the personal opinions held by the Mayor of Warsaw as presented in an interview published in “Gazeta Wyborcza” on 20 May 2005. The facts of the case did not indicate that any link existed between the Mayor's views expressed in the press and the official decisions given in the applicants' case.

88. The Government argued that in the instant case no provisions, acts or omissions of the public authorities had exposed the applicants to treatment less favourable than that to which other persons in an analogous situation would have been subjected. There was no indication that their treatment had been based on any prohibited grounds. Consequently, the applicants had not suffered discrimination in the enjoyment of their freedom of assembly contrary to Article 14 of the Convention.

89. The applicants stressed that they had been required to submit a “traffic organisation plan”, while other organisations had not been requested to do so. In the absence of particularly serious reasons by way of justification and in the absence of any reasons provided by the Government for such differences in treatment, the selective application of the requirement to submit such a plan sufficiently demonstrated that they had been discriminated against.

90. The applicants further argued that they had been treated in a discriminatory manner essentially because they were refused permission to organise the demonstrations on 11 June 2005, while other organisations and persons had received permission. This difference of treatment had not pursued a legitimate aim, the more so as the Mayor and his collaborators had made it plain to the public that they would ban the demonstrations because of the homosexual orientation of the organisers, regardless of any legal grounds.

91. The applicants further argued that the decisions of 3 and 9 June 2005 had been formally issued in the name of the Mayor of Warsaw. They referred to the interview with the Mayor published in May 2005 in which he had stated that he would ban the assemblies irrespective of what the organisers had submitted in their requests for permission. They submitted that it could not be reasonably concluded that there had been no link between the statements made by the Mayor and the decisions subsequently given in his name. They emphasised that the practical outcome of the proceedings in their case had been consistent with the tenor of the Mayor's statements.

92. The applicants observed that the Government's argument about the lack of a causal link between the opinions publicly expressed by the Mayor and the administrative decisions given in his name amounted to implying that at the relevant time decisions had been issued in the Mayor's office with no regard to his opinions expressed publicly in his capacity as head of the municipal administration.

2. The Court's assessment

93. The Court has repeatedly held that Article 14 is not autonomous but has effect only in relation to Convention rights. This provision complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among many other authorities, Van Raalte v. Netherlands, judgment of 21 February 1997, Reports 1997‑I, p. 184, § 33, and Gaygusuz v. Austria, judgment of 16 September 1996, Reports 1996‑IV, § 36).

94. It is common ground between the parties that the facts of the case fall within the scope of Article 11 of the Convention. Hence, Article 14 is applicable to the circumstances of the case.

95. The Court first notes that the first-instance administrative decisions concerned in the present case did not refer to any direct motive that could be qualified as one of the forbidden grounds for discrimination within the Convention meaning of the term. These decisions focused on technical aspects of the organisation of the assemblies and on compliance with the relevant requirements (see paragraphs 11 and 13 above). It has been established that in the proceedings before the Traffic Officer the applicants were required to submit a "traffic organisation plan" and that their request was refused because of their failure to submit such a plan. At the same time, the Court notes that it has not been shown or argued that other organisers were likewise required to do this.

96. The Court further notes that the decision of 3 June 2005, refusing permission for the march organised by the applicants, was given by the Road Traffic Officer, acting on behalf of the Mayor of Warsaw. On 9 June 2005 the municipal authorities, acting on the Mayor's behalf, gave decisions banning the stationary assemblies to be organised by the first five applicants, referring to the need to avoid any possible violent clashes between participants in the various demonstrations to be held on 11 June 2005. It is also not in dispute that on the same day the same authorities gave permission for other groups to stage six counter-demonstrations on the same date.

97. The Court cannot speculate on the existence of motives, other than those expressly articulated in the administrative decisions complained of, for the refusals to hold the assemblies concerned in the present case. However, it cannot overlook the fact that on 20 May 2005 an interview with the Mayor was published in which he stated that he would refuse permission to hold the assemblies (see paragraph 27 above).

98. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest, in particular as regards politicians themselves (see Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV, and Castells v. Spain, judgment of 23 April 1992, Series A no. 236). However, the exercise of freedom of expression by elected politicians who at the same time are holders of public offices in the executive branch of government entails particular responsibility. In certain situations it is a normal part of the duties of such public officials personally to take administrative decisions which are likely to affect the exercise of individual rights, or that such decisions are given by public servants acting in their name. Hence, the exercise of freedom of expression by such officials may unduly impinge on the enjoyment of other rights guaranteed by the Convention (as regards statements by public officials, amounting to declarations of a person's guilt, pending criminal proceedings, see Butkevičius v. Lithuania, no. 48297/99, § 53, ECHR 2002-II (extracts); see also Allenet de Ribemont v. France, judgment of 10 February 1995, Series A no. 308, p. 16, §§ 35-36, and Daktaras v. Lithuania, no. 42095/98, §§ 41-44, ECHR 2000-X). When exercising their freedom of expression they

may be required to show restraint, bearing in mind that their views can be regarded as instructions by civil servants whose employment and careers depend on their approval.

99. The Court is further of the view, having regard to the prominent place which freedom of assembly and association hold in a democratic society, that even appearances may be of a certain importance in administrative proceedings where the executive powers exercise their functions relevant to the enjoyment of these freedoms (see, mutatis mutandis, De Cubber v. Belgium, judgment of 26 October 1984, Series A no. 86, p. 14, § 26). The Court is fully aware of the differences between administrative and judicial proceedings. It is true that it is only in respect of the latter that the Convention stipulates, in its Article 6, the requirement that a tribunal deciding on a case should be impartial from both a subjective and an objective point of view (see Findlay v. the United Kingdom, judgment of 25 February 1997, Reports 1997‑I, § 73, and Warsicka v. Poland, §§ 34-37, no. 2065/03, 16 January 2007).

100. However, in the present case the Court considers that in the assessment of the case it cannot disregard the strong personal opinions publicly expressed by the Mayor on issues directly relevant to the decisions regarding the exercise of freedom of assembly. It observes that the decisions concerned were given by the municipal authorities acting on the Mayor's behalf after he had made known to the public his opinions regarding the exercise of freedom of assembly and "propaganda about homosexuality" (see paragraph 27 above). It is further noted that the Mayor expressed these views when a request for permission to hold the assemblies was already pending before the municipal authorities. The Court is of the view that it may be reasonably surmised that his opinions could have affected the decision‑making process in the present case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner."

101. Having regard to the circumstances of the case seen as a whole, the Court is of the view that there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

102. Article 41 of the Convention provides:

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

103. The applicants did not claim any compensation for damage in connection with the violation of the Convention.

The Court's decision

1. Dismisses the Government's preliminary objections;

2. Holds that there has been a violation of Article 11 of the Convention;

3. Holds that there has been a violation of Article 13 in conjunction with Article 11 of the Convention;

4. Holds that there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

Case of Alekseyev v. Russia [10]

Procedure

1. The case originated in three applications (nos. 4916/07, 25924/08 and 14599/09) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Mr Nikolay Aleksandrovich Alekseyev ("the applicant"), on 29 January 2007, 14 February 2008 and 10 March 2009.

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2. The applicant was represented by Mr D.G. Bartenev, a lawyer practising in St Petersburg. The Russian Government ("the Government") were represented by Mr G. Matyushkin, Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged a violation of his right to peaceful assembly on account of the repeated ban on public events he had organised in 2006, 2007 and 2008. He also complained that he had not had an effective remedy against the alleged violation of his freedom of assembly and that the Moscow authorities' treatment of his applications to hold the events had been discriminatory.

4. On 17 September 2009 the Court decided to give notice of the applications to the Government. It was also decided to join the applications and to rule on the admissibility and merits of the applications at the same time.

The facts

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1977 and lives in Moscow. He is a gay rights activist.

A. Pride March and picketing on 27 May 2006

6. In 2006 the applicant, together with other individuals, organised a march to draw public attention to discrimination against the gay and lesbian minority in Russia, to promote respect for human rights and freedoms and to call for tolerance on the part of the Russian authorities and the public at large towards this minority. The march was entitled "Pride March" that year, and "Gay Pride" in subsequent years, to replicate similar events held by homosexual communities in big cities worldwide. The date chosen for the march, 27 May 2006, was also meant to celebrate the anniversary of the abolition of criminal liability in Russia for homosexual acts.

7. On 16 February 2006 the Interfax news agency published a statement by Mr Tsoy, the press secretary of the mayor of Moscow, to the effect that "the government of Moscow [would] not even consider allowing the gay parade to be held". Interfax further quoted Mr Tsoy as saying: "The mayor of Moscow, Mr Luzhkov, has firmly declared: the government of the capital city will not allow a gay parade to be held in any form, whether openly or disguised [as a human rights demonstration], and any attempt to hold any unauthorised action will be severely repressed".

8. On 22 February 2006 Interfax quoted the mayor of Moscow as having said, on a different occasion, that if he received a request to hold a gay parade in Moscow he would impose a ban on it because he did not want "to stir up society, which is ill-disposed to such occurrences of life" and continuing that he himself considered homosexuality "unnatural", though he "tried to treat everything that happens in human society with tolerance".

9. On 17 March 2006 the first deputy to the mayor of Moscow wrote to the mayor about the imminent campaign to hold a gay parade in Moscow in May that year. She considered that allowing the event would be contrary to health and morals, as well as against the will of numerous petitioners who had protested against the idea of promoting homosexuality. Having noted that the Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing ("the Assemblies Act") did not provide for the possibility of banning the event, she stated that the authorities could suggest changing the venue or time or that, if the event turned out to be a real public threat, it could be interrupted. She requested the mayor's agreement on developing an effective action plan for the prevention of any actions – public or otherwise – aimed at promoting or holding a gay parade or festival.

10. On 24 March 2006 the mayor of Moscow instructed his first deputy, five other officials of his office and all prefects of Moscow "to take effective measures for the prevention and deterrence of any gay-oriented public or mass actions in the capital city". He called for action proposals based on the legislative and regulatory framework and demanded an "active mass-media campaign and social commercials with the use of petitions brought by individuals and religious organisations".

11. On 15 May 2006 the organisers submitted a notice to the mayor of Moscow stating the date, time and route of the intended march. It was to take place between 3 p.m. and 5 p.m. on 27 May 2006, with an estimated number of about 2,000 participants, who would march from the Moscow Post Office along Myasnitskaya Street to Lubyanskaya Square. The organisers undertook to cooperate with the law-enforcement authorities in ensuring safety and respect for public order by the participants and to comply with regulations on restriction of noise levels when using loudspeakers and sound equipment.

12. On 18 May 2006 the Department for Liaison with Security Authorities of the Moscow Government informed the applicant of the mayor's decision to refuse permission to hold the march on grounds of public order, for the prevention of riots and the protection of health, morals and the rights and freedoms of others. It stated, in particular, that numerous petitions had been brought against the march by representatives of legislative and executive State

bodies, religious denominations, Cossack elders and other individuals; the march was therefore likely to cause a negative reaction and protests against the participants, which could turn into civil disorder and mass riots.

13. Having received the above reply, the organisers submitted a notice with a view to holding another event on the same date and time as the march for which permission had been refused. They informed the prefect of their intention to hold a picket in the park at Lubyanskaya Square.

14. On 19 May 2006 the applicant challenged before a court the mayor's decision of 18 May 2006 refusing permission to hold the march.

15. On 23 May 2006 the deputy prefect of the Moscow Central Administrative Circuit refused permission to hold the picket on the same grounds as those given for the refusal to hold the march.

16. On 26 May 2006 Interfax quoted the mayor of Moscow as saying in an interview to the radio station Russian Radio that no gay parade would be allowed in Moscow under any circumstances, "as long as he was the city mayor". He stated that all three "major" religious faiths – "the Church, the Mosque and the Synagogue" – were against it and that it was absolutely unacceptable in Moscow and in Russia, unlike "in some Western country more progressive in that sphere". He went on to say: "That's the way morals work. If somebody deviates from the normal principles [in accordance with which] sexual and gender life is organised, this should not be demonstrated in public and anyone potentially unstable should not be invited." He stated that 99.9% of the population of Moscow supported the ban.

17. On the same day the Tverskoy District Court of Moscow dismissed the applicant's complaint. It referred to provisions of the Assemblies Act concerning the authorities responsible for ensuring the safety of events (sections 12 and 14), who were entitled to suggest changing the time or venue, or both, of a proposed event on safety grounds (section 12). It also noted that a public event could be held at any suitable venue unless it threatened to cause the collapse of buildings or constructions or entailed safety risks for its participants (section 8). It then noted the organisers' right to hold the event at the venue and time indicated in the notice to the authorities, or at the venue and time agreed with the authorities if they had suggested a change, and stated that it was prohibited to hold the event if the notice had not been submitted on time or if the organisers had failed to agree to a change of venue or time proposed by the authorities (section 5). Finally, the court noted that the organisers, officials or

other individuals were prohibited from interfering with the expression of opinion by the participants in the public event unless they breached public order or contravened the format of the event (section 18). It concluded on the basis of these provisions that the authorities could ban a public event on safety grounds and that it was for the organisers to submit a notice suggesting a change of venue and time for consideration by the authorities. It considered that the refusal to hold the event in the present case had legitimate grounds and that the applicant's right to hold assemblies and other public events had not been breached.

18. The applicant lodged an appeal, relying on section 12 of the Assemblies Act, which imposed an obligation on the authorities, and not the organisers, to make a reasoned proposal to change the venue or the time of the event as indicated in the notice. He also challenged the finding that the ban was justified on safety grounds, claiming that concerns for safety could have been addressed by providing protection to those taking part in the event.

19. On 27 May 2006 the applicant and several other persons participated in a conference celebrating the International Day Against Homophobia, at which they announced their intention to gather in the Aleksandrovskiy Garden to lay flowers at the war memorial, the Tomb of the Unknown Soldier, allegedly to commemorate the victims of fascism, including gay and lesbian victims, and to hold a fifteen-minute picket at the Moscow mayor's office to protest against the ban on the march and the picketing.

20. Later that day the applicant and about fifteen other persons arrived at the Aleksandrovskiy Garden to find the gates closed, with police patrolling the access. According to the applicant, there were about 150 policemen from the special riot squad (OMON), and also about a hundred individuals protesting against the flower-laying event planned by the applicant and his fellow participants.

21. The applicant was arrested and taken to the police station to be charged with the administrative offence of breaching the conditions for holding a demonstration.

22. In the meantime, other participants in the flower-laying event proceeded towards the Moscow mayor's office, with protesters pursuing and attacking them. Several persons reportedly sustained slight injuries. According to the applicant, the OMON arrested about one hundred persons involved in attacking those taking part in the event.

23. The applicant submitted two reports by NGOs on the events of 27 May 2006, one prepared by the International Lesbian and Gay Association and another one by Human Rights Watch. These reports corroborated the applicant's account of events.

24. On 31 May 2006 Interfax quoted the mayor of Moscow as saying in a television interview: “Those gays trying to lay flowers at the Tomb of the Unknown Soldier ... it is a provocation. It was a desecration of a holy place” and reiterating the condemnation of the action on behalf of the public at large.

25. On 16 June 2006 the applicant challenged before a court the prefect's decision of 23 May 2006 refusing to allow the picketing. On 22 August 2006 the Taganskiy Disctrict Court of Moscow dismissed the complaint, finding that the ban had been justified on safety grounds. The applicant appealed.

26. On 19 September 2006 the Moscow City Court examined the appeal against the judgment of 26 May 2006. It upheld the first-instance judgment as lawful and justified in the circumstances.

27. On 28 November 2006 the Moscow City Court examined the appeal against the judgment of 22 August 2006 and dismissed it on essentially the same grounds.

B. Pride March and picketing on 27 May 2007

28. In 2007 the applicant, together with other individuals, decided to organise a march similar to the one attempted in 2006.

29. On 15 May 2007 the organisers submitted a notice to the mayor of Moscow, stating the date, time and route of the intended march and its purpose, all of which were identical to the march proposed the previous year, except that the estimated number of participants was 5,100.

