

# LGBTI RIGHTS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS: ONE STEP AT A TIME

## Through the lens of key cases

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has the right to life, liberty and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel,





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# Introduction

The rights of LGBTI persons<sup>1</sup> are violated in a large number of countries because of their sexual orientation and/or their gender identity: inequality in legal status and civil rights, discrimination, coercion, persecution, ill treatment, torture, death, including application of the death penalty.

Approximately 80 countries still criminalise same-sex relationships. In some countries, gay, lesbian and bisexual people can be prosecuted because of their sexual orientation and even sentenced to death, the death penalty being the maximum sentence, namely in Mauritania, Sudan, Nigeria, Somalia, Saudi Arabia, Iran and Yemen. Other countries have introduced prison sentences which include life imprisonment<sup>2</sup>.

LGBTI people are often the target of hate speech and bias crimes based on their sexual orientation or gender identity.

In addition to attacks upon their physical and mental integrity, they also suffer from differences in treatment and legal status with respect to heterosexual persons, especially in matters relating to family, employment and freedom of assembly. Civil marriage is authorised for same-sex couples in only 15 countries.<sup>3</sup> Recently Brazil (14 May 2013)<sup>4</sup>, New Zealand (19 March 2013)<sup>5</sup>, Uruguay (10 April 2013)<sup>6</sup>, France (17 May 2013)<sup>7</sup> and England & Wales (16 July 2013)<sup>8</sup> have recognised same-sex marriages, thus putting an end to inequality in rights based on sexual orientation. The right to asylum for gay, lesbian and bisexual individuals is hardly applied, even though the fear of persecution because of their sexual orientation is recognised as a legitimate ground. Trans people face a daily discrimination and persecution because of the lack of recognition of their sex change in legal documents.

In Council of Europe countries, Northern Cyprus still officially criminalises homosexual relations. Two men were recently arrested for having participated in acts against the “order of nature”.<sup>9</sup> Despite official decriminalisation, Greece still incriminates contacts “against nature” between men in certain situations under Article 347 of the Greek Penal Code. On 30 June 2013, Russia adopted two laws: the first sanctions all acts of “propaganda” which minors may be exposed to – a vague term that could include participation in a gay pride parade and the dissemination of information and films. The second law forbids the adoption of Russian children by same-sex couples or by unmarried persons from other countries that have legalised the union of persons of the same sex.<sup>10</sup>

For many years, the Council of Europe has fought discrimination based on sexual orientation, and has recalled that: “*the principle that neither cultural, traditional nor religious values, not*

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1. LGBTI: Lesbian, gay, bisexual, transsexual and transgender, intersex persons

2. See country files on the NGO ILGA website: <http://ilga.org/ilga/en/index.html>.

3. Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, the Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden and Uruguay. However, in some federated countries same-sex marriages are only authorised in certain States, e.g. Australian Capital Territory, and in the United States of America (California, Connecticut, Delaware, Illinois, Iowa, Maine, Massachusetts, Maryland, Minnesota, New-Hampshire, New Jersey, New York, Rhode Island, Vermont, Washington, Washington D.C.) and Mexico (Chihuahua, Federal District, Oaxaca, Quintana Roo).

4. [http://www.nytimes.com/2013/05/15/world/americas/brazilian-court-council-removes-a-barrier-to-same-sex-marriage.html?\\_r=1](http://www.nytimes.com/2013/05/15/world/americas/brazilian-court-council-removes-a-barrier-to-same-sex-marriage.html?_r=1)

5. <http://www.legislation.govt.nz/act/public/2013/0020/latest/whole.html>

6. [http://www.la-razon.com/mundo/Registro-matrimonios-homosexuales-Uruguay-comenzara\\_0\\_1878412209.html](http://www.la-razon.com/mundo/Registro-matrimonios-homosexuales-Uruguay-comenzara_0_1878412209.html)

7. <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540&dateTexte=&categorieLien=id>

