

Discrimination on the Basis of Sexuality a Violation of the Rights to Privacy and Equality

EB v France [2008] ECHR 43546/02 (22 January 2008)

The Grand Chamber of European Court of Human Rights in *E.B. v France* held that the refusal to authorise an adoption application by a woman in a same-sex relationship, on the basis of her sexuality, amounted to a violation of arts 14 and 8 of the *European Convention on Human Rights*.

Facts

The applicant (E.B.) was a 45 year old school teacher who, since 1990, had been in a stable relationship with another woman, R. On 26 February 1998, E.B. applied to the Jura Social Services Department for authorisation to adopt a child. In her application, E.B. noted her sexual orientation and her relationship with R. Despite French legislation expressly granting single persons a right to adopt, the adoption board recommended the application be refused on the ground that the child's best interests would not be served due to the lack of a paternal role model (paternal referent) and R's ambivalence or lack of commitment to the adopted child.

In March 1999, E.B's request for the decision to be reconsidered was dismissed and the decision was confirmed. E.B. then applied to the Besançon Administrative Court to have both the November 1998 and March 1999 decisions set aside, primarily on the basis that the psychologist from the Adoption Board had not met her. While she was successful in this appeal, the decision was subsequently reversed by the Administrative Court of Appeal and the Conseil d'Etat in the respondent's favour. In its reasoning, the Administrative Court and the Conseil d'Etat consistently included consideration of E.B's 'lifestyle' and its effect on the adoption process and future child.

Relying on arts 8 and 14 of the Convention (which respectively protect the right to privacy and non-discrimination), E.B. appealed to the European Court of Human Rights. She claimed that in exercising her right under French law for a single person to adopt, she suffered discriminatory treatment due to her sexual orientation. This, she alleged, amounted to interference with her right to respect for her private life.

The respondent denied that the refusal to grant authorisation had been based on E.B.'s sexual orientation and, therefore, that the refusal could not amount to discrimination. Instead, it stated that the refusal was based on the child's interests alone. It cited the lack of paternal role model as crucial, given that 'many professionals considered that a model of sexual difference' an important factor in a child's identity. In addition, the ambivalence of R was seen as a potential source of insecurity for the child.

Decision

By a majority of 10 to 7, the European Court found that the refusal to grant authorisation for the adoption violated art14 (prohibition of discrimination) in conjunction with art 8 (the right to respect for private and family life).

In response to the first ground (the lack of a paternal role model) the court noted its ultimate effect was to require E.B. to demonstrate the existence of a referent of the opposite sex among her

family or close friends. This, the court considered, had the potential to render ineffective the French legislation permitting adoption by single persons. In addition, while the court acknowledged the need to consider the availability of a paternal referent, it rejected the excessive weight given to this factor by the French authorities.

In response to the second ground (R's lack of commitment) the court agreed with the French government that the attitude of E.B.'s partner was relevant to ensure necessary safeguards for the child are in place. There was no evidence to indicate that this ground was based on E.B.'s sexual orientation and therefore reliance on this ground was not discriminatory.

However, the court found that the domestic authority's consideration of E.B.'s 'lifestyle' irrefutably indicated that her sexual orientation was a 'decisive factor leading to the decision to refuse her authorisation to adopt.'

In conclusion, the majority found E.B had been discriminated against, as a distinction was drawn based on consideration of her sexual orientation. Consequently, E.B. was entitled to payment of EUR 10,000 for non pecuniary damage, plus an additional EUR 14,528 in respect of costs.

Implications for the Victorian *Charter*

In Victoria the *Adoption Act 1984 (Vic)* restricts adoption to heterosexual couples, or, in the case of single persons, only where special circumstances are proven. In relation to heterosexual couples, s 11 of the Act prescribes only four categories of people in whose favour an adoption order may be made. These categories concern heterosexual couples only and do not contemplate same-sex couples or persons. In its *Assisted Reproductive Technologies and Adoption Final Report* of June 2007, the Victorian Law Reform Commission recommended amendments to the Act, to allow adoption orders to be made in favour of same-sex couples. While the report does not directly consider adoption by a homosexual person in similar circumstances to E.B, it recommends that single people be able to adopt subject to criteria consistent with those applying to a couple that seeks to adopt.

If the VLRC recommendations are indeed adopted, this decision may be instructive as to the scope of ss 8(2) and 17 of the Victorian *Charter*. These provisions relate to the right of an individual to enjoy his or her human rights free from discrimination and the protection of families and children, respectively.

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