30. On 16 May 2007 the Department for Liaison with Security Authorities of the Moscow Government informed the applicant that permission to hold the march had been refused on the grounds of potential breaches of public order and violence against the participants, with

reference to the events of the previous year. The organisers were warned that holding the event without permission would render them liable.

31. Having received the above reply, the organisers submitted a notice with a view to holding other events on the same date and time as the march for which permission had been refused. They informed the prefect of the Moscow Central Administrative Circuit of their intention to hold a picket in front of the Moscow mayor's office at Tverskaya Square and another one in Novopushkinskiy Park.

32. On 23 May 2007 the organisers were informed that the prefect had refused permission to hold the picket at both venues on the grounds of public order, prevention of riots and protection of health, morals and the rights and freedoms of others. They were warned that they would be held liable for holding any unauthorised picketing.

33. On 26 May 2007 the applicant and several other persons announced at the annual "LGBT Rights are Human Rights" conference that they would meet the following day in front of the Moscow mayor's office to file a petition together in protest against the ban on the march and the picketing.

34. On 27 May 2007 the applicant and about twenty other individuals were stopped by the police as they attempted to approach the mayor's office. The applicant and two other men were detained at the police station for twenty-four hours on charges of having committed the administrative offence of disobeying a lawful order from the police. On 9 June 2007 the applicant was found guilty of the administrative offence and had to pay a fine of 1,000 roubles. That decision was upheld by the Tverskoy District Court on 21 August 2007.

35. On 30 May 2007 the applicant challenged before a court the decision of 16 May 2007 by the mayor of Moscow refusing permission to hold the march. In particular, he alleged that under the Assemblies Act, the authorities were not entitled to ban public events, but could only propose changing their time and location, which in the present case they had not. He also argued that official disapproval of the purpose of a public event was not by itself a sufficient ground, in a democratic society, for a ban.

36. On 26 June 2007 the applicant challenged before a court the prefect's decision of 23 May 2007 refusing permission for the picketing.

37. On 24 August 2007 the Taganskiy District Court of Moscow dismissed the complaint concerning the ban on the picketing, finding that the ban had been justified on safety grounds. That judgment was upheld on 8 November 2007 by the Moscow City Court.

38. On 4 September 2007 the Tverskoy District Court dismissed the applicant's claim, upholding the grounds for the ban on the march and confirming the lawfulness of the authorities' acts. That judgment was upheld on 6 December 2007 by the Moscow City Court.

C. Pride Marches in May 2008 and picketing in May and June 2008

39. In 2008 the applicant, together with other individuals, decided to organise several marches similar to the ones attempted the two previous years.

40. On 18 April 2008 the organisers submitted a notice to the mayor of Moscow stating the date, time and route of ten intended marches to be held on 1 and 2 May 2008 in central Moscow.

41. On 24 April 2008 the Department for Liaison with Security Authorities of the Moscow Government informed the applicant that permission to hold all the marches had been refused on the grounds of potential breaches of public order and violence against the participants.

42. Having received the above reply, on 22 April 2008 the organisers submitted a notice with a view to holding a further fifteen marches from 3 to 5 May 2008.

43. On 28 April 2008 the Department for Liaison with Security Authorities of the Moscow Government informed the applicant that permission to hold the fifteen marches had also been refused on the same grounds.

44. The applicant submitted a number of alternative proposals for holding marches on different dates in May 2008 and in various locations. These proposals were refused, on the same grounds, as follows:

(i) applications of 25 and 28 April 2008 (30 marches in total), refused on 5 May 2008;

(ii) application of 30 April 2008 (20 marches), refused on 7 May 2008;

(iii) application of 5 May 2008 (20 marches), refused on 8 May 2008;

(iv) application of 8 May 2008 (15 marches), refused on 13 May 2008;

(v) application of 12 May 2008 (15 marches), refused on 16 May 2008;

(vi) application of 15 May 2008 (15 marches), refused on 21 May 2008;

(vii) application of 19 May 2008 (15 marches), refused on 23 May 2008.

45. On 16 May 2008 the applicant gave notice to the President of Russia of his intention to hold a march in the Aleksandrovskiy Garden on 31 May 2008. He received no reply to the notice.

46. From 28 April 2008 to 17 June 2008 the applicant brought several court actions challenging the decisions by the mayor of Moscow refusing permission to hold the marches. The Tverskoy District Court joined these applications and on 17 September 2008 it dismissed the applicant's claim, upholding the grounds for the bans on the marches and confirming the lawfulness of the authorities' acts. That judgment was upheld on 2 December 2008 by the Moscow City Court.

47. In the meantime, the applicant also attempted to organise picketing to call for criminal charges to be brought against the mayor of Moscow for hindering the holding of public events. The picket intended to be held on 17 May 2008 was prohibited on 13 May 2008 on the same grounds as those given for the previous events. This decision was reviewed and upheld by the Taganskiy District Court on 22 July 2008 and, on appeal, by the Moscow City Court on 14 October 2008.

48. On 1 June 2008 the applicant, in a group of twenty individuals, held a picket on Bolshaya Nikitskaya Street for about ten minutes.

II. RELEVANT DOMESTIC LAW

49. Article 30 of the Constitution of the Russian Federation provides that everyone has the right to freedom of association. Article 55 § 3 provides that rights and freedoms may be restricted by federal laws for the protection of constitutional principles, public morals, health and the rights and lawful interests of others, and to ensure the defence and security of the State.

50. The Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing (no. 54-FZ of 18 August 2004 – "the Assemblies Act") provides in so far as relevant as follows:

Section 5: Organisation of a public event

"...

3. The organiser of a public event shall have the right:

(i) to hold meetings, demonstrations, marches and pickets at the venues and time specified in the notice on holding the public event or as altered by agreement with the executive authority of the subject of the Russian Federation or the municipal body; to hold assemblies at a venue that has been specially allocated or adapted to ensure the safety of citizens while such assemblies are held;

...

(v) in holding assemblies, meetings, demonstrations and marches, to use sound-amplifying technical devices (audio, video and other equipment) with a level of sound corresponding to the standards and norms established in the Russian Federation.

4. The organiser of the public event must:

(i) submit to the executive authority of the subject of the Russian Federation or the municipal body a notice on holding the public event in accordance with the procedure prescribed by section 7 of this Federal Law;

(ii) no later than three days prior to the holding of the public event (except in the case of an assembly or picket held by a single participant), notify in writing the executive authority of the subject of the Russian Federation or the municipal body of the acceptance (or non-acceptance) of its proposal to alter the venue and/or time of the public event as specified in the notice of the event;

(iii) ensure compliance with the conditions for holding the public event as specified in the notice of the event or with any conditions that have been altered as a result of an agreement reached with the executive authority of the subject of the Russian Federation or the municipal body;

(iv) require the participants in the public event to observe public order and comply with the conditions for holding the public event. Persons who fail to comply with the lawful requirements of the organiser of the public event may be expelled from the venue of the public event;

(v) ensure, within their competence, public order and the safety of citizens when holding the public event and, in instances specified by this Federal Law, perform this obligation jointly with the authorised representative of the executive authority of the subject of the Russian Federation or the municipal body and the authorised representative of the Ministry of the Interior and comply with all their lawful requirements;

5. The organiser of the public event shall have no right to hold it if the notice on holding the public event has not been submitted in due time or no agreement has been reached with the executive authority of the subject of the Russian Federation or the municipal body on their reasoned proposal as to the alteration of the venue and/or time of the public event."

Section 8: Venue for holding a public event

"A public event may be held at any venue suitable for holding the event if its conduct does not create a threat of the collapse of buildings or structures or other threats to the safety of the

participants in the public event. Conditions governing bans or restrictions on holding a public event at particular venues may be specified by federal laws.

...”

Section 12: Obligations of the executive authority of the subject of the Russian Federation and the municipal body

“1. The executive authority of the subject of the Russian Federation or the municipal body, upon receiving notice of the public event, must: (ii) inform the organiser of the public event, within three days of receipt of the notice on holding the event (or, if a notice on holding a picket by a group of individuals is submitted within less than five days before its intended date, on the day of its receipt), of a reasoned proposal to alter the venue and/or time of the public event, as well as of any proposal for the organiser of the event to bring the aims, form or other conditions for holding the event as indicated in the notice into line with the requirements of this Federal Law;

(iii) designate, depending on the form of the public event and the number of participants, an authorised representative to assist the event organisers in conducting the event in accordance with this Federal Law. The authorised representative shall be formally appointed by a written order which must be forwarded to the organiser of the public event in advance [of the event];

...

(v) ensure, within its competence and jointly with the organiser of the public event and the authorised representative of the Ministry of the Interior, public order and safety of citizens while holding the event and, if necessary, provide them with urgent medical aid;

...”

Section 14: Rights and obligations of the authorised representative of the Ministry of the Interior

“...

3. The authorised representative of the Ministry of the Interior must:

(i) facilitate the conduct of the public event;

(ii) ensure, jointly with the organiser of the public event and the executive authority of the subject of the Russian Federation or the municipal body, public order and safety of citizens and compliance with the law while holding the public event.”

Section 18: Securing the conditions for holding a public event

"1. The organiser of the public event, officials or other individuals may not prevent the participants in the event from expressing their opinion in a manner that does not breach public order or the conditions for holding the public event.

..."

III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

51. The following are extracts from Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member States on measures to combat discrimination on grounds of sexual orientation or gender identity:

"...

III. Freedom of expression and peaceful assembly

13. Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.

14. Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly, as enshrined in Article 11 of the Convention, can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity.

15. Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.

16. Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the

abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order ...”

52. On 6 June 2006 the Council of Europe Commissioner for Human Rights issued the following press release:

“In a statement given in St Petersburg yesterday, Commissioner Hammarberg stressed that the rights to freedom of expression and peaceful assembly belong to all people and that the authorities have a duty to protect peaceful demonstrators. The Commissioner regrets that his statement has been misrepresented by the news agency RIA Novosti (Report by RIA Novosti dated 5 June 2006 at 13:33).”

The law

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

53. The applicant complained of a violation of his right to peaceful assembly. He claimed that the ban repeatedly imposed by the Moscow authorities on holding the Pride March and the picketing had not been in accordance with the law, had not pursued any legitimate aim and had not been necessary in a democratic society. He relied on Article 11 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

54. The Government contested that argument. They submitted that the authorities had acted lawfully and within their margin of appreciation when deciding to prohibit the events at issue.

A. Admissibility

55. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

56. The Government contended that the ban on the events organised by the applicant had been imposed in accordance with the law, had pursued a legitimate aim and had been necessary in a democratic society.

57. They first pointed out that Article 55 § 3 of the Constitution and section 8(1) of the Assemblies Act should be construed as providing for restrictions on public events on safety grounds and for the protection of public order. In the present case, the events which the applicant had sought to hold had carried an obvious risk of confrontation between the participants and their opponents. They claimed to have received numerous public petitions from various political, religious, governmental and non-governmental organisations calling for the ban, some of which included threats of violence should the events go ahead. They were therefore concerned about the safety of the participants and the difficulties in maintaining public order during the events.

58. The Government further claimed that Article 11 § 2 should be interpreted as providing for a wide margin of appreciation within which the authorities should be able to choose measures appropriate for maintaining public order. They referred to the cases of Barankevich v. Russia (no.10519/03, 26 July 2007) and Plattform “Ärzte für das Leben” v. Austria (21 June 1988, Series A no. 139) for principles governing the authorities' conduct at public events marked by

a high probability of violence. In the present case, the Government asserted that they could not have avoided banning the event, because no other measure could have adequately addressed the security risks. They further claimed that if the Court were to give an assessment different from that of the domestic authorities it would put itself in the position of a "court of fourth instance".

59. In addition to that, the Government submitted that the event in question had had to be banned for the protection of morals. They emphasised that any promotion of homosexuality was incompatible with the "religious doctrines for the majority of the population", as had been made clear in the statements by the religious organisations calling for the ban. They contended that allowing the gay parades would be perceived by believers as an intentional insult to their religious feelings and a "terrible debasement of their human dignity".

60. The Government relied on the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which guaranteed individuals respect for and protection of their religious and moral beliefs and the right to bring up their children in accordance with them. They claimed that authorising gay parades would breach the rights of those people whose religious and moral beliefs included a negative attitude towards homosexuality. They further noted that in the case of Otto-Preminger-Institut v. Austria (20 September 1994, §§ 52 and 56, Series A no. 295‑A) the Court had recognised the great role of religion in people's everyday life, which should be taken into account in order to prevent religious beliefs from becoming the subject of unreasonable and insulting accusations. They concluded on that basis that the State must take into account the requirements of the major religious associations and that "the democratic State must protect society from destructive influence on its moral fundamentals, and protect the human dignity of all citizens, including believers". In the present case, the ideas of the event organisers were not neutral to the rest of society, but had actually encroached on the rights, lawful interests and human dignity of believers.

61. The Government also alleged that there was no consensus between the Council of Europe member States as to the extent to which homosexuality was accepted in each country. According to them, "[s]uch relations are allowed in some countries, in other countries they are considerably restricted". For this reason they claimed that the domestic authorities were better informed as to what might insult believers in the respective communities. To illustrate this point they referred to the case of Dudgeon v. the United Kingdom (22 October 1981, §§ 56-58, Series A no. 45), in which the Court had discussed the diversity of moral and cultural values in the context of criminal liability for homosexual conduct, which had existed at the material time in Northern Ireland, while stressing that they did not adhere to the conclusion arrived at by the Court in that case. They also cited at length the case of Müller and Others v. Switzerland (24 May 1988, Series A no. 133), where the Court had upheld measures by the

authorities restricting general access to an exhibition of paintings depicting “crude sexual relations, particularly between people and animals”. They suggested that gay parades should be viewed from the same standpoint, taking into account the interests of involuntary spectators, especially children. In their opinion, any form of celebration of homosexual behaviour should take place in private or in designated meeting places with restricted access. They added that such clubs, bars and entertainment facilities existed aplenty in Moscow (listing twenty-four examples of such places) and were well frequented, their operation not being hindered by the authorities.

62. In the Government's view, in Moscow the public was not yet ready to accept the holding of gay parades in the city, unlike in Western countries, where such celebrations were regular occurrences. It was thus the authorities' duty to demonstrate sensitivity to the existing public resentment of any overt manifestation of homosexuality. To that end they quoted a Russian celebrity performer, whose stage image capitalised on exaggeration of homosexual stereotypes, as saying that gay parades should not be conducted. They also referred to a statement apparently made by an organisation called “The Union of Orthodox Citizens”, which promised to conduct a mass protest “should the homosexuals try to hold the march in Moscow”. Likewise, the Orthodox Church was quoted as objecting to the gay parade as propaganda promoting sin, as had the Supreme Mufti for Russia, who had threatened mass protests by Muslims of Russia “as well as by all normal people” should the parade go ahead. They also quoted, although referring to his statement as extreme, the head Muslim authority of Nizhniy Novgorod, who had said that “as a matter of necessity, homosexuals must be stoned to death”.

63. Finally, the Government claimed that the prohibition of the gay parades in Moscow had been supported by the Council of Europe Commissioner for Human Rights. They relied on the statement reported in the news, although they did not mention that this statement had been denied by the Commissioner (see paragraph 52 above).

(b) The applicant

64. The applicant contested the Government's submissions on every point. First, he disagreed that the ban on the public events he had sought to hold had been imposed in accordance with the law. He pointed out that neither the Assemblies Act nor any other legislative instrument provided for a ban on public events. The restrictions set out in section 8(1) of the Act on holding events in venues which were unsuitable for safety reasons required the authorities to suggest another venue, as set out in section 12 of the Act, and not to ban the event. In any case, even if the Court were to accept that the alleged impossibility of avoiding public disorder at any venue could provide a justification for the ban under domestic law, the

applicant maintained that the ban did not comply with two other requirements of Article 8 § 2 of the Convention, in that it had failed to pursue a legitimate aim and had not been necessary in a democratic society.