8. <http://www.legislation.gov.uk/ukpga/2013/30/contents/enacted/data.htm>

9. <http://www.bbc.co.uk/news/world-europe-16840318>

10. <http://www.fidh.org/russian-federation-stop-the-anti-lgbt-law-now-13468>

*the rules of a “dominant culture” can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity”.* The Council of Europe recommends that States “ensure that legislative measures and other mechanisms are adopted and effectively implemented to combat discrimination based on sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons, and to promote tolerance towards them”.<sup>11</sup>

The European Court of Human Rights (ECtHR) has accepted to hear several cases connected to LGBTI discrimination on grounds of sexual orientation or gender identity. FIDH, working in collaboration with the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the International Commission of Jurists (ICJ) and Advice on Individual Rights in Europe (AIRE Centre), took this opportunity to submit *amicus curiae* briefs to the ECtHR.<sup>12</sup> These NGOs asked the Court to be allowed to intervene in around 15 proceedings, in particular through the submission of written comments to the Court presented by their representatives Robert Wintemute and also S. Chelvan and Allison Jernow, and in some cases oral observations at a hearing before the Grand Chamber.

This third party intervention procedure enables FIDH to present the judges with information to clarify matters of law, as well as case law of various national courts in Council of Europe Member States, in non-member States and before regional courts and thus to contribute to developments in European jurisprudence against discrimination based on sexual orientation. Jurisprudence of this nature often leads to subsequent changes in the law. This is why FIDH is contributing to the development of such jurisprudence – described in this paper – whose effects may be felt in countries other than those directly concerned as it may become applicable in all Council of Europe Member States.

This position paper does not cover all LGBTI thematics, but those addressed in the cases FIDH is intervening in. For instance, it can be noted that the ECtHR has not yet dealt with rights of intersex persons. Regarding the trans rights, the Court has delivered decisions on the right to legal recognition of gender reassignment<sup>13</sup>, on insurance coverage of the medical expenses related to gender reassignment<sup>14</sup> and also on their right to marriage after their reassignment.<sup>15</sup> As for LGB rights, the ECtHR delivered decisions on different topics : total prohibition of same-sex sexual activity<sup>16</sup>, freedom of assembly<sup>17</sup>, hate speech.<sup>18</sup>

FIDH and its partner organisations intervened in cases relating to equality with respect to family (the legal recognition of same-sex couples and adoption) and discrimination based on sexual orientation (asylum seekers and the articulation with freedom of belief).

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11. Committee of Ministers, *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*, 31 March 2010.

12. In compliance with Article 36(2) of the European Convention on Human Rights (ECHR), “*The President of the Court may authorise any person other than the applicant, or another State Party to the Convention other than that against which the application has been lodged, to intervene in the proceedings. This is called third-party intervention. The person or State in question is entitled to file pleadings and take part in public hearings*”. In “The ECHR in 50 Questions”: [http://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](http://www.echr.coe.int/Documents/50Questions_ENG.pdf)

13. ECtHR, *B. v. France*, Application no. 13343/87, Plenary, 25 March 1992. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57770>

14. ECtHR, *van Kück v. Germany*, Application no. 35968/97, Third Section, 12 September 2003. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61142>

15. ECtHR, *Christine Goodwin v. The United Kingdom*, Application no. 28957/95, Grand Chamber, 11 July 2002. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60596>

16. ECtHR, *Dudgeon v. United Kingdom*, Application no. 7525/76, Plenary, 22 October 1981. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473>

17. ECtHR, *Alekseyev v. Russia*, Application no. 4916/07, 25924/08, 14599/09, First Section, 21 October 2010. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257>

18. ECtHR, *Vejdeland and Others v. Sweden*, Application no. 1813/07, Fifth Section, 9 February 2012. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109046>

# I - Equality in the family

FIDH has intervened in seven cases involving, in particular, the possibility for same-sex couples to get legally recognised by marriage or civil partnership, including when one of the partner had his/her sex changed, and partners in same-sex relationships who wish to adopt the children of their partner (second-parent adoption).

