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Case Law 43546/2002 (22/01/2008)

Type: Judgment

Authority: European Authorities: European Court of human rights

Date: 01/22/2008

Subject: The Court held by ten votes to seven that there had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights. Relying on Article 14 of the Convention, taken in conjunction with Article 8, 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. Admissibility The Court reiterated at the outset that whilst French law and Article 8 did not guarantee either the right to found a

family or the right to adopt (which neither party contested), the concept of “private life” within the meaning of Article 8 was a broad one which encompassed a certain number of rights. With regard to an allegation of discrimination on grounds of the applicant’s homosexuality, the Court also reiterated that Article 14 (prohibition of discrimination) had no independent existence. The application of Article 14 did not necessarily presuppose the violation of Article 8. It was sufficient for the facts of the case to fall “within the ambit” of that Article. This was the case here since French legislation expressly granted single persons the right to apply for authorisation to adopt and established a procedure to that end. Consequently, the Court considered that the State, which had gone beyond its obligations under Article 8 in creating such a right, could not then take discriminatory measures when it came to applying it. The applicant alleged that, in the exercise of her right under the domestic law, she had been discriminated against on the ground of her sexual orientation, which was a concept covered by Article 14. Article 14 of the Convention, taken in conjunction with Article 8, was therefore applicable in the present case. Article 14 in conjunction with Article 8 After drawing a parallel with a previous case, the Court pointed out that the domestic administrative authorities, and then the courts that heard the applicant’s appeal, had based their

decision to reject her application for authorisation to adopt on two main grounds: the lack of a paternal referent in the applicant's household, and the attitude of the applicant's declared partner. The Court found that the attitude of the applicant's partner was not without interest or relevance in assessing the application. In the Court's view, it was legitimate for the authorities to ensure that all safeguards were in place before a child was taken into a family, particularly where not one but two adults were found to be living in the household. In the Court's opinion, that ground had nothing to do with any consideration relating to the applicant's sexual orientation. With regard to the ground relied on by the domestic authorities relating to the lack of a paternal referent in the household, the Court considered that this did not necessarily raise a problem in itself. However, in the present case it was permissible to question the merits of such a ground as the application had been made by a single person and not a couple. 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, and the Government had been unable to prove that use of that ground at domestic level had not been leading to discrimination. Regarding the systematic reference to the lack of a "paternal referent", the Court disputed 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 the applicant's homosexuality had featured to such an extent in the reasoning of the domestic authorities was significant despite the fact that the courts had considered that the refusal to grant her authorisation had not been based on that. Besides their considerations regarding the applicant's "lifestyle", they had above all confirmed the decision of the president of the council for the département recommending that the application for authorisation be refused and giving as reasons the two impugned grounds: the wording of certain opinions revealed that the applicant's homosexuality or, at other times, her status as a single person had been a determining factor in refusing her authorisation whereas the law made express provision for the right of single persons to apply for authorisation to adopt. The Court considered that the reference to the applicant's homosexuality had been, if not explicit, at least implicit; the influence of her homosexuality on the assessment of her application had not only been established but had also been a decisive factor leading to the decision to refuse her authorisation to adopt. Accordingly, it considered that the applicant had suffered a difference in treatment. If the reasons advanced for such a difference in treatment were based

solely on considerations regarding the applicant's sexual orientation this amounted to discrimination under the Convention. In any event, particularly convincing and weighty reasons had to be made out in order to justify such a difference in treatment regarding rights falling within the ambit of Article 8. There were no such reasons in the present case because French law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual. Furthermore, the Civil Code remained silent as to the necessity of a referent of the other sex and, 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”. The Court noted that the applicant's situation had been assessed overall by the domestic authorities, who had not based their decision on one ground alone but on “all” the factors, and considered that the two main grounds had to be examined concurrently. Consequently, the illegitimacy of one of the grounds (lack of a paternal referent) had the effect of contaminating the entire decision. The Court concluded that the decision refusing the applicant authorisation was incompatible with the Convention and that there had been a violation of Article 14 of the Convention, taken in conjunction with Article 8. Judges Lorenzen and Jebens expressed a concurring opinion, and Judges Costa, Türmen,

Ugrekheldze, Jočienė, as well as Judges Zupančič, Loucaides and Mularoni, expressed dissenting opinions. These are annexed to the judgment.

Parties: E.B. c/ Francia

Classification: Freedoms - Art. 7 Privacy - Equality - Art. 21 Non discrimination