65. As regards the three legitimate aims referred to by the Government, namely the protection of public safety and the prevention of disorder, the protection of morals and the protection of the rights and freedoms of others, the applicant considered all of them inapplicable. He argued that the reference to the protection of morals was not justified because the Government's definition of "morals" included only attitudes that were dominant in public opinion and did not encompass the notions of diversity and pluralism. Moreover, the events at issue could not by their nature affect morals because they had been intended as a demonstration in favour of human rights and civil liberties for the protection and equality of sexual minorities. No intention to demonstrate nudity or sexually explicit or provocative behaviour or material had ever been expressed by the organisers in their applications or public statements. The Government had not shown that any harm would have been caused to society or third persons by the proposed events. On the contrary, the applicant argued, the events would have been of benefit to Russian society by advocating the ideas of tolerance and respect for the rights of the lesbian and gay population.

66. He further contested the aims of protection of public safety and prevention of disorder because the planned marches and picketing had been intended to be strictly peaceful and orderly events by themselves. As regards the potential riots to be caused by the counter-demonstrators, the Government had not at any stage assessed the scale of possible clashes with the events' opponents and therefore their argument of inability to provide sufficient protection to the gay parades was unsubstantiated. In the three reference years the applicant had submitted numerous applications suggesting different formats and venues for the events, and the authorities had never given reasons as to why it was not possible to make security arrangements for any of them.

67. Finally, the applicant contended that the ban imposed on the events throughout the reference period had not been necessary in a democratic society. He referred to the Court's established case-law, stating that the mere possibility of confusing and even shocking part of society could not be regarded as a sufficient ground for such a sweeping measure as a total ban on the events in question (he referred to Bączkowski and Others v. Poland, no. 1543/06, § 64, ECHR 2007‑VI). He submitted that the measure repeatedly taken in the present case was gravely disproportionate to the aims allegedly pursued by the authorities and was incompatible with the notion of a democratic society which was "pluralistic, tolerant and broadminded" (ibid., § 63). He argued that the authorities had failed even to attempt to comply with their obligation under Article 11 to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully. They had banned the events, which in

their view were likely to be attacked, instead of protecting them. Moreover, they had endorsed the disapproval expressed by the events' opponents, claiming that they were immoral and thus depriving the minority of a lawful right to hold a peaceful demonstration, a right that was inherent in a society striving to be democratic.

2. The Court's assessment

68. The Court observes that the Moscow authorities imposed a ban on the Pride March and picketing in 2006, 2007 and 2008 and enforced the ban by dispersing events held without authorisation and by finding the applicant and other participants who had breached the ban guilty of an administrative offence. There is accordingly no doubt that there has been an interference with the exercise of the applicant's freedom of peaceful assembly guaranteed by Article 11 § 1 of the Convention. In fact, the existence of the interference in the present case is not in dispute between the parties.

69. The Court further notes that the parties disagreed as to whether the Moscow authorities' acts were prescribed by law. They also disagreed as to whether the interference served a legitimate aim. However, the Court may dispense with ruling on these points because, irrespective of the aim and the domestic lawfulness of the ban, it fell short of being necessary in a democratic society, for the reasons set out below. To the extent that these issues are relevant to the assessment of the proportionality of the interference they will be addressed in paragraphs 78-79 below (see Christian Democratic People's Party v. Moldova, no. 28793/02, § 53, ECHR 2006‑II).

70. In so far as the proportionality of the interference is concerned, the Court observes that the relevant principles were set out in its judgment in Bączkowski and Others (cited above):

“61. As has been stated many times in the Court's judgments, not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a 'democratic society' (see Refah Partisi (the Welfare Party) and Others v. Turkey [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§ 86-89, ECHR 2003-II, and Christian Democratic People's Party, [cited above]).

62. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively (see Gorzelik and Others v. Poland [GC], no. 44158/98, § 92, ECHR 2004-I).

63. Referring to the hallmarks of a 'democratic society', the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see Young, James and Webster v. the United Kingdom, 13 August 1981, Series A no. 44, § 63, and Chassagnou and Others v. France [GC], nos. 25088/95 and 28443/95, § 112, ECHR 1999-III).

64. In Informationsverein Lentia and Others v. Austria (24 November 1993, § 38, Series A no. 276) the Court described the State as the ultimate guarantor of the principle of pluralism. Genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms (see Wilson and the National Union of Journalists and Others v. the United Kingdom, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V, and Ouranio Toxo v Greece, no. 74989/01, § 37, ECHR 2005-X). This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation."

71. Turning to the circumstances of the present case, the Court observes that the Government put forward two reasons for imposing the ban on the events organised by the applicant.

72. Their first argument, which also formed the ground on which the events were banned by the domestic authorities, related to concerns for the participants' safety and to the prevention of disorder. They alleged that the Moscow authorities, having received numerous protest petitions, had realised that any such event would cause a large-scale controversy with various groups who objected to any demonstrations supporting or promoting the interests of lesbians, gays or other sexual minorities. The petitions cited by the Government (paragraph 62 above), however, were not all of identical gist. Some petitioners, such as the Orthodox Church, simply expressed their objection to the events and to the general idea of people being homosexual and identifying themselves as such. Others, such as the Supreme Mufti, informed the authorities of their intention to hold a protest against the events, whereas the senior Muslim authority in Nizhniy Novgorod threatened violence.

73. The Court has previously stressed in this connection that freedom of assembly as enshrined in Article 11 of the Convention protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote (see Stankov and the United Macedonian Organisation Ilinden v. Bulgaria, nos. 29221/95 and 29225/95, § 86, ECHR 2001-IX). The participants must be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents. It is thus the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully (see Plattform "Ärzte für das Leben", cited above, §§ 32 and 34).

74. The Court cannot accept the Government's argument that these petitions should be viewed as a general indication that the Pride March and the picketing had the potential to cause public disorder. The first group of petitions, calling for the events to be prohibited because the petitioners considered them immoral, without a threat of immediate counteraction at the site of the events, were irrelevant to safety considerations. They could only be taken into account for the purpose of restrictions to be imposed for the protection of morals, an issue that will be specifically addressed below.

75. The next group of petitions, indicating the authors' intention to engage in protest actions at the site of the events because they found them objectionable, should, on the contrary, have been carefully assessed from the standpoint of security arrangements. As a general rule, where a serious threat of a violent counter-demonstration exists, the Court has allowed the domestic authorities a wide discretion in the choice of means to enable assemblies to take place without disturbance (see Plattform "Ärzte für das Leben", loc. cit.). However, the mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes (see Barankevich, cited above, § 33). In the present case, no preliminary assessment of the risks posed by counter-

demonstrations had been carried out. The subsequent events revealed that there was a potential total of about a hundred counter-protesters, a figure that is significant but by no means overwhelming on the scale of a city such as Moscow. The Court observes, moreover, that only a few of the petitions cited by the Government expressed determination on the part of the counter-protesters to proceed by unlawful means. The Government did not make any submissions as to whether any of the petitioners had attempted to give notice of their counter-demonstration. Had they done so, the authorities could have made arrangements to ensure that both events proceeded peacefully and lawfully, allowing both sides to achieve the goal of expressing their views without clashing with each other. It was for the Moscow authorities to address potential counter-protesters – whether by making a public statement or by replying to their petitions individually – in order to remind them to remain within the boundaries of the law when carrying out any protest actions.

76. As regards any statements calling for violence and inciting offences against the participants in a public event, such as those by a Muslim cleric from Nizhniy Novgorod, who reportedly said that homosexuals must be stoned to death (see paragraph 62 above), as well as any isolated incidents of threats of violence being put into practice, they could have adequately been dealt with through the prosecution of those responsible. However, it does not appear that the authorities in the present case reacted to the cleric's call for violence in any other way than banning the event he condemned. By relying on such blatantly unlawful calls as grounds for the ban, the authorities effectively endorsed the intentions of persons and organisations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order.

77. In the light of the above findings, the Court concludes that the Government failed to carry out an adequate assessment of the risk to the safety of the participants in the events and to public order. It reiterates that if every probability of tension and heated exchange between opposing groups during a demonstration were to warrant its prohibition, society would be faced with being deprived of the opportunity of hearing differing views on any question which offends the sensitivity of the majority opinion (see Stankov and the United Macedonian Organisation Ilinden, cited above, § 107). In the present case, the Court cannot accept the Government's assertion that the threat was so great as to require such a drastic measure as banning the event altogether, let alone doing so repeatedly over a period of three years. Furthermore, it appears from the public statements made by the mayor of Moscow, as well as from the Government's observations, that if security risks played any role in the authorities' decision to impose the ban, they were in any event secondary to considerations of public morals.

78. The Court observes that the mayor of Moscow on many occasions expressed his determination to prevent gay parades and similar events from taking place, apparently because

he considered them inappropriate (see paragraphs 7, 8, 10, 16 and 24 above). The Government in their observations also pointed out that such events should be banned as a matter of principle, because propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults.

79. The Court observes, however, that these reasons do not constitute grounds under domestic law for banning or otherwise restricting a public event. Accordingly, no such arguments were put forward in the domestic proceedings, which remained focused on security issues. The Court is not convinced that the Government may at this stage substitute one Convention-protected legitimate aim for another one which never formed part of the domestic balancing exercise. Moreover, it considers that in any event the ban was disproportionate to either of the two alleged aims.

80. The Court reiterates that the guarantees of Article 11 of the Convention apply to all assemblies except those where the organisers and participants have violent intentions or otherwise deny the foundations of a "democratic society" (see G. v. Germany, no. 13079/87, Commission decision of 6 March 1989, Decisions and Reports (DR) 60, p. 256, and Christians against Racism and Fascism v. the United Kingdom, Commission decision of 16 July 1980, DR 21, p. 138). As the Court stated in Sergey Kuznetsov v. Russia (no. 10877/04, § 45, 23 October 2008): "any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it."

81. The Court further reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention (see Artico v. Italy, 13 May 1980, § 33, Series A no. 37, and Barankevich, cited above, § 31).

82. In the present case, having carefully studied all the material before it, the Court does not find that the events organised by the applicant would have caused the level of controversy claimed by the Government. The purpose of the marches and picketing, as declared in the notices of the events, was to promote respect for human rights and freedoms and to call for tolerance towards sexual minorities. The events were to take the form of a march and picketing, with participants holding banners and making announcements through loudspeakers. At no stage was it suggested that the event would involve any graphic

demonstration of obscenity of a type comparable to the exhibition in the case of Müller and Others (cited above) referred to by the Government. The applicant submitted, and it was not contested by the Government, that the participants had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views. Moreover, it transpires from the mayor's comments (see, in particular, paragraphs 16 and 24 above) and the Government's observations (see paragraph 61 above) that it was not the behaviour or the attire of the participants that the authorities found objectionable but the very fact that they wished to openly identify themselves as gay men or lesbians, individually and as a group. The Government admitted, in particular, that the authorities would reach their limit of tolerance towards homosexual behaviour when it spilt over from the strictly private domain into the sphere shared by the general public (ibid., in fine).

83. To justify this approach the Government claimed a wide margin of appreciation in granting civil rights to people who identify themselves as gay men or lesbians, citing the alleged lack of European consensus on issues relating to the treatment of sexual minorities. The Court cannot agree with that interpretation. There is ample case-law reflecting a long-standing European consensus on such matters as abolition of criminal liability for homosexual relations between adults (see Dudgeon, cited above; Norris v. Ireland, 26 October 1988, Series A no. 142; and Modinos v. Cyprus, 22 April 1993, Series A no. 259), homosexuals' access to service in the armed forces (see Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, ECHR 1999-VI), the granting of parental rights (see Salgueiro da Silva Mouta v. Portugal, no. 33290/96, ECHR 1999-IX), equality in tax matters and the right to succeed to the deceased partner's tenancy (see Karner v. Austria, no. 40016/98, ECHR 2003-IX); more recent examples include equal ages of consent under criminal law for heterosexual and homosexual acts (see L. and V. v. Austria, nos. 39392/98 and 39829/98, ECHR 2003-I). At the same time, there remain issues where no European consensus has been reached, such as granting permission to same-sex couples to adopt a child (see Fretté v. France, no. 36515/97, ECHR 2002-I, and E.B. v. France [GC], no. 43546/02, ECHR 2008‑...) and the right to marry, and the Court has confirmed the domestic authorities' wide margin of appreciation in respect of those issues. This, however, does not dispense the Court from the requirement to verify whether in each individual case the authorities did not overstep their margin of appreciation by acting arbitrarily or otherwise. Indeed, the Court has consistently held that the State's margin of appreciation goes hand in hand with European supervision (see Handyside v. the United Kingdom, 7 December 1976, § 49, Series A no. 24). The Government's reference to the concept of a “court of fourth instance” (see § 58 above) cannot prevent the Court from exercising its duties in that regard in accordance with the Convention and established case-law.

84. In any event, the absence of a European consensus on these questions is of no relevance to the present case because conferring substantive rights on homosexual persons is fundamentally different from recognising their right to campaign for such rights. There is no

ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly. As the Government rightly pointed out, demonstrations similar to the ones banned in the present case are commonplace in most European countries. It is also worth noting that in the case of Bączkowski and Others it was the domestic authorities which first acknowledged the illegal nature of the ban initially imposed on similar marches, when the ban was quashed by the appeal court (cited above, § 22).

85. The Court is therefore unable to accept the Government's claim to a wide margin of appreciation in the present case. It reiterates that any decision restricting the exercise of freedom of assembly must be based on an acceptable assessment of the relevant facts (see, among other authorities, Christian Democratic People's Party, cited above, § 70). The only factor taken into account by the Moscow authorities was the public opposition to the event, and the officials' own views on morals.

86. The mayor of Moscow, whose statements were essentially reiterated in the Government's observations, considered it necessary to confine every mention of homosexuality to the private sphere and to force gay men and lesbians out of the public eye, implying that homosexuality was a result of a conscious, and antisocial, choice. However, they were unable to provide justification for such exclusion. There is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults". On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned. It would also clarify some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily. This was exactly the kind of debate that the applicant in the present case attempted to launch, and it could not be replaced by the officials spontaneously expressing uninformed views which they considered popular. In the circumstances of the present case the Court cannot but conclude that the authorities' decisions to ban the events in question were not based on an acceptable assessment of the relevant facts.

87. The foregoing considerations are sufficient to enable the Court to conclude that the ban on the events organised by the applicant did not correspond to a pressing social need and was thus not necessary in a democratic society.

88. There has accordingly been a violation of Article 11 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

89. The applicant complained under Article 13 of the Convention in conjunction with Article 11 of the Convention that he did not have an effective remedy against the alleged violation of his freedom of assembly. He alleged in particular that he had not had at his disposal any procedure which would have allowed him to obtain a final decision prior to the date of the planned demonstrations. Article 13 of the Convention reads:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

90. The Government contested this allegation, claiming that the applicant had had the possibility of bringing judicial proceedings and had availed himself of it.

A. Admissibility

91. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

92. The Government first indicated that the authorisation procedure was different for marches and picketing and submitted that the applicant had challenged the refusal of permission in respect of both types of events in separate sets of proceedings. His claims had been examined

by the courts and rejected in reasoned decisions. All judicial hearings had proceeded expeditiously and in any event within the time-limits set by law.

93. The Government also pointed out that the applicant had not always taken procedural steps as soon as he could have done. In particular, it had taken him one month and fifteen days to appeal against the judgment of 26 May 2006, following an extension granted to him by the court after the expiry of the statutory time-limit of ten days. Likewise, his appeal against the judgment of 22 August 2006 had been lodged two months and ten days after the judgment, again after the extension of the time-limit.

(b) The applicant

94. The applicant contended that the judicial proceedings of which he had availed himself to challenge the ban were not an effective remedy because the general time-limits provided for by law did not allow a final decision to be taken before the date of the disputed event. He referred to the time-limits for giving notice of a proposed event as set out in section 7(1) of the Assemblies Act, that is, no earlier than fifteen days and no later than ten days before the date of the event. Under Article 257 § 1 of the Code of Civil Procedure and the provisions of the Code concerning the entry of judgments into force, he argued that any decision in the case – be it the first-instance judgment or the appeal decision – was bound to become final only after the planned date of the event. Therefore, the judicial reversal of the authorities' refusal of permission to hold the events would in any case have been retrospective and therefore futile.