## A) Access to marriage

### **Schalk and Kopf v. Austria** (Application no. [30141/04](#))

Facts: Refusal of authorities to marry two men.

National proceedings (Austria): Application rejected by the Municipal Office in 2002 / Refusal confirmed by the Regional Governor in 2003. / The Constitutional Court declared that the law in force was compliant with the Constitution in 2003.

Proceedings before the ECtHR: Lodged with the Court on 5 August 2004 / Hearing before the First Section on 25 February 2010 / Decision on 22 November 2010.

Arguments presented in the amicus brief of 26 June 2007: the relationship of same-sex couples should be included in the scope of “family life” and not only “private life”. Furthermore, the scope of Article 12 of the Convention on marriage should include same sex couples and last, the granting of special rights to married couples amounts to indirect discrimination against same sex couples who do not have access to marriage.

Participating NGOs: FIDH, ICJ, AIRE Centre, ILGA-Europe.

Decision of the ECtHR: 22 November 2010: No violation of Article 12 of the ECHR (7 votes) / No violation of Article 14 in conjunction with Article 8 of the EHRC (4 votes to 3).

### **Chaplin and Charpentier v. France** (Application no. [40183/07](#))

Facts: Refusal to marry two men.

National proceedings (France): Application for marriage rejected by the Public Prosecutor in May 2004. / The Mayor of Bègles nonetheless married the two men in June 2004. / Marriage declared null and void by the Court in July 2004. / Judgement confirmed by Court of Appeals in April 2005. / Appeal rejected by the Supreme Court (*Cour de cassation*) in March 2007.

Proceedings before the ECtHR: Lodged with the Court on 6 September 2007. Case pending.

Arguments in the amicus brief of 26 October 2009: the relationship of same-sex couples should be included in the scope of “family life” and not only “private life”. Furthermore, the granting of special rights to married couples is indirect discrimination against same sex couples who do not have access to marriage.

Participating NGOs: FIDH, ICJ, AIRE Centre, ILGA-EUROPE.

**Vallianatos and others v. Greece** (Application no. 29381/09)

Facts: Refusal of registered partnership (civil union) for two men, open only to couples of different sex.

National proceedings (Greece): no national proceedings.

Proceedings before the ECtHR: Lodged with the Court on 6 May 2009. / Hearing before the Grand Chamber on 16 January 2013. / Decision on 7 November 2013.

Arguments in the amicus brief of 20 June 2010: Prohibition of discrimination on the grounds of sexual orientation reasserted in accordance with the case of *Karner v. Austria*\* and respect for this prohibition by national courts.

Participating NGOs: FIDH, ICJ, AIRE Centre, and ILGA-EUROPE.

Decision of the ECHR Court: 7 November 2013: Violation of Article 14 in conjunction with Article 8 of the ECHR (16 votes to 1).

\* *V. infra*.

The question of opening civil marriage to same-sex couples has been presented in various ways before the ECtHR. First, should marriage between same-sex couples be included in the scope of “family life”? Does Article 12 of the ECHR (right to marriage) guarantee the right to marriage for said couples? And finally, where applicable, does Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect of private and family life) of the ECHR allow for civil marriage for same-sex couples?

**1) Inclusion of same-sex marriage in the scope of “family life”**

According to Article 12 of the ECHR: “*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right*”.<sup>19</sup> The petitioners, which included FIDH, pointed out that any interpretation of the Article which excludes access to same-sex couples would be contradictory to the Convention, for several reasons. First, the exclusion of same-sex couples constitutes direct discrimination on the grounds of sexual orientation. Second, a serious reason must be provided to justify discrimination on the basis of sexual orientation. Third, there is no serious reason. The petitioners maintain that: “[...] *tradition is not justification, and sending the symbolic message that same-sex couples are inferior to different-sex couples is not a legitimate aim*”.<sup>20</sup>