95. He also contested the Government's allegation that he had unduly delayed appealing against the first-instance judgment. He asserted that the appeals had been lodged as soon as the full text of the judgment had been made available to him. Moreover, he contended that the appeal proceedings had in any event been bound to take place after the intended date of the event. Thus, the event intended to be held on 27 May 2006 had been banned by the first-instance court on 26 May 2006, only one day before the event. There had been no possibility of having the appeal against the first-instance judgment examined on the same day so that the event could have taken place had the final decision been favourable to the applicant. The notices he had submitted for the picketing had suffered a similar fate. The 2007 and 2008 applications had likewise been refused at final instance long after the intended dates of the events. The applicant further contended that there would have been no possibility of obtaining a final decision before the event in question even if the first-instance judgment had allowed the demonstration. A first-instance judgment, if not appealed against, entered into force ten days after the date of its adoption. This time-frame made it impossible for the organisers of an event, even with their best efforts and forward planning, to obtain a final decision before the

scheduled date of the event, because neither the administrative authorities nor the courts were required to complete the proceedings before that date.

96. The applicant reiterated that the date for the events in issue had been chosen intentionally, on account of its symbolic meaning as the anniversary of the abolition of criminal liability in Russia for homosexual acts. Therefore, it was essential for the demonstration, if allowed, to be held on that day.

2. The Court's assessment

97. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see, among many other authorities, Chahal v. the United Kingdom, 15 November 1996, § 145, Reports of Judgments and Decisions 1996‑V). In the present case the Court has found that the applicant's rights under Article 11 were infringed (see paragraph 88 above). Therefore, he had an arguable claim within the meaning of the Court's case‑law and was thus entitled to a remedy satisfying the requirements of Article 13.

98. The Court reiterates that, bearing in mind that the timing of public events is crucial for the organisers and participants, and provided that the organisers have given timely notice to the competent authorities, the notion of an effective remedy implies the possibility of obtaining a ruling concerning the authorisation of the event before the time at which it is intended to take place (see Bączkowski and Others, cited above, § 81). It is therefore important for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act (ibid., § 83).

99. The Court observes that in the present case, the applicable laws provided for time-limits for the applicant to give notice of the events. In contrast, the authorities were not obliged by any legally binding time-frame to give their final decisions before the planned date of the march or the picketing. The Court is therefore not persuaded that the judicial remedy available to the applicant in the present case, which was of a post-hoc character, could have provided adequate redress in respect of the alleged violations of the Convention.

100. Therefore, the Court finds that the applicant has been denied an effective domestic remedy in respect of his complaint concerning a breach of his freedom of assembly.

Consequently, the Court concludes that there has been a violation of Article 13 in conjunction with Article 11 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

101. Lastly, the applicant complained of the discriminatory manner in which the Moscow authorities had treated the application to hold the public events organised by him. Relying on Article 14 in conjunction with Article11 of the Convention, he contended that he had suffered discrimination on the grounds of his sexual orientation and that of other participants. Article 14 of the Convention reads:

"The enjoyment of the rights and freedoms set forth in [the] 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."

102. The Government disagreed with this allegation, claiming that the ban had never been intended to discriminate against the applicant.

A. Admissibility

103. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

104. The Government denied that the ban imposed in the present case was discriminatory in nature. They stated that the existence of sexual minorities was recognised by the authorities, as well as the necessity to make provision for the absence of discrimination against them. However, in view of their antagonistic relations with religious groups, it could prove necessary to place restrictions on the exercise of their rights.

105. The applicant, on the contrary, alleged that the ban on the events had been discriminatory. Despite the absence of express reference to sexual orientation as grounds for the ban, it was clear that the main reason for its refusal was the official disapproval of the participants' moral standing. The authorities had relied, in particular, on the disapproval of the events by religious and other groups. In addition to that, the mayor of Moscow had made a number of discriminatory statements, and there was a clear link between the statements and the ban.

2. The Court's assessment

106. The Court has repeatedly held that Article 14 is not autonomous but has effect only in relation to Convention rights. This provision complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, among other authorities, Van Raalte v. Netherlands, 21 February 1997, § 33, Reports 1997-I, and Gaygusuz v. Austria, 16 September 1996, § 36, Reports 1996-IV).

107. It is common ground between the parties that the facts of the case fall within the scope of Article 11 of the Convention. Hence, Article 14 is applicable to the circumstances of the case.

108. The Court reiterates that sexual orientation is a concept covered by Article 14 (see, among other cases, Kozak v. Poland, no. 13102/02, 2 March 2010). Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention (ibid, § 92).

109. It has been established above that the main reason for the ban imposed on the events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality (see paragraphs 77-78 and 82 above). In particular, the Court cannot disregard the strong personal opinions publicly expressed by the mayor of Moscow and the undeniable link between these statements and the ban. In the light of these findings the Court also considers it established that the applicant suffered discrimination on the grounds of his sexual orientation and that of other participants in the proposed events. It further considers that the Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention.

110. Accordingly, the Court considers that in the present case there has been a violation of Article 14 in conjunction with Article 11 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

111. Article 41 of the Convention provides:

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

A. Damage

112. The applicant claimed 40,000 euros (EUR) in respect of non-pecuniary damage.

113. The Government contested the claim as excessive and unreasonable. They requested the Court, if it were to find a violation in the present case, to award the applicant the minimum amount possible.

114. Having regard to the fact that the present case involved banning multiple demonstrations for three consecutive years in violation of Articles 11, 13 and 14 of the Convention, the Court, ruling on an equitable basis, awards the applicant EUR 12,000 in respect of non-pecuniary damage.

B. Costs and expenses

115. The applicants also claimed 18,700 Russian roubles (approximately EUR 483) for the costs and expenses incurred before the domestic courts and EUR 17,027 for those incurred in the proceedings before the Court. He submitted itemised claims, bills and supporting documents.

116. The Government considered this part of the claims unsubstantiated. They pointed out that the lawyer's travel expenses for attending the hearings in the domestic courts were unrelated to the proceedings before the Court and were therefore not eligible for reimbursement. They further argued that these costs and expenses could not be regarded as "actually and necessarily incurred", given that the three applications forming part of this case were very similar and did not require the lawyer to develop a separate line of argument for each case.

117. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. The Court notes that the costs and expenses relate to three consecutive sets of domestic proceedings and were incurred over a period of three years. Throughout these years the applicant was represented by Mr Bartenev, the lawyer who also represented him before the Court. Although the three applications have been joined in one case and therefore the applicant was dispensed from the requirement to submit separate sets of comments on the Government's observations for each of them, the original applications and the accompanying documents had to be prepared separately. The amounts incurred by the applicant on account of legal fees do not appear excessive or disproportionate to the work performed. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the amounts claimed in full. It makes an aggregate award of EUR 17,510, plus any tax that may be chargeable to the applicant.

C. Default interest

118. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

The Court's decision

1. Declares the applications admissible;

2. Holds that there has been a violation of Article 11 of the Convention;

3. Holds that there has been a violation of Article 13 in conjunction with Article 11 of the Convention;

4. Holds that there has been a violation of Article 14 in conjunction with Article 11 of the Convention;

5. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:

(i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 17,510 (seventeen thousand five hundred and ten euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. Dismisses the remainder of the applicant's claim for just satisfaction.

Chapter IV Parental rights

Case of Salgueiro Da Silva Mouta v. Portugal [11]

Procedure

1. The case originated in an application (no. 33290/96) against the Portuguese Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Mr João Manuel Salgueiro da Silva Mouta ("the applicant"), on 12 February 1996.

2. On 20 May 1997 the Commission decided to give notice of the application to the Portuguese Government ("the Government") and invited them to submit observations in writing on its admissibility and merits. The Government submitted their observations on 15 October 1997 after an extension of the time allowed and the applicant replied on 6 January 1998.

3. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998, and in accordance with Article 5 § 2 thereof, the application was examined by the Court.

4. In accordance with Rule 52 § 1 of the Rules of Court, the President of the Court, Mr L. Wildhaber, assigned the case to the Fourth Section. The Chamber constituted within that Section included ex officio Mr I. Cabral Barreto, the judge elected in respect of Portugal (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Mr M. Pellonpää, President of the Section (Rule 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr G. Ress, Mr. A Pastor Ridruejo, Mr L. Caflisch, Mr J. Makarczyk and Mrs N. Vajić (Rule 26 § 1 (b)).

[11] Application no. 33290/96 Judgment Strasbourg 21 December 1999; Final 21/03/2000

5. On 1 December 1998 the Chamber declared the application admissible, considering that the complaints lodged by the applicant under Articles 8 and 14 of the Convention should be examined on the merits[1].

6. On 15 June 1999 the Chamber decided to hold a hearing in private on the merits of the case. The hearing took place in the Human Rights Building, Strasbourg, on 28 September 1999.

The facts

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a Portuguese national born in 1961. He lives in Queluz (Portugal).

9. In 1983 the applicant married C.D.S. On 2 November 1987 they had a daughter, M. The applicant separated from his wife in April 1990 and has since then been living with a man, L.G.C. Following divorce proceedings instituted by C.D.S., the divorce decree was pronounced on 30 September 1993 by the Lisbon Family Affairs Court (Tribunal de Família).

10. On 7 February 1991, during the divorce proceedings, the applicant signed an agreement with C.D.S. concerning the award of parental responsibility (poder paternal) for M. Under the terms of that agreement C.D.S. was to have parental responsibility and the applicant a right to contact. However, the applicant was unable to exercise his right to contact because C.D.S. did not comply with the agreement.

11. On 16 March 1992 the applicant sought an order giving him parental responsibility for the child. He alleged that C.D.S. was not complying with the terms of the agreement signed on 7 February 1991 since M. was living with her maternal grandparents. The applicant submitted that he was better able to look after his child. In her memorial in reply C.D.S. accused L.G.C. of having sexually abused the child.

12. The Lisbon Family Affairs Court delivered its judgment on 14 July 1994 after a period in which the applicant, M., C.D.S., L.G.C. and the child's maternal grandparents had been interviewed by psychologists attached to the court. The court awarded the applicant parental

responsibility, dismissing as unfounded – in the light of the court psychologists' reports – C.D.S.'s allegations that L.G.C. had asked M. to masturbate him. It also found, again in the light of the court psychologists' reports, that statements made by M. to that effect appeared to have been prompted by others. The court added:

"The mother continues to be most uncooperative and it is wholly improbable that her attitude will change. She has repeatedly failed to comply with the Court's decisions. The finding is inescapable that [the mother] has not shown herself capable at present of providing M. with conditions conducive to the balanced and calm life she needs. The father is at present better able to do so. In addition to providing the economic and living conditions necessary to have the child with him, he has shown himself capable of providing her with the balanced conditions she needs and of respecting her right to maintain regular and sustained contact with her mother and maternal grandparents."

13. M. stayed with the applicant from 18 April to 3 November 1995, when she was allegedly abducted by C.D.S. The applicant reported the abduction and criminal proceedings are pending in that connection.

14. C.D.S. appealed against the Family Affairs Court's judgment to the Lisbon Court of Appeal (Tribunal da Relação), which gave judgment on 9 January 1996, reversing the lower court's judgment and awarding parental responsibility to C.D.S., with contact to the applicant. The judgment was worded as follows.

"In the proceedings for the award of parental responsibility for the child M., born on 2 November 1987, daughter of [the applicant] and C.D.S., the decision given on 7 February 1991 confirmed the agreement between the parents as to parental responsibility for the child, contact and the amount of maintenance payable by the father, since custody of M. was awarded to the mother.

On 16 March 1992 [the applicant] applied for a variation of the order granting parental responsibility, alleging that the child was not living with her mother in accordance with what had been decided, but with her maternal grandparents, which – he argued – was unsatisfactory. It was for that reason that the custody arrangements should be varied so as to allow him to have his daughter and apply to the mother the contact and maintenance arrangements which had hitherto been applied to him.

The child's mother not only opposed the application lodged by the applicant, but also relied on evidence supporting her contention that the child should not remain in the company of her father because he was a homosexual and was cohabiting with another man. After a number of steps had been taken in connection with those proceedings, the following decision was given on 14 July 1994:

'1. Custody and care of the child is awarded to the father, in whom parental responsibility shall be vested.

2. The child may see her mother on alternate weekends, from Friday to Monday. Her mother shall collect her from school on the Friday and bring her back to school on Monday morning before lessons start.

3. The child may also see her mother every Tuesday and Wednesday; her mother shall fetch her from school after lessons and bring her back the following morning.

4. The child shall spend Christmas Eve and Christmas Day alternately with her father and her mother.

5. The child shall spend the Easter holidays with her mother.

6. During the school summer holidays the child shall spend thirty days with her mother. The dates must be agreed on with the father at least sixty days beforehand.

7. The mother shall pay the father maintenance of 30,000 escudos per month, payable before the 8th of every month. Those maintenance payments shall be adjusted once annually on the basis of the inflation index for the previous year published by the INE (National Institute of Statistics).'

That decision specifically governed arrangements applicable to the year 1994. C.D.S., who was dissatisfied with the decision, appealed. She had previously appealed against the decision appearing on page 238, which dismissed an application for a stay of the proceedings, and the decision given at the hearing of 29 April 1994 on the application for an examination of the document appearing on page 233; both those appeals were adjourned and did not have the effect of staying the proceedings.

The appellant sets out the following grounds in her appeal:

In his pleadings [the applicant] submitted that the judgment of the first-instance court should be upheld.

State Counsel attached to the Court of Appeal has recommended that the decision be set aside, but not on the grounds relied on by the appellant.

After examining the case, we shall give our decision.

We shall first examine the following facts, which the first-instance court considered to be established.

1. The child, M., who was born on 2 November 1987, is the daughter of [the applicant] and C.D.S.

2. Her parents married on 2 April 1983.

3. Divorce was granted on 30 September 1993 and their marriage dissolved.

4. The parents have been living separately since April 1990, when [the applicant] left his home to go and live with another man, whose first name is L.

5. On 7 March 1991 the Loures Court gave a decision in case no. 1101/90 confirming the following agreement on the exercise of parental responsibility for the child:

‘I. The mother shall have custody of the child.

II. The father may visit his daughter whenever he likes provided that he does not disrupt her schooling.

III. The child shall spend alternate weekends and Christmas and Easter with her father.

IV. The child shall spend the father's holidays with him unless those holidays coincide with those of the mother, in which case the child shall spend fifteen days with each parent.

V. On the weekends which the child spends with her father, he shall collect her from her mother's house on Saturday at about 10 a.m. and bring her back on Sunday at about 8 p.m.

VI. The child shall go to a kindergarten as soon as possible, the enrolment fees to be paid by the father.

VII. The father shall pay maintenance of 10,000 escudos per month, which shall be adjusted once annually by the same percentage as the net increase in his salary. That sum shall be paid into the account of the child's mother – account no. …– before the 5th day of the following month.

VIII. The father shall also pay half his daughter's kindergarten fees.

IX. The father shall pay half of any special expenses for his child's health.'

6. From April 1992 the child stopped seeing her father on the agreed terms, against his wishes.

7. Until January 1994 the child lived with her maternal grandparents [name] at Camarate [address].

8. From that date the child went to live with her mother and her mother's boyfriend [address] in Lisbon.

9. She continued, however, to stay overnight at her maternal grandparents' house from time to time.

10. On schooldays when the child did not stay overnight with her grandparents, her mother used to drive her to her grandparents' house where she used to stay after school from 5 p.m.

11. During that school year M. was in the first year primary at … school, for which the fees came to 45,400 escudos per month.

12. Her mother has been cohabiting with J. for at least two years.

13. J., who is a business manager, works in the imports and exports sector, the major part of his activity being in Germany where he has immigrant status. His income amounts to some 600,000 escudos per month.

14. The mother, C.D.S., is the manager of DNS, the partners of which are her boyfriend and his brother, J.P.

15. She has been registered with the State agency for employment and vocational training since 17 February 1994.

16. Her expenses are paid for jointly by herself and her boyfriend.

17. She states that she pays 120,000 escudos in rent and spends approximately 100,000 escudos per month on food.

18. The father, João Mouta, is in a homosexual relationship with L.G.C., with whom he has been living since April 1990.

19. He is the head of his sector at A., and his net monthly income, plus commission, comes to just over 200,000 escudos.

20. The child is very close to her maternal grandmother, who is a Jehovah's Witness.

21. Following her failure to comply with the decision referred to in paragraph 5, the child's mother was ordered, on 14 May 1993, to pay a fine of 30,000 escudos because since April 1992 she had been refusing to allow the father to exercise his 'right to contact with his daughter in accordance with the decision given'.

22. On 25 June 1994, after interviewing the father and mother both individually and together, and M. without her parents or her maternal grandmother being present, and the maternal grandmother and the father's partner individually, and performing a psychological examination of M., the court psychologists drew up the following report:

'M. is a communicative child of normal intellectual development for her age and above average intelligence. She is very attached to her father and mother, and the conflict between her parents is a source of some insecurity. She would like her parents to live closer together because she finds it difficult to understand why she has to live with her grandparents and not see her father or to accept this. She has a very good relationship with her father, who is very affectionate and attentive towards his daughter. Both [the applicant] and his ex-wife are affectionate and flexible parents and both invest in their daughter's upbringing and emotional security. The reasons for their separation were subsequently a source of substantial conflict between them, exacerbated by M.'s maternal grandmother, who does not accept [the applicant's] lifestyle and unconsciously tries to keep him away from his daughter. To sum up, both parents are capable of overseeing their daughter's satisfactory psychoaffective development, but we do not feel that it is right for her to live with her grandmother, who exacerbates the conflict between the two parties and fuels it by trying to keep [the applicant] away because she does not accept his lifestyle.'

23. On 16 August 1993 M. told the psychologist and her father that the latter's partner had asked her, while her father was out, to go into the bathroom with him, that he had locked the door and asked her to masturbate him (she made gestures imitative of masturbation) and then told her that she did not need to wash her hands and that she should not say anything to her father. The psychologist stated that the manner in which the child had related that episode had made her doubt the truthfulness of the story, which might have been suggested by repeated promptings. She added that while the daughter was describing the episode, the applicant had been understanding and asked for clarification, which confirmed that the father and daughter had a good relationship.

24. During the interview with the psychologist on 6 December 1993 the child stated that she was still living with her maternal grandmother and that from time to time she stayed with her mother where she would sleep on a sofa in the living room because there was no bedroom for her.

25. In a report dated 17 January 1994, drawn up following a meeting between the daughter and her father, the psychologist concluded that ‘although M. has observed during her meetings with her father that he is living with another man, her parental images have been fully assimilated and she presents no problem relating to psychosexual identity, be it her own or that of her parents’.

26. Dr V., a psychiatrist, stated, after interviewing the boyfriend of [the applicant], the child’s father, that in his opinion the partner was well adjusted and of satisfactory emotional and cognitive development. He found nothing abnormal about the boyfriend either as an individual or in terms of his relationship with the child’s father. He considered it wholly improbable that the episode related by the child, as described in paragraph 23, had really occurred.

27. The final report drawn up by the court psychologists, dated 12 April 1994, indicated that M. was suffering from a degree of insecurity due in part to the conflict between her mother’s side of the family and her father, and that she had a defensive attitude which manifested itself in a refusal to confront potentially stressful situations. The child is aware that her family opposes her meetings with her father, their opposition being justified by the child’s description of an episode which had allegedly occurred between her and her father’s boyfriend, L.G.C., in which L.G.C. had asked her to masturbate him. With regard to that account, it is difficult to imagine how a 6-year-old child could relate in detail an episode which had occurred several years earlier. The experts conclude in their report that the fact that M. had described in detail the above-mentioned masturbation episode did not mean that it had actually occurred. They reiterate that the father is a very affectionate father, full of understanding and kindness towards his daughter, while also imposing on her, satisfactorily and instructively, limits which were necessary and made her feel secure.

The experts also reiterate that the child’s mother is a very affectionate mother, but rather permissive, which is not conducive to a feeling of security, although she is capable of improving. They also conclude that it is not advisable for the child to live with her grandmother because the religious fanaticism present in her environment not only condemns the father, but excludes him on grounds of the individual and emotional choices he has made. This has contributed to sowing confusion in the child’s mind and exacerbating her sense of conflict and anxiety, thus compromising her healthy psychoaffective development.

28. At the hearing on 24 January 1994 the following interim decision was given with the agreement of both parents: (I) M. could spend every Saturday from 10 a.m. to 10 p.m. with her father, (II) to that end, her father would fetch her from her mother’s house accompanied by her paternal grandmother and/or her paternal great-grandmother.

29. The mother did not allow her daughter to see her father on the terms fixed by the above-mentioned decision.

30. On 22 April 1994 the child psychiatry department of D. Estefânea Hospital decided that M. should be monitored because her feelings of anxiety were such as might inhibit her psychoaffective development.

Those facts, found at first instance, are considered to have been definitively established, without prejudice to the possibility of considering a further factor in delivering this judgment. With regard to the other appeals, since the mother has not submitted any pleadings they are considered to be inoperative under Articles 292 § 1 and 690 § 2 of the Code of Civil Procedure. Apart from the fact that factual evidence has not been submitted, these aspects appear to us to be sufficient to give a ruling here as we understand that the lower court ruled on the essential issue of the case, that is to which of the two parents custody of the child should be awarded. The shortcomings in the decision referred to by State Counsel, although relevant, do not warrant setting it aside.

Let us now examine the appeal:

Article 1905 § 1 of the Civil Code provides that in cases of divorce, judicial separation of persons and possessions, declarations of nullity or annulment of marriage, child custody, maintenance and the conditions of payment are governed by agreement between the parents, that agreement being subject to confirmation by the court; confirmation is refused if the agreement is contrary to the child's interests, including the child's interest in maintaining a very close relationship with the non-custodial parent. Paragraph 2 adds that, in the absence of an agreement, the court shall decide, while protecting the child's interests, including his or her interest in maintaining a very close relationship with the non-custodial parent, it being possible to award custody of the child to one or other parent or, if one of the cases provided for in Article 1918 applies, to a third party or to an educational or welfare establishment.

The Guardianship Act also deals with this point. Section 180(1) of that Act provides that any award of parental responsibility must be in the child's interests.

A judgment of the Lisbon Court of Appeal of 24 April 1974, summarised in BMJ (Bulletin of the Ministry of Justice) no. 236, p. 189, states: 'The Convention on the Rights of the Child – Resolution of 20 November 1989 of the General Assembly of the United Nations – proclaims

with rare concision that children, for the full and harmonious development of their personality, require love and understanding; they should, as far as possible, grow up under the protection and responsibility of their parents and, in any event, in a climate of affection and psychological and material security, with young children not being separated from their mother save in exceptional cases.'

We do not have the slightest hesitation in supporting that declaration, which fully corresponds to the realities of life. Despite the importance of paternal love, a young child needs the care which only the mother's love can provide. We think that M., who is now aged 8, still needs her mother's care. See on this point the judgment of the Porto Court of Appeal of 7 June 1988, in BMJ no. 378, p. 790, in which that court held that 'in the case of young children, that is until 7 or 8 years of age, the emotional tie to the mother is an essential factor in the child's psychological and emotional development, given that the special needs of tenderness and attentive care at this age can rarely be replaced by the father's affection and interest'.

The relationship between M. and her parents is a decisive factor in her emotional well-being and the development of her personality, particularly as it has been demonstrated that she is deeply attached to her parents, just as it has been shown that both of them are capable of guiding the child's psychoaffective development.

In the official record of the decision of 5 July 1990 awarding parental responsibility, [the applicant] acknowledged that the appellant was capable of looking after their daughter and suggested that custody be awarded to the mother, a statement he repeated in the present proceedings to vary that order, as recorded in the transcript of the hearing of 15 June 1992, declaring that he wished to waive his initial application for custody of the child because she was living with her mother again. M.'s father expresses the wish that his daughter not stay with her maternal grandparents, referring to the numerous difficulties he encounters when trying to see his daughter, given the conduct of the appellant and her mother who do all they can to keep him away from his daughter because they do not accept his homosexuality.

Section 182 of the Guardianship Act provides that previous arrangements can be varied if the agreement or final decision is not complied with by both parents or if subsequent circumstances make it necessary [to vary] the terms. Consideration needs to be given, however, to whether there is a justified ground for varying the decision awarding custody of the child to her mother.

On examining the content of the initial application for a variation of the order it can be seen that emphasis is placed on the fact that the child was living with her maternal grandparents who are Jehovah's Witnesses. The truth of the matter, however, is that [the applicant] has not produced any evidence to prove that this religion is harmful and has merely stressed the grandparents' stubborn refusal to allow the father and daughter to see each other. To the Court's knowledge, the beliefs of Jehovah's Witnesses do not incite to evil practices, although fanaticism does exist.

Are there adequate reasons for withdrawing from the mother the parental responsibility which was granted her with the parents' agreement?

There is ample evidence in this case that the appellant habitually breaches the agreements entered into by her with regard to the father's right to contact and that she shows no respect for the courts trying the case, since on several occasions, and without any justification, she has failed to attend interviews to which she has been summoned in the proceedings. We think, however, that her conduct is due not only to [the applicant]'s lifestyle, but also to the fact that she believed the indecent episode related by the child, implicating the father's partner.

On this point, which is particularly important, we agree that it is not possible to accept as proven that such an episode really occurred. However, we cannot rule out the possibility that it did occur. It would be going too far – since there is no conclusive evidence – to assert that the boyfriend of M.'s father would never be capable of the slightest indecency towards M. Thus, although it cannot be asserted that the child told the truth or that she was not manipulated, neither can it be concluded that she was telling an untruth. Since there is evidence to support both scenarios, it would be wrong to give greater credence to one than the other.

In the same way, the accepted principle in cases involving awards of parental responsibility is that the child's interests are paramount, completely irrespective of the – sometimes selfish – interests of the parents. In order to establish what is in the child's interests, a court must in every case take account of the dominant family, educational and social values of the society in which the child is growing up.

As we have already stated and as established case-law authority provides, having regard to the nature of things and the realities of daily life, and for reasons relating to human nature, custody of young children should as a general rule be awarded to the mother unless there are

overriding reasons militating against this (see the Evora Court of Appeal's judgment of 12 July 1979, in BMJ no. 292, p. 450).

In the instant case parental responsibility was withdrawn from the mother despite the fact that it had been awarded her, we repeat, following an agreement between the parents, and without sufficient evidence being produced to cast doubt on her ability to continue exercising that authority. The question which therefore arises, and this should be stressed, is not really which of the two parents should be awarded custody of M., but rather whether there are reasons for varying what was agreed.

Even if that were not the case, however, we think that custody of the child should be awarded to the mother.

The fact that the child's father, who has come to terms with his homosexuality, wishes to live with another man is a reality which has to be accepted. It is well known that society is becoming more and more tolerant of such situations. However, it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society, as the appellant rightly points out. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature and let us remember that it is [the applicant] himself who acknowledged this when, in his initial application of 5 July 1990, he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria.

No doubt is being cast on the father's love for his daughter or on his ability to look after her during the periods for which she is entrusted to his care, for it is essential that they do see each other if the objectives set out above are to be met, that is ensuring the child's well-being and the development of her personality. M. needs to visit her father if her feelings of anxiety and insecurity are to be dissipated. When children are deprived of contact with their father, their present and future development and psychological equilibrium are put at risk. The mother would be wise to try to understand and accept this if she is not to cast doubt on her own ability to exercise parental responsibility.

At present, the failure to comply with the decision confirming the contact arrangements does not amount to a sufficient reason for withdrawing from the appellant the parental responsibility awarded to her by that decision.

Accordingly, we reverse the judgment of the lower court as regards the child's permanent residence with her father, without prejudice to the father's right to contact during the periods which will be stipulated below.

It should be impressed upon the father that during these periods he would be ill-advised to act in any way that would make his daughter realise that her father is living with another man in conditions resembling those of man and wife.

For all the foregoing reasons the Court of Appeal reverses the impugned decision and rules that the appellant, C.D.S., shall continue to exercise parental responsibility for her daughter, M.

The contact arrangements shall be established as follows:

1. The child may see her father on alternate weekends from Friday to Monday. To that end the father shall fetch his daughter from school at the end of classes on the Friday and bring her back on Monday morning before classes start.

2. The father may visit his daughter at school on any other day of the week provided that he does not disrupt her schooling.

3. The child shall spend the Easter holidays alternately with her father and her mother.

4. The Christmas holidays shall be divided into two equal parts: half to be spent with the father and the other half with the mother, but in such a way that the child can spend Christmas Eve and Christmas Day with one and New Year with the other alternately.

5. During the summer holidays the child shall spend thirty days with her father during the latter's holidays, but if that period coincides with the mother's holidays the child shall spend fifteen days with each of them.

6. During the Easter, Christmas and summer holidays the father shall fetch the child from the mother's house and bring her back between 10 a.m. and 1 p.m. unless the parents agree on different times.

7. In accordance with the date of this decision, the child shall spend the next Easter and Christmas holidays with the parent with whom she did not spend those holidays in 1995.

8. The matter of maintenance payable by the father and the manner of payment shall be examined by the Third Section of the Third Chamber of the Lisbon Family Affairs Court in case no. 3821/A, which has been adjourned pending the present decision regarding the child's future.

Costs are awarded against the respondent."

15. One of the three Court of Appeal judges gave the following separate opinion:

"I voted in favour of this decision, with the reservation that I do not consider it constitutionally lawful to assert as a principle that a person can be stripped of his family rights on the basis of his sexual orientation, which – accordingly – cannot, as such, in any circumstances be described as abnormal. The right to be different should not be treated as a 'right' to be ghettoised. It is not therefore a matter of belittling the fact that [the applicant] has come to terms with his sexuality and consequently of denying him his right to bring up his daughter, but rather, since a decision has to be given, of affirming that it cannot be declared in our society and in our era that children can come to terms with their father's homosexuality without running the risk of losing their reference models."

16. No appeal lay against that decision.

17. The right to contact granted to the applicant by the judgment of the Lisbon Court of Appeal was never respected by C.D.S.

18. The applicant therefore lodged an application with the Lisbon Family Affairs Court for enforcement of the Court of Appeal's decision. On 22 May 1998, in connection with those proceedings, the applicant received a copy of a report drawn up by the medical experts attached to the Lisbon Family Affairs Court. He learnt from this that M. was in Vila Nova de Gaia in the north of Portugal. The applicant made two unsuccessful attempts to see his daughter. The enforcement proceedings are apparently still pending.

ii. Relevant domestic law

19. Article 1905 of the Civil Code provides:

"1. In the event of divorce …, child custody, maintenance and the terms of payment shall be determined by agreement between the parents, which is subject to confirmation by the ... court

2. In the absence of an agreement, the court shall decide on the basis of the interests of the child, including the child's interest in maintaining a very close relationship with the non-custodial parent ..."

20. Certain provisions of the Guardianship Act are also relevant to the instant case.

Section 180

"1. ... a decision as to the exercise of parental responsibility shall be made on the basis of the interests of the child, custody of whom may be awarded to one of the parents, a third party or an educational or welfare establishment.

2. Contact arrangements shall be made unless, exceptionally, this would not be in the child's interests ..."

Section 181

"If one of the parents does not comply with the agreement or decision reached in respect of the child's situation, the other parent may apply to the court for enforcement ..."

Section 182

“If the agreement or final decision is not complied with by both the father and the mother or if fresh circumstances make it necessary to vary the terms, one of the parents or the guardian may apply to the ... court for variation of the award of parental responsibility ...”

The law

i. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

21. The applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter, M., to his ex-wife rather than to himself exclusively on the ground of his sexual orientation. He alleged that this constituted a violation of Article 8 of the Convention taken alone and in conjunction with Article 14.

The Government disputed that allegation.

22. Under Article 8 of the Convention,

“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.”

The Court notes at the outset that the judgment of the Court of Appeal in question, in so far as it set aside the judgment of the Lisbon Family Affairs Court of 14 July 1994 which had awarded parental responsibility to the applicant, constitutes an interference with the applicant’s right to respect for his family life and thus attracts the application of Article 8. The

Convention institutions have held that this provision applies to decisions awarding custody to one or other parent after divorce or separation (see the Hoffmann v. Austria judgment of 23 June 1993, Series A no. 255-C, p. 58, § 29; see also Irlen v. Germany, application no. 12246/86, Commission decision of 13 July 1987, Decisions and Reports 53, p. 225).