However, in *Schalk and Kopf v. Austria* the ECtHR unanimously decided that the “*choice of wording in Article 12 must be regarded as deliberate*”, thus excluding a dynamic interpretation which would allow for the inclusion of marriage between persons of the same sex. The Court added that “[...] *marriage has deep-rooted social and cultural connotations which may differ largely from one society to another*” and recalled that “*it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society*”.<sup>21</sup> By referring to the traditional character of marriage, the Court leaves a large national margin of appreciation for the States. The lack of European consensus makes any change to this position highly unlikely. FIDH believes that the focus cannot be on the lack of consensus, which is not a valid reason for not recognizing rights; instead it should be on the lack of serious reasons to exclude same-sex couples from marriage.

19. On this subject, the ECtHR “observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to “everyone” or state that “no one” is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate.”, in ECtHR *Schalk and Kopf v. Austria*, Application no. 30141/04, First Section, 22 November 2010, §55: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605> .

20. Written comments by FIDH, ICJ, AIRE CENTRE and ILGA-EUROPE, 26 June 2007, §17: [http://www.fidh.org/IMG/pdf/schalk\\_kopf\\_v\\_austria\\_fidh\\_writencomments\\_june2007.pdf](http://www.fidh.org/IMG/pdf/schalk_kopf_v_austria_fidh_writencomments_june2007.pdf).

21. ECtHR, *Schalk and Kopf v. Austria*, Application no. 30141/04, First Section, 22 November 2010, §62. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99643>.

The Court also argued that the life of a same-sex couple (without children) is included in the scope of “family life” and is protected in Article 8 of the Convention. Recognition of the existence of family life for same-sex couples is important. Family life encompasses adoption, as well as family reunification. Respect for family life is guaranteed for different-sex couples without children by the Court’s “*established case-law in respect of different-sex couples*.”<sup>22</sup>

The position of FIDH is clear in this matter. The relationships of different-sex couples are encompassed in the scope of “family life”. The relationships of same-sex couples should also fall within the notion of “family life”, in compliance with the principle of non-discrimination. The Court has noted the “*evolution of social attitudes towards same-sex couples*” and *inter alia* the legal recognition of same-sex couples in certain countries, and has decided to encompass same-sex relationships in the scope of family life.<sup>23</sup>

## **2) *The right to marriage and to civil partnership for same-sex couples***

In *Schalk and Kopf v. Austria*, the Court also concluded that Article 14 in conjunction with Article 8 of the Convention did not give access to the right to marriage to same-sex couples. The applicants argued that differences between the rights offered in civil partnership and rights offered in marriage were discriminatory. In order to avoid this form of direct discrimination (same-sex couples do not have access to marriage) and indirect discrimination (same-sex couples do not have access to marriage and thus to specific entitlements stemming from marriage), same-sex couples should have access to marriage. In this matter, the ECtHR decided that: “[...] *the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another*”. After refusing to interpret Article 12 of the Convention (specifically on marriage) as granting same-sex couples access to marriage, it had no choice but to conclude that: “*Article 14, taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either*”.<sup>24</sup>

The Court went farther by stipulating that: “[...] *the States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition*”<sup>25</sup> such as civil partnership. It also specifies that “*the area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative change*”.<sup>26</sup> Thus discrimination between same-sex couples and different-sex couples is still being applied regarding access to marriage (direct discrimination) and to rights granted through other types of legal recognition (indirect discrimination).

Legal recognition of same-sex couples has motivated FIDH and other petitioners to file an *amicus* brief in *Vallianatos v. Greece*. In this case the applicants censure Greece for having established, in 2008, a common life pact that is limited to heterosexual couples. In their comments, NGOs recall that in *Karner v. Austria*<sup>27</sup> the ECtHR decided that the rights granted to unmarried heterosexual couples should also be granted to homosexual couples: “*The Court held that unmarried same-sex couples must generally be granted the same rights and obligations as unmarried different-sex couples*”.<sup>28</sup>

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22. *Ibid.*, §91.

23. *Ibid.*, §§ 93-95.

24. *Ibid.*, § 101.

25. *Ibid.*, § 108.

26. *Ibid.*, § 105.

27. ECtHR, *Karner v. Austria*, Application no. 40016/98, First Section, 24 October 2010, § 37.

28. FIDH, ICJ, AIRE CENTRE & ILGA-EUROPE written comments in *Karner v. Austria*, 20 June 2011, § 3, [http://www.fidh.org/IMG/pdf/vallianatos\\_v\\_greece\\_fidh\\_writtencomments\\_june2011.pdf](http://www.fidh.org/IMG/pdf/vallianatos_v_greece_fidh_writtencomments_june2011.pdf).



In this case the Court decided that Greece did not have sufficient justification to exclude same-sex couples. The argument of the Government that the main purpose of the law was to protect children born out of wedlock does not constitute a sound and convincing reason since the real main purpose of the law is to provide legal recognition for a new form of common life; hence, the exclusion of same-sex couples constitutes a breach of the Convention.

The question of access to marriage for same-sex couples also arises in other cases. In the case of *H. v. Finland*, a man married to a woman decided to undergo gender reassignment surgery to become a woman, which he claimed he had always been. Following the surgery, she was unable to obtain changes to her identity documents, which continued to state that she was a man. The applicant's request for a change in legal sexual status was rejected for reasons of marital status. Finnish law refuses access to marriage for same-sex couples. The change of the identity document required a divorce or a transformation of the marriage into a civil partnership, which the applicant refused to do. The applicant argued that: "*There were no justifiable grounds to make the applicant divorce in order to protect her privacy. Attitudes towards same-sex marriages were changing and they were allowed both in Sweden and Norway, Finland's neighbouring countries. As the legal frameworks for marriage and civil partnership were so similar, there was no major public interest involved but the matter should be left to the private sphere.*"<sup>29</sup> The Court, however, decided that: "*the applicant has a real possibility to change that state of affairs: her marriage can be turned at any time, ex lege, into a civil partnership with the consent of her spouse. If no such consent is obtained, the applicant has the possibility to divorce*".<sup>30</sup> Thus, there is no violation of Article 8 of the Convention. On the basis of this decision, the Court held that there was no violation of the Convention. On 29 April 2013 the case was referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) of the Convention at the request of the applicant. The Grand Chamber held a hearing in this case on 16 October 2013. FIDH and its member organisation in Finland, the Finnish League for Human Rights, ILGA-EUROPE and ICJ wanted to submit an *amicus* brief but their request was rejected, without explanation, by the President of the Grand Chamber.<sup>31</sup>

**FIDH considers that no argument can justify direct discrimination against same-sex couples with respect to marriage or the legal recognition of couples. This implies equality of access to marriage and other forms of union provided for in national legislations, for same-sex and different-sex couples.**

29. ECtHR, *H. v. Finland*, Application no.37359/09, Fourth Section, 13 November 2012, § 33, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-114486>

30. *Ibid.*, § 50.

31. The hearing before the Grand Chamber was held on 16 October 2013.

## B) Adoption

### **E.B. v. France** (Application no. 43546/02)

Facts: Refusal of individual adoption by a women living as a couple with her female partner.

National proceedings (France): Application for adoption rejected in 1998 and 1999. / The Administrative Court (AC) reverses the decision to reject the application for adoption in 2000. / The Administrative Court of Appeal invalidates the decision handed down by AC in 2001. / The *Conseil d'État* dismisses the new request for appeal filed by the applicant in 2002.

Proceedings before the ECtHR: Lodged with the Court on 2 December 2002. / Hearings on 14 March 2007. / Decision of the Court on 22 January 2008.