That finding is not affected by the Government's submission that since the judgment of the Court of Appeal did not ultimately vary what had been decided by friendly settlement between the parents on 7 February 1991, there was no interference with the rights of Mr Salgueiro da Silva Mouta.

The Court observes in that connection that the application lodged – successfully – by the applicant with the Lisbon Family Affairs Court was based on, among other things, the fact that his ex-wife had failed to comply with the terms of that agreement (see paragraph 11 above).

A. Alleged violation of Article 8 taken in conjunction with Article 14

23. Given the nature of the case and the allegations of the applicant, the Court considers it appropriate to examine it first under Article 8 taken in conjunction with Article 14, according to which

"The enjoyment of the rights and freedoms set forth in [the] 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."

24. Mr Salgueiro da Silva Mouta stressed at the outset that he had never disputed the fact that his daughter's interests were paramount, one of the main ones consisting in seeing her father and being able to live with him. He argued, nonetheless, that the Court of Appeal's judgment, in awarding parental responsibility to the mother exclusively on the basis of the father's sexual orientation, amounted to an unjustifiable interference with his right to respect for his family life. The applicant submitted that the decision in issue had been prompted by atavistic misconceptions which bore no relation to the realities of life or common sense. In doing so, he argued, the Court of Appeal had discriminated against him in a manner prohibited by Article 14 of the Convention.

The applicant pointed out that judgment had been given in his favour by the court of first instance, that court being the only one to have had direct knowledge of the facts of the case since the Court of Appeal had ruled solely on the basis of the written proceedings.

25. The Government acknowledged that Article 8 could apply to the situation in question, but only as far as the applicant's right to respect for his family life with his child was concerned. They stressed, however, that no act had been done by a public authority which could have interfered with the applicant's right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life.

With regard to family life, however, the Government pointed out that, as far as parental responsibility was concerned, the Contracting States enjoyed a wide margin of appreciation in respect of the pursuit of the legitimate aims set out in paragraph 2 of Article 8 of the Convention. They added that in this field, in which the child's interests were paramount, the national authorities were naturally better placed than the international court. The Court should not therefore substitute its own interpretation of things for that of the national courts, unless the measures in question were manifestly unreasonable or arbitrary.

In the instant case the Lisbon Court of Appeal had taken account, in accordance with Portuguese law, of the child's interests alone. The intervention of the Court of Appeal had been prescribed by law (Article 1905 § 2 of the Civil Code and sections 178 to 180 of the Guardianship Act). Moreover, it had pursued a legitimate aim, namely the protection of the child's interests, and was necessary in a democratic society.

The Government concluded that the Court of Appeal, in reaching its decision, had had regard exclusively to the overriding interests of the child and not to the applicant's sexual orientation. The applicant had not therefore been discriminated against in any way.

26. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see the Hoffmann judgment cited above, p. 58, § 31).

It must be determined whether the applicant can complain of such a difference in treatment and, if so, whether it was justified.

1. Existence of a difference in treatment

27. The Government disputed the allegation that in the instant case the applicant and M.'s mother had been treated differently. They argued that the Lisbon Court of Appeal's decision had been mainly based on the fact that, in the circumstances of the case, the child's interests would be better served by awarding parental responsibility to the mother.

28. The Court does not deny that the Lisbon Court of Appeal had regard above all to the child's interests when it examined a number of points of fact and of law which could have tipped the scales in favour of one parent rather than the other. However, the Court observes that in reversing the decision of the Lisbon Family Affairs Court and, consequently, awarding parental responsibility to the mother rather than the father, the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man.

The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M.'s mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment") (see the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, pp. 30-31, § 72).

2. Justification for the difference in treatment

29. In accordance with the case-law of the Convention institutions, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see the Karlheinz Schmidt v. Germany judgment of 18 July 1994, Series A no. 291‑B, pp. 32-33, § 24).

30. The decision of the Court of Appeal undeniably pursued a legitimate aim, namely the protection of the health and rights of the child; it must now be examined whether the second requirement was also satisfied.

31. In the applicant's submission, the wording of the judgment clearly showed that the decision to award parental responsibility to the mother was based mainly on the father's sexual orientation, which inevitably gave rise to discrimination against him in relation to the other parent.

32. The Government submitted that the decision in question had, on the contrary, merely touched on the applicant's homosexuality. The considerations of the Court of Appeal to which the applicant referred, when viewed in context, were merely sociological, or even statistical, observations. Even if certain passages of the judgment could arguably have been worded differently, clumsy or unfortunate expressions could not in themselves amount to a violation of the Convention.

33. The Court reiterates its earlier finding that the Lisbon Court of Appeal, in examining the appeal lodged by M.'s mother, introduced a new factor when making its decision as to the award of parental responsibility, namely the applicant's homosexuality (see paragraph 28 above). In determining whether the decision which was ultimately made constituted discriminatory treatment lacking any reasonable basis, it needs to be established whether, as the Government submitted, that new factor was merely an obiter dictum which had no direct effect on the outcome of the matter in issue or whether, on the contrary, it was decisive.

34. The Court notes that the Lisbon Family Affairs Court gave its decision after a period in which the applicant, his ex-wife, their daughter M., L.G.C. and the child's maternal grandparents had been interviewed by court psychologists. The court had established the facts and had had particular regard to the experts' reports in reaching its decision.

The Court of Appeal, ruling solely on the basis of the written proceedings, weighed the facts differently from the lower court and awarded parental responsibility to the mother. It considered, among other things, that "custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this (see paragraph 14 above). The Court of Appeal further considered that there were insufficient reasons for taking away from the mother the parental responsibility awarded her by agreement between the parties.

However, after that observation the Court of Appeal added "Even if that were not the case ... we think that custody of the child should be awarded to the mother" (ibid.). The Court of Appeal then took account of the fact that the applicant was a homosexual and was living with another man in observing that "The child should live in ... a traditional Portuguese family"

and that “It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations” (ibid.).

35. It is the Court’s view that the above passages from the judgment in question, far from being merely clumsy or unfortunate as the Government maintained, or mere obiter dicta, suggest, quite to the contrary, that the applicant’s homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant’s right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man “in conditions resembling those of man and wife” (ibid.).

36. The Court is therefore forced to find, in the light of the foregoing, that the Court of Appeal made a distinction based on considerations regarding the applicant’s sexual orientation, a distinction which is not acceptable under the Convention (see, mutatis mutandis, the Hoffmann judgment cited above, p. 60, § 36).

The Court cannot therefore find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14.

B. Alleged violation of Article 8 taken alone

37. In view of the conclusion reached in the preceding paragraph, the Court does not consider it necessary to rule on the allegation of a violation of Article 8 taken alone; the arguments advanced in this respect are essentially the same as those examined in respect of Article 8 taken in conjunction with Article 14.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. Article 41 of the Convention provides:

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

A. Damage

39. The applicant requested the Court to award him "just satisfaction" without, however, quantifying his claim. In the circumstances the Court considers that the finding of a violation set out in the present judgment constitutes in itself sufficient just satisfaction in respect of the damage alleged.

B. Costs and expenses

40. The applicant requested reimbursement of the costs incurred in lodging his application, including those of himself and his advisers attending the hearing before the Court, namely 224,919 Portuguese escudos (PTE), 5,829 French francs, 11,060 Spanish pesetas and 67 German marks, that is a total sum of PTE 423,217.

He also requested reimbursement of the fees billed by his lawyer and by the adviser who had assisted her in preparing for the hearing before the Court, that is PTE 2,340,000 and PTE 340,000 respectively.

41. The Government left the matter to the Court's discretion.

42. The Court is not satisfied that all the costs claimed were necessary and reasonable. Making an equitable assessment, it awards the applicant an aggregate sum of PTE 350,000 under that head.

As regards fees, the Court considers that the sums claimed are also excessive. Making an equitable assessment and having regard to the circumstances of the case, it decides to award PTE 1,500,000 for the work done by the applicant's lawyer and PTE 300,000 for that done by her adviser.

C. Default interest

43. According to the information available to the Court, the statutory rate of interest applicable in Portugal at the date of adoption of the present judgment is 7% per annum.

The Court's decision

1. Holds that there has been a violation of Article 8 of the Convention taken in conjunction with Article 14;

2. Holds that there is no need to rule on the complaints lodged under Article 8 of the Convention taken alone;

3. Holds that the present judgment constitutes in itself sufficient just satisfaction for the damage alleged;

4. Holds

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:

(i) 350,000 (three hundred and fifty thousand) Portuguese escudos in respect of costs;

(ii) 1,800,000 (one million eight hundred thousand) Portuguese escudos in respect of fees;

(b) that simple interest at an annual rate of 7% shall be payable from the expiry of the above-mentioned three months until settlement;

5. Dismisses the remainder of the claim for just satisfaction.

Chapter V Right to a lease

Case of Karner v. Austria [12]

Procedure

1. The case originated in an application (no. 40016/98) against the Republic of Austria lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Siegmund Karner ("the applicant"), on 24 July 1997.

2. The applicant was represented by Lansky & Partner, a law firm in Vienna. The Austrian Government ("the Government") were represented by their Agent, Mr H. Winkler.

3. The applicant alleged, in particular, that the Supreme Court's decision not to recognise his right to succeed to a tenancy after the death of his companion amounted to discrimination on the ground of his sexual orientation in breach of Article 14 of the Convention taken in conjunction with Article 8.

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

[12] Application no. 40016/98 Judgment Strasbourg 24 July 2003 FINAL 24/10/2003

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. By a decision of 11 September 2001 the Chamber declared the application partly admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed First Section (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

8. On 7 December 2001 the President of the Chamber granted ILGA-Europe (The European Region of the International Lesbian and Gay Association), Liberty and Stonewall leave to intervene as third parties (Article 36 § 2 of the Convention and Rule 61 § 3). The third parties were represented by Mr R. Wintemute.

9. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

The facts

I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1955 and lived in Vienna.

11. From 1989 the applicant lived with Mr W., with whom he had a homosexual relationship, in a flat in Vienna, which the latter had rented a year earlier. They shared the expenses on the flat.

12. In 1991 Mr W. discovered that he was infected with the Aids virus. His relationship with the applicant continued. In 1993, when Mr W. developed Aids, the applicant nursed him. In 1994 Mr W. died after designating the applicant as his heir.

13. In 1995 the landlord of the flat brought proceedings against the applicant for termination of the tenancy. On 6 January 1996 the Favoriten District Court (Bezirksgericht) dismissed the action. It considered that section 14(3) of the Rent Act (Mietrechtsgesetz), which provided that family members had a right to succeed to a tenancy, was also applicable to a homosexual relationship.

14. On 30 April 1996 the Vienna Regional Civil Court (Landesgericht für Zivilrechtssachen) dismissed the landlord's appeal. It found that section 14(3) of the Rent Act was intended to protect persons who had lived together for a long time without being married against sudden homelessness. It applied to homosexuals as well as to persons of opposite sex.

15. On 5 December 1996 the Supreme Court (Oberster Gerichtshof) granted the landlord's appeal, quashed the lower court's decision and terminated the lease. It found that the notion of "life companion" (Lebensgefährte) in section 14(3) of the Rent Act was to be interpreted as at the time it was enacted, and the legislature's intention in 1974 was not to include persons of the same sex.

16. On 26 September 2000 the applicant died.

17. On 11 November 2001 the applicant's lawyer informed the Court of the applicant's death and that his mother had waived her right to succeed to the estate. He asked the Court not to strike the application out of its list before the public notary handling the applicant's estate had traced other heirs.

18. On 10 April 2002 the applicant's lawyer informed the Court that the public notary had instigated enquiries in order to trace previously unknown heirs who might wish to succeed to the estate.

II. RELEVANT DOMESTIC LAW

19. Section 14 of the Rent Act (Mietrechtsgesetz) reads as follows:

"Right to a tenancy in the event of death

(1) The death of the landlord or a tenant shall not terminate a tenancy.

(2) On the death of the main tenant of a flat, the persons designated in subsection (3) as being entitled to succeed to the tenancy shall do so, to the exclusion of other persons entitled to succeed to the estate, unless they have notified the landlord within fourteen days of the main tenant's death that they do not wish to continue the tenancy. On succeeding to the tenancy, the new tenants shall assume liability for the rent and any obligations that arose during the tenancy of the deceased main tenant. If more than one person is entitled to succeed, they shall succeed jointly to the tenancy and become jointly and severally liable.

(3) The following shall be entitled to succeed to the tenancy for the purposes of subsection (2): a spouse, a life companion, relatives in the direct line including adopted children, and siblings of the former tenant, in so far as such persons have a pressing need for accommodation and have already lived in the accommodation with the tenant as members of the same household. For the purposes of this provision, 'life companion' shall mean a person who has lived in the flat with the former tenant until the latter's death for at least three years, sharing a household on an economic footing like that of a marriage; a life companion shall be

deemed to have lived in the flat for three years if he or she moved into the flat together with the former tenant at the outset."

The law

I. JURISDICTION OF THE COURT

20. The Government requested that the application be struck out of the list of cases in accordance with Article 37 § 1 of the Convention, since the applicant had died and there were no heirs who wished to pursue the application.

21. The applicant's counsel emphasised that the case involved an important issue of Austrian law and that respect for human rights required its continued examination, in accordance with Article 37 § 1 in fine. Article 37 § 1 of the Convention reads as follows:

"1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the Protocols thereto so requires.

22. The Court notes that in a number of cases in which an applicant died in the course of the proceedings it has taken into account the statements of the applicant's heirs or of close family members expressing the wish to pursue the proceedings before the Court (see, among other authorities, Deweer v. Belgium, judgment of 27 February 1980, Series A no. 35, pp. 19‑20, §§ 37-38; X v. the United Kingdom, judgment of 5 November 1981, Series A no. 46, p. 15, § 32; Vocaturo v. Italy, judgment of 24 May 1991, Series A no. 206-C, p. 29, § 2; G. v. Italy, judgment of 27 February 1992, Series A no. 228-F, p. 65, § 2; Pandolfelli and Palumbo v. Italy, judgment of 27 February 1992, Series A no. 231-B, p. 16, § 2; X v. France, judgment of 31 March 1992, Series A no. 234-C, p. 89, § 26; and Raimondo v. Italy, judgment of 22 February 1994, Series A no. 281-A, p. 8, § 2).

23. On the other hand, it has been the Court's practice to strike applications out of the list of cases in the absence of any heir or close relative who has expressed the wish to pursue an application (see Scherer v. Switzerland, judgment of 25 March 1994, Series A no 287, pp. 14-15, § 31; Öhlinger v. Austria, no. 21444/93, Commission's report of 14 January 1997, § 15, unreported; Malhous v. the Czech Republic (dec.) [GC], no. 33071/96, ECHR 2000-XII). Thus, the Court has to determine whether the application in the present case should also be struck out of the list. In formulating an appropriate answer to this question, the object and purpose of the Convention system as such must be taken into account.

24. The Court reiterates that, while Article 33 (former Article 24) of the Convention allows each Contracting State to refer to the Court (Commission) “any alleged breach” of the Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 34 (former Article 25), claim “to be the victim of a violation ... of the rights set forth in the Convention or the Protocols thereto”. Thus, in contrast to the position under Article 33 – where, subject to the other conditions laid down, the general interest attaching to the observance of the Convention renders admissible an inter-State application – Article 34 requires that an

individual applicant should claim to have been actually affected by the violation he alleges (see Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, pp. 90-91, §§ 239-40, and Klass and Others v. Germany, judgment of 6 September 1978, Series A

no. 28, pp. 17-18, § 33). Article 34 does not institute for individuals a kind of actio popularis for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention (see Norris v. Ireland, judgment of 26 October 1988, Series A no. 142, pp. 15-16, § 31, and Sanles Sanles v. Spain (dec.), no. 48335/99, ECHR 2000-XI).

25. While under Article 34 of the Convention the existence of a "victim of a violation", that is to say, an individual applicant who is personally affected by an alleged violation of a Convention right, is indispensable for putting the protection mechanism of the Convention into motion, this criterion cannot be applied in a rigid, mechanical and inflexible way throughout the whole proceedings. As a rule, and in particular in cases which primarily involve pecuniary, and, for this reason, transferable claims, the existence of other persons to whom that claim is transferred is an important criterion, but cannot be the only one. As the Court pointed out in Malhous (decision cited above), human rights cases before the Court generally also have a moral dimension, which must be taken into account when considering whether the examination of an application after the applicant's death should be continued. All the more so if the main issue raised by the case transcends the person and the interests of the applicant.

26. The Court has repeatedly stated that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties" (see Ireland v. the United Kingdom, cited above, p. 62, § 154, and Guzzardi v. Italy, judgment of 6 November 1980, Series A no. 39, p. 31, § 86). Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.

27. The Court considers that the subject matter of the present application – the difference in treatment of homosexuals as regards succession to tenancies under Austrian law – involves an important question of general interest not only for Austria but also for other States Parties to the Convention. In this connection the Court refers to the submissions made by ILGA-Europe, Liberty and Stonewall, whose intervention in the proceedings as third parties was authorised as it highlights the general importance of the issue. Thus, the continued examination of the present application would contribute to elucidate, safeguard and develop the standards of protection under the Convention.

28. In these particular circumstances, the Court finds that respect for human rights as defined in the Convention and the Protocols thereto requires a continuation of the examination of the case (Article 37 § 1 in fine of the Convention) and accordingly rejects the Government's request for the application to be struck out of its list.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

29. The applicant claimed to have been a victim of discrimination on the ground of his sexual orientation in that the Supreme Court, in its decision of 5 December 1996, had denied him the status of "life companion" of the late Mr W. within the meaning of section 14 of the Rent Act, thereby preventing him from succeeding to Mr W.'s tenancy. He relied on Article 14 of the Convention taken in conjunction with Article 8, which provide as follows:

Article 14

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

Article 8

“1. Everyone has the right to respect for his private and family life [and] his home ...

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.”

A. Applicability of Article 14

30. The applicant submitted that the subject matter fell within the scope of Article 8 § 1 as regards the elements of private life, family life and home.

31. The Government, referring to Röösli v. Germany (no. 28318/95, Commission decision of 15 May 1996, Decisions and Reports 85-A, p. 149), submitted that the subject matter of the present case did not come within the ambit of Article 8 § 1 as regards the elements of “private and family life”. The issue whether it came within the ambit of the “home” element could be left open because, in any event, there had been no breach of Article 14 of the Convention taken in conjunction with Article 8.

32. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the “rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions, and to this extent it is autonomous, there can be no room for its application unless the facts of the

case fall within the ambit of one or more of the latter (see Petrovic v. Austria, judgment of 27 March 1998, Reports of Judgments and Decisions 1998-II, p. 585, § 22).

33. The Court has to consider whether the subject matter of the present case falls within the ambit of Article 8. The Court does not find it necessary to determine the notions of "private life" or "family life" because, in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home guaranteed under Article 8 of the Convention (see Larkos v. Cyprus [GC], no. 29515/95, § 28, ECHR 1999-I). The applicant had been living in the flat that had been let to Mr W. and if it had not been for his sex, or rather, sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease, in accordance with section 14 of the Rent Act.

Therefore, Article 14 of the Convention applies.

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

34. The applicant submitted that section 14 of the Rent Act aimed to provide surviving cohabitants with social and financial protection from homelessness but did not pursue any family- or social-policy aims. That being so, there was no justification for the difference in treatment of homosexual and heterosexual partners. Accordingly, he had been the victim of discrimination on the ground of his sexual orientation.

35. The Government accepted that in respect of succession to the tenancy the applicant had been treated differently on the ground of his sexual orientation. They maintained that that difference in treatment had an objective and reasonable justification, as the aim of the relevant provision of the Rent Act had been the protection of the traditional family.

36. ILGA-Europe, Liberty and Stonewall submitted as third-party interveners that a strong justification was required when the ground for a distinction was sex or sexual orientation. They pointed out that a growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view was supported by recommendations and legislation of European institutions, such as Protocol No. 12 to the Convention, recommendations by the Parliamentary Assembly of the Council of Europe (Recommendations 1470 (2000) and 1474 (2000)), the European Parliament (Resolution on equal rights for homosexuals and lesbians in the EC, OJ C 61, 28 February 1994, p. 40; Resolution on respect for human rights in the European Union 1998-1999, A5-0050/00, § 57, 16 March 2000) and the Council of the European Union (Directive 2000/78/EC, OJ L 303/16, 27 November 2000).

37. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see Petrovic, cited above, p. 586, § 30). Furthermore, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see Burghartz v. Switzerland, judgment of 22 February 1994, Series A no. 280-B, p. 29, § 27; Karlheinz Schmidt v. Germany, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24; Salgueiro da Silva Mouta v. Portugal, no. 33290/96, § 29, ECHR 1999-IX; Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, § 94, ECHR 1999-VI; Fretté v. France, no. 36515/97, §§ 34 and 40, ECHR 2002‑I; and S.L. v. Austria, no. 45330/99, § 36, ECHR 2003-I). Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see Smith and Grady, cited above, § 90, and S.L. v. Austria, cited above, § 37).

38. In the present case, after Mr W.'s death, the applicant sought to avail himself of the right under section 14(3) of the Rent Act, which he asserted entitled him as a surviving partner to succeed to the tenancy. The court of first instance dismissed an action by the landlord for termination of the tenancy and the Vienna Regional Court dismissed the appeal. It found that the provision in issue protected persons who had been living together for a long time without

being married against sudden homelessness and applied to homosexuals as well as to heterosexuals.

39. The Supreme Court, which ultimately granted the landlord's action for termination of the tenancy, did not argue that there were important reasons for restricting the right to succeed to a tenancy to heterosexual couples. It stated instead that it had not been the intention of the legislature when enacting section 14(3) of the Rent Act in 1974 to include protection for couples of the same sex. The Government now submit that the aim of the provision in issue was the protection of the traditional family unit.

40. The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see Mata Estevez v. Spain (dec.), no. 56501/00, ECHR 2001-VI, with further references). It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.

42. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.

43. Thus, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

44. Article 41 of the Convention provides:

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

A. Damage

45. The applicant's lawyer claimed 7,267 euros (EUR) as compensation for pecuniary damage caused by the applicant's having to return the flat, which he had renovated, have recourse to an estate agent and renovate a new flat. He also claimed EUR 7,267 for non-pecuniary damage due to the anxiety suffered by the applicant.

46. The Government argued that the claim for pecuniary damage was not supported by any receipts. As to the claim for non-pecuniary damage, it had only been made after the applicant's death. In the absence of any injury to any heirs, it was unnecessary to determine whether such a claim could form part of the applicant's estate.

47. The Court considers that in the absence of an injured party no award can be made under Article 41 of the Convention as regards the claims for pecuniary and non-pecuniary damage. Accordingly, the Court rejects these claims.

B. Costs and expenses

48. The applicant's lawyer claimed EUR 13,027.75 for costs and expenses incurred in the Convention proceedings.

49. The Government considered this request to be excessive and that any award under that head should not exceed EUR 1,453.46.

50. The Court, making an assessment on an equitable basis, decides that EUR 5,000 shall be paid to the applicant's estate in respect of costs and expenses, plus any tax that may be chargeable.

C. Default interest

51. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

The Court's decision

1. Rejects by six votes to one the Government's request that the application be struck out of the list of cases;

2. Holds by six votes to one that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

3. Holds by six votes to one

(a) that the respondent State is to pay the applicant's estate, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

4. Dismisses unanimously the remainder of the claims for just satisfaction.

Chapter VI Social rights

Case of p.B. and J.S. v. Austria [13]

Procedure

1. The case originated in an application (no. 18984/02) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by one Hungarian national, Mr P.B. and one Austrian national, Mr J.S. ("the applicants"), on 24 April 2002. The President of the Chamber

[13] Application no. 18984/02 Judgment Strasbourg 22 July 2010 ; Final 22/10/2010

acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicants were represented by Mr J. Unterweger, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. By a decision of 20 March 2008 the Court declared the application admissible.

4. The Government of Hungary, having been informed by the Registrar of their right to intervene (Article 36 § 1 of the Convention and Rule 44 § 1), indicated that they did not intend to do so.

5. The applicants and the Government each filed observations on the merits (Rule 59 § 1).

The facts

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1963 and 1959 respectively and live in Vienna.

7. The applicants live together in a homosexual relationship. The second applicant is a civil servant and, for the purpose of accident and sickness insurance cover, he is insured with the Civil Servants Insurance Corporation ("the CSIC") (Versicherungsanstalt Öffentlicher Bediensteter). On 1 July 1997 the first applicant asked the CSIC to recognise him as the dependent (Angehöriger) and to extend the second applicant's insurance cover to include him. He submitted that section 56(6) of the Civil Servants Sickness and Accident Insurance Act

("the CSSAIA") (Beamten-Kranken- und Unfallversicherungsgesetz) only referred to persons of the opposite sex living with the principally insured person and running the common household without receiving any payment. But, because there were no good reasons for excluding persons living in a homosexual relationship from the privilege of extended insurance cover, section 56(6) should be interpreted as also including homosexual partners.

8. On 2 September 1997 the CSIC dismissed the request, holding that, because the first applicant was of the same sex as the second applicant, his request had to be dismissed. This decision was served on the second applicant who, on 1 October 1997, filed an objection.

9. On 21 November 1997 the Mayor of Vienna, acting as the Regional Governor, quashed the decision on procedural grounds. He held that the CSIC should have served its decision on the first applicant.

10. On 13 January 1998 the CSIC dismissed a request by the first applicant and this time served the decision on him. The first applicant filed objections.

11. The mayor of Vienna confirmed the CSIC's decision on 19 March 1998. Thereupon the first applicant lodged a complaint with the Constitutional Court in which he argued that the exclusion, under section 56(6) of the CSSAIA, of homosexual couples from the extension of insurance cover was in breach of Article 14, read in conjunction with Article 8, of the Convention and was therefore unconstitutional.

12. On 15 June 1998 the Constitutional Court declined to deal with the first applicant's complaint. Referring to its previous case-law, the Constitutional Court found that, in the issue at hand, the legislator had had a very wide margin in which to reach a decision and the decision taken had been within that margin.

13. On an unspecified date the Constitutional Court granted a request by the first applicant for the case to be transferred to the Administrative Court. On 7 September 1998 the first applicant supplemented his complaint to the Administrative Court.

14. On 4 October 2001 the Administrative Court dismissed the first applicant's complaint. It found that the authorities had correctly concluded that section 56(6) of the CSSAIA only applied to heterosexual partnerships. There was no issue under Article 14, read in conjunction with Article 8, of the Convention, because Article 8 did not guarantee specific social rights, and the case at issue did not therefore fall within the ambit of that provision. The exclusion of homosexual partnerships from the scope of section 56(6) of the CSSAIA also complied with the principle of equality because that difference in treatment was justified. While it was true that, where persons of different sex living together in a household in which one of them was running that household while not being gainfully employed, it was, as a rule, safe to conclude that they were cohabiting in a partnership, that was not the case if two persons of the same sex were living together in a household. In the absence of any possibility to register a homosexual partnership, it would have been necessary to undertake delicate enquiries into the most intimate sphere of the person concerned. That difference in the factual situation justified different treatment in law.

15. In proceedings instituted by the Constitutional Court to examine the constitutionality of two similar provisions to section 56(6) of the CSSAIA relating to extending insurance cover to relatives, on 10 October 2005 the Constitutional Court decided to quash section 123(8b) of the General Social Security Act ("the GSSA") (Allgemeines Sozial-versicherungsgesetz) and section 83(3) of the Social Security Act for Trade and Commerce ("the TCSSA") (Gewerbliches Sozialversicherungsgesetz). The Constitutional Court explicitly referred to the judgment of the European Court of Human Rights in the case of Karner v. Austria (see Karner v. Austria, no. 40016/98, 24 July 2003) and held that the two provisions in which the extension of insurance cover to unrelated persons living with the insured were discriminatory because they were restricted to persons of the opposite sex.

16. On 1 August 2006 the Social Rights Amendment Act ("the SRAA") (Sozialrechts-Änderungsgesetz) entered into force amending in particular the GSSA, the TCSSA and also section 56 of the CSSAIA. A second amendment to section 56 of the CSSAIA entered into force on 1 July 2007.

II. RELEVANT DOMESTIC LAW

17. Before 1 August 2006 section 56(6) of the Civil Servants Sickness and Accident Insurance Act (Beamten-, Kranken- und Unfallversicherungs-gesetz), in so far as relevant, provided as follows:

"(1) Relatives are entitled to benefits, if they have their ordinary residence in Austria and are neither health insured under the provisions of this Act nor any other provision of law ...

...

(6) A person belonging to the group of parents, ... step-parents and foster parents, children, ... stepchildren and foster children, grandchildren or brothers and sisters of the insured or a person of the opposite sex who is not related to him or her who has been living with him or her in the same household for at least ten months and since then has been doing the domestic work for the insured without payment, unless there is a spouse living in the same household who is able to work, shall be regarded as a member of the household. Only one person can be a member in this sense."

18. After the amendment to the Civil Servants Sickness and Accident Insurance Act on 1 August 2006, section 56(6) remained the same, but a new paragraph (6a) was introduced. It read as follows;

"A person who is not a relative of the insured and who has been living with him or her in the same household for at least ten month and since then is doing the domestic work for him or

her without payment, unless there is a spouse living in the same household who is able to work, shall be regarded as a member of the common household, if

(a) he or she is bringing up one or more children living in the same household ... or did so for at least four years;

(b) he or she is entitled to benefits for the payment of nursing care (at least level 4) pursuant to section 5 of the Federal Nursing Care Benefits Act or pursuant to the provisions of the Regional Nursing Care Benefits Act;

(c) he or she is doing nursing work for the insured who is entitled to benefits (at least level 4) for the payment of nursing care pursuant to the Federal Nursing Care Benefits Act or pursuant to the provisions of the Regional Nursing Care Benefits Act."

19. On 1 July 2007 a further amendment to the Civil Servants Sickness and Accident Insurance Act entered into force. Section 56(6) no longer applied to non-related persons, but only to relatives of the insured. The newly introduced paragraph 6a was only slightly modified. These provisions, in so far as relevant, read as follows:

"(6) A person belonging to the group of parents, ... step-parents and foster parents, children, ... stepchildren and foster children, grandchildren or brothers and sisters of the insured who has been living with him or her in the same household for at least ten months and since then has been doing the domestic work for the insured without payment, unless there is a spouse living in the same household who is able to work, shall be regarded as a member of the household. He or she shall also be considered a member if he or she is no longer able to do the domestic work. Only one person can be a member in this sense.

(6a) A person who is not a relative of the insured and who has been living with him or her in the same household for at least ten month and since then has been doing the domestic work for him or her without payment, unless there is a spouse living in the same household who is able to work, shall be regarded as a member of the common household, if

(a) he or she is bringing up one or more children living in the same household ... or did so for at least four years, or

(b) he or she is doing nursing work for the insured who is entitled to public benefits at least level 4 pursuant to the Federal Nursing Care Benefits Act or pursuant to the provisions of the Regional Nursing Care Benefits Act."

20. The last amendment to the Civil Servants Sickness and Accident Insurance Act which entered into force on 1 July 2007 was accompanied by a transitory provision. Section 217(3) and (4) read as follows:

"(3) Persons of the opposite sex and not related to the insured, who, pursuant to section 56(6) as in force on 30 June 2007, had been entitled to benefits as relatives and who on that date had already reached twenty-seven years of age remain entitled to benefits as relatives until the relevant circumstances change.

(4) Persons of the opposite sex and not related to the insured, who, pursuant to section 56(6) as in force on 30 June 2007, had been entitled to benefits as relatives and who on that date had not yet reached twenty-seven years of age remain entitled to benefits as relatives until the relevant circumstances change, but at most until 31 December 2010."

The law

I. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLE 8 OF THE CONVENTION

21. The applicants claimed to be victims of discrimination on the ground of sexual orientation in that the Administrative Court in its decision of 4 October 2001 upheld that the insurance cover of the second applicant only extended to heterosexual partners within the meaning of section 56(6) CSSAIA. They relied on Article 14 of the Convention in conjunction with Article 8.

22. Article 14 reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] 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."

Article 8, in so far as relevant, provides:

"1. Everyone has the right to respect for his private and family life [and] his home ...

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

A. Submissions by the parties

23. The applicants submitted that they had been victims of discrimination because of the refusal of the Austrian authorities to extend the second applicant's health and accident insurance to the first applicant on grounds of their sexual orientation. This had also been acknowledged in substance by the Constitutional Court in its judgment of 10 October 2005. They maintained that, despite the Constitutional Court's judgment of 10 October 2005 and the subsequent amendment to the CSSAIA, they were still victims because same-sex partners were still excluded from joint insurance if they did not raise children in the common household. Moreover, the transitional provision guaranteed the joint insurance to those (male/female) couples who were entitled to it before the amendment, irrespective of whether they raised children or not. Given that this was not the case for same-sex partners they were continuously victims of discriminatory legislation.

24. The Government did not comment on the merits of the application. They noted that after the Constitutional Court had, on 10 October 2005, repealed the two parallel provisions of the General Social Security Act (GSSA) and the Social Security Act for Trade and Commerce (TCSSA) and replaced them with section 56(6) of the CSSAIA, a general reform reformulating the legal provisions on the extension of insurances to cohabitees had been enacted. On 1 August 2006 and 1 July 2007 amendments to the CSSAIA entered into force, which regulated the affiliation of a partner to a social security scheme in a non-discriminatory way.

B. The Court's assessment

1. Applicability of Article 14

25. The Court points out at the outset that the provision of Article 8 of the Convention does not guarantee as such a right to have the benefits deriving from a specific social security insurance scheme extend to a co‑habiting partner (see Stec and Others v. the United Kingdom [GC], no. 65731/01, § 53, ECHR 2006‑VI).

26. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of “private life” within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate to address the issue whether their relationship also constitutes “family life”.

27. The Courts reiterates its established case-law in respect of different‑sex couples, namely that the notion of family under this provision is not confined to marriage-based relationships and may encompass other de facto “family” ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that “family” unit from the moment and by the very fact of his birth (see Elsholz v. Germany [GC], no. 25735/94, § 43, ECHR 2000-VIII; Keegan v. Ireland, 26 May 1994, § 44, Series A no. 290; and also Johnston and Others v. Ireland, 18 December 1986, § 56, Series A no. 112).

28. In contrast, the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes “private life” but has not found that it constitutes “family life”, even where a long‑term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see Mata Estevez v. Spain (dec.), no. 56501/00, ECHR 2001-VI, with further references). In the case of Karner (cited above, § 33), concerning the succession of a same‑sex couples' surviving partner to the deceased's tenancy rights, which fell under the notion of “home”, the Court explicitly left open the question whether the case also concerned the applicant's “private and family life”.

29. The Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a

growing tendency to include same-sex couples in the notion of “family” (see paragraph 26 above).

30. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.

31. With regard to Article 14, which was relied on in the present case, the Court reiterates that it only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence because it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions (see, among many other authorities, Sahin v. Germany [GC], no. 30943/96, § 85, ECHR 2003‑VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but also sufficient for the facts of the case to fall “within the ambit” of one or more of the Articles of the Convention (see Petrovic v. Austria, 27 March 1998, § 22, Reports of Judgments and Decisions 1998‑II).

32. The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It also applies to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see E.B. v France [GC], no. 43546/02, § 48, ECHR 2008‑... with further references).

33. The present case concerns the possibility to extend accident and sickness insurance cover under a statutory insurance scheme to cohabiting partners, a possibility which the legal provisions impugned by the applicants recognise under certain conditions. Moreover, the

possibility to extend insurance cover, in the Court's view, has to be qualified as a measure intended to improve the principally insured person's private and family situation. The Court therefore considers that the extension of insurance cover at issue falls within the ambit of Article 8.

34. Consequently, the State, which has gone beyond its obligations under Article 8 in creating such a right - a possibility open to it under Article 53 of the Convention - cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 (see, mutatis mutandis, E.B. v. France, cited above, §49).

35. Because the applicants complain that they are victims of a difference in treatment which allegedly lacks objective and reasonable justification as required by Article 14 of the Convention, that provision, taken in conjunction with Article 8, is applicable.

2. Compliance with Article 14 read in conjunction with Article 8

36. The applicants submitted that they had been victims of discrimination because it had been impossible to have the cover of the second applicant's health and accident insurance extended to include the first applicant. This was because, under section 56(6) of the CSSAIA, as in force until 1 August 2006, such an extension was only open to cohabitees of the opposite sex and because this discriminatory situation did not effectively change after the entry into force of an amendment to the relevant provisions which imposed conditions they could not fulfil.

37. The Government did not comment on the situation in law until the entry into force of the modifications of the CSSAIA on 1 August 2006 and 1 July 2007 respectively and argued that from that time on the applicants could no longer claim to be victims of discrimination, because the amended provisions were formulated in a gender-neutral way.

38. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see Petrovic, cited above, p. 586, § 30). Furthermore, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention (see Burghartz v. Switzerland, cited above, § 27; Karlheinz Schmidt v. Germany, 18 July 1994, § 24, Series A no. 291-B; Salgueiro da Silva Mouta v. Portugal, no. 33290/96, § 29, ECHR 1999-IX; Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, § 94, ECHR 1999-VI; Fretté v. France, no. 36515/97, §§ 34 and 40, ECHR 2002-I; and S.L. v. Austria, no. 45330/99, § 36, ECHR 2003-I). Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see Karner v. Austria, no. 40016/98, § 36, ECHR 2003‑IX).

39. In order to determine whether the difference in treatment that the applicants complained of had an objective and reasonable justification, the Court will consider each of the periods separately.

(a) First period: until the entry into force of section 56(6a) of the CSSAIA on 1 August 2006

40. The Court notes that on 1 July 1997 the first applicant asked the CSIC to recognise him as a dependent of the second applicant and to extend the latter's health and accident insurance cover to him. On 2 September 1997 the CSIC dismissed the request, holding that, because the first applicant was of the same sex as the second applicant, he did not qualify as a dependent within the meaning of section 56(6) of the CSSAIA. It did not accept the applicants' argument that section 56(6) should be interpreted so as to also include homosexual relationships. The appeal authorities also refuted this argument. The Administrative Court, in its judgment of 4 October 2001 found that the exclusion of homosexual partnerships from the scope of section 56(6) of the CSSAIA also complied with the principle of equality because that difference in treatment was justified. It argued that, while it was true that where persons of different sex living together in a household in which one of them was running that household and not being

gainfully employed, it was, as a rule, safe to conclude that they were cohabiting in a partnership, that was not the case if two persons of the same sex were living together in a household. In the absence of any possibility to register a homosexual partnership, it would be necessary to undertake delicate enquiries into the most intimate sphere of the person concerned. That difference in the factual situation justified different treatment in law.

41. The Court further observes that the Government themselves have not given any justification for the difference in treatment experienced by the applicants and that experienced by cohabitees of the opposite sex.

42. The Court reiterates that in the case of Karner v. Austria, which bears certain similarities to the present case, it found that in cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people - in this instance persons living in a homosexual relationship - from the scope of application of a specific provision of law (see Karner, cited above, § 41). It does not consider, however, that the Government or the domestic authorities and courts have advanced any arguments that would allow such a conclusion.

Accordingly, there was a breach of Article 14, read in conjunction with Article 8, in respect of the period in question.

(b) Second period: from the entry into force of section 56(6a) of the CSSAIA on 1 August 2006 until the entry into force of the amended section 56(6) and (6a) of the CSSAIA on 30 June 2007

43. The Court considers that the discriminatory character of the CSSAIA established above did not change after the first amendment, because unmarried male/female couples qualified for preferential treatment, whereas unmarried couples of the same sexual orientation, irrespective of their sexual orientation, only qualified if they were raising children together. Even though the situation improved as a result of that amendment because homosexual couples were in principle no longer excluded from the scope of application of section 56 of the CSSAIA, there remained a substantial difference in treatment for which no sufficient justification had been advanced by the Government.

44. Accordingly, there was also a breach of Article 14, read in conjunction with Article 8, in respect of this period.

(c) Third period: after the entry into force of the amended section 56(6) and (6a) of the CSSAIA on 1 July 2007

45. The Court observes that the newly amended version of the CSSAIA as in force from 1 July 2007 onwards omitted the explicit reference to partners of the opposite sex in section 56(6a) and restricted the scope of application of section 56(6) to relatives. It is thus formulated in a neutral way concerning the sexual orientation of cohabitees.

46. The applicants submitted that, following the above-mentioned amendment, the legal situation is still discriminatory, because the opportunity to extend health and accident insurance cover has become more difficult following the amendment because additional conditions were introduced which not all couples, and in particular the applicants, fulfil. Moreover, they were also victims of discrimination because persons to whom the extension of insurance cover had been granted before the entry into force of the amendment continued to benefit from an extension of the insurance cover.

47. As regards the applicants' first argument, the Court observes that Article 14 of the Convention only guarantees a right to equal treatment of persons in relatively similar situations but does not guarantee access to specific benefits. It further observes that the condition to which the applicants refer, the raising of children in the common household, is formulated in a neutral way and the applicants did not argue that under Austrian law homosexuals are excluded from caring for children.

48. As regards the applicants' second argument, the Court observes that, according to the transitory provision of section 217 of the CSSAIA, the continued application of section 56(6a) is restricted to persons having passed a certain age limit and where the relevant circumstances remain the same, and also applies to those who will not have yet reached the age limit by 31 December 2010. The Court cannot find that it is incompatible with the requirements of Article 14 for those who have previously been entitled to a specific benefit under the law in force at the time to be given sufficient time to adapt to changing circumstances.

49. In this context, the Court notes its case-law according to which the principle of legal certainty, which is necessarily inherent in the law of the Convention, may dispense States from questioning legal acts or situations that antedate judgments of the Court declaring domestic legislation incompatible with the Convention. The same considerations apply where a constitutional court annuls domestic legislation as being unconstitutional (see Marckx v. Belgium, 13 June 1979, § 58, Series A no. 31). Moreover, it has also been accepted, in view of the principle of legal certainty that a constitutional court may set a time-limit for the legislator to enact new legislation with the effect that an unconstitutional provision remains applicable for a transitional period (see Walden v. Liechtenstein (dec.), no. 33916/96, 16 March 2000; and J.R. v. Germany (dec.), no. 22651/93, Decisions and Reports 83-A).

50. The Court therefore considers that from 1 July 2007 the applicants were no longer subject to an unjustified difference in treatment as regards the benefit of extending health and accident insurance cover to the second applicant. Accordingly there was no breach of Article 14, read in conjunction with Article 8, in respect of this period.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 1 PROTOCOL No. 1

51. The applicants also complained under Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1, that the Administrative Court's decision violated their right to the peaceful enjoyment of their property. Article 1 of Protocol No. 1, in so far as relevant, reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...."

52. The Court observes that neither the Government nor the applicants submitted any observations in this respect. Having regard to its finding under Article 14, read in conjunction with Article 8, the Court considers that it is not necessary to examine whether, in this case, there has been a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

53. Article 41 of the Convention provides:

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

A. Damage

54. The applicants claimed pecuniary damage in the amount of 28,375.12 euros (EUR) for the period from 1993 until May 2008 plus EUR 81.52 per month from that date onwards. They submitted that, because it had been impossible to extend the second applicant's health and accident insurance cover to the first applicant, the first applicant had had to subscribe to an individual health insurance for himself which had cost him in contributions EUR 11,375.12 from 1993 until May 2008 plus a lump sum for non-reimbursed vaccination costs in the amount of EUR 1,000 and costs for medical care abroad in the amount of EUR 16,000. Lastly, they claimed EUR 81.52 per month, from May 2008 onwards, which was the monthly contribution of the first applicant to his health and accident insurance scheme.

55. The Government submitted that that claim was excessive because the first applicant could have avoided a large portion of the amount claimed for the individual health insurance contract by subscribing to the general social insurance scheme. The monthly contributions under that scheme were moderate and could even have been reduced in the event of hardship. Moreover, the period for which reimbursement of those costs could be claimed only started in July 1997, when the applicants first applied to include the first applicant in the second applicant's health insurance scheme. It must also be taken into account that even if the extension to the insurance cover had been granted, additional contributions for such an extension would have had to have been paid from January 2001 onwards. Such hypothetical costs would have had to have been offset against the applicants' reimbursement claim. The claim for vaccination costs was unfounded, because, in any event, such costs were not covered by the insurance scheme to which the first applicant wished to adhere. The lump sum claim for medical treatment abroad was equally unfounded because normally such treatment was also covered by a health clause in a private travel insurance contract and, in any event, the applicants failed to substantiate that claim.

56. The Court observes first that it has found a breach of Article 14, read in conjunction with Article 8, only in respect of the period until 30 June 2007. Thus, it cannot make any award for claims which relate to the subsequent period. The Court further observes that, as regards the claims for reimbursement of vaccination costs and costs of medical treatment abroad the applicants have merely indicated a lump sum and failed to substantiate their claim. Thus, no award for pecuniary damage can be made in this respect. Nevertheless, the Court is convinced that the applicants, as a consequence of the refusal of the request for extension of the second applicant's health and accident insurance cover to the first applicant and the ensuing necessity for him to subscribe to another insurance scheme, have suffered financial loss. However, the sums claimed by the applicants are excessive because it seems reasonable, as argued by the Government, to start the period for which reimbursement may in principle be granted only when the applicants made a concrete step to have the insurance cover extended in 1997 and to deduct costs the applicants would have incurred if the extension of the insurance cover had actually been granted. Having regard to the above considerations the Court grants, on an equitable basis, EUR 5,000 under this head plus any tax that may be chargeable on this amount.

57. The applicants claimed non-pecuniary damage in the amount of EUR 36,000.

58. The Government considered this claim excessive and found that, in the circumstances of the present case, the finding of a violation constituted in itself sufficient redress.

59. The Court considers that the applicants must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards them EUR 10,000 under this head plus any tax that may be chargeable on this amount.

B. Costs and expenses

60. The applicants claimed costs and expenses incurred in the domestic proceedings in the amount of EUR 5,408.62, including Turnover Tax, and costs and expenses incurred in the

proceedings before the Court in the amount of EUR 10,273.67, also including Turnover Tax. In addition, the applicants claimed a lump sum of EUR 2,500 for out of pocket expenses for them and EUR 500 for translation.

61. The Government disputed this claim as being excessive. In their view it should be taken into account that the submissions made before the domestic authorities and courts and those made before the Court were to a large extent identical.

62. The Court finds that no reimbursement of out of pocket expenses and costs for translation can be granted because the applicants have failed to submit receipts in order to substantiate these claims.

63. As regards the claim for costs and expenses incurred in the domestic proceedings and before the Court, the Court reiterates that, according to its case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred in order to prevent or redress the violation found and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the applicants EUR 4,500 in respect of the domestic proceedings and EUR 5,500 in respect of the Convention proceedings. Consequently, the Court awards the applicants EUR 10,000 in respect of costs and expenses, plus any tax that may be chargeable to them.

C. Default interest

64. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

The Court's decision

1. Holds by five votes to two that there has been a violation of Article 14, read in conjunction with Article 8 of the Convention, as regards the period until 1 August 2006;

2. Holds unanimously that there has been a violation of Article 14, read in conjunction with Article 8 of the Convention, as regards the period from 1 August 2006 until 30 June 2007;

3. Holds unanimously that there has been no violation of Article 14, read in conjunction with Article 8 of the Convention, as regards the period from 1 July 2007 onwards;

4. Holds unanimously that it is not necessary to examine the application also under Article 14 of the Convention, read in conjunction with Article 1 of Protocol No. 1;

5. Holds unanimously

(a) that the respondent State is to pay the applicants, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of pecuniary damage, EUR 10,000 (ten thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage and EUR 10,000 (ten thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. Dismisses unanimously the remainder of the applicants' claim for just satisfaction.