Arguments in amicus brief of 3 June 2005: the application for individual adoption by a homosexual person is systematically rejected, unlike that of a heterosexual individual. A large number of courts have decided to put an end to this form of discrimination based on sexual orientation since no scientific studies have shown that being raised by a homosexual parent has a negative impact on the child.

Participating NGOs: FIDH, ILGA-EUROPE, British Agencies for Adoption and Fostering (BAAF), Association des Parents et futurs parents Gays et Lesbiens (APGL).

Decision of the ECtHR of 22 January 2008: Violation of Article 14 in conjunction with Article 8 of the Convention.

### **Gas and Dubois v. France** (Application no. 25951/07)

Facts: Refusal of adoption by the same-sex second parent.

National proceedings (France): The *Tribunal d'instance* (TI) rejects the adoption application in 2006. / The Court of Appeals upholds the decision of the TI in 2006.

Proceedings before the ECtHR: Lodged with the Court on 15 June 2007. / Hearing on 12 April 2011. / Decision of the Court on 15 March 2012.

Arguments in amicus brief of 11 December 2009: a large number of legislations and judicial decisions have opened access to second-parent adoption for homosexual couples. In France there is a difference in the treatment of same-sex (unmarried) couples and married different-sex couples; the former do not have access to this type of adoption. This difference in treatment is not justified.

Participating NGOs: FIDH, ILGA-EUROPE, BAAF, Network of European LGBT Families Associations (NELFA)

Decision of the ECtHR of 15 March 2012: No violation of Article 14 taken in conjunction with Article 8 of the Convention.

**X and others v. Austria** (Application no. 19010/07)

Facts: Refusal of adoption by the same-sex second parent.

National proceedings (Austria): The District Court refuses to approve the adoption request in 2005. / The Regional Court upheld the decision in 2006.

Proceedings before the ECtHR: Lodged with the Court on 24 April 2007. / Hearings on 3 October 2012. / Decision of the Court on 19 February 2013.

Arguments in amicus brief of 1 August 2012: There is no justification for forbidding the access to second-parent adoption for (unmarried) homosexual couples while access is granted to unmarried heterosexual couples. Furthermore, the Member States of the Council of Europe that authorised second-parent adoption for unmarried heterosexual couples applied the same rule to unmarried homosexual couples.

Participating NGOs: FIDH, ILGA-EUROPE, BAAF, NELFA, European Commission on Sexual Orientation Law (ECSOL)

Decision of the ECtHR of 19 February 2013: Violation of Article 14 taken in conjunction with Article 8 of the Convention.

LGB people are directly concerned in three types of adoption scenarios: adoption by an unmarried person in a country that authorises this type of adoption in which the partner (if any) does not acquire any sort of parental rights over the child (“individual adoption”); the adoption of the child of one partner in a same-sex couple by the other partner to obtain joint custody (“second parent adoption”); adoption by a same-sex couple of a child with no biological, legal and social connection with the couple for the purpose of acquiring joint custody (“joint adoption”).

### ***1) Individual adoption***

In the case *Fretté v. France*, the Court decided that the rejection of the adoption application on the ground of the applicant’s homosexuality did not violate the Convention.<sup>32</sup> The Court, however, reconsidered its position with regard to individual adoption in *E.B. v. France*. In this case, a lesbian woman living in a stable relationship wanted to adopt a child. Her adoption application was rejected by the *Conseil d’État* on 5 June 2002 on the grounds of “*absence of ‘identity markers’ due to the lack of a paternal role model or referent*”,<sup>33</sup> although the Government, in its arguments before the Court, claimed that the decision of the *Conseil d’État* was not based on the applicant’s sexual orientation.

FIDH and its co-petitioners maintained that none of the States parties to the Council of Europe that authorise individual adoption explicitly forbids individual adoption to lesbian, gay and bisexual people either in law or in practice; this constitutes further proof of the emergence of a consensus. Moreover, and contrary to the arguments put forward by the *Conseil d’État*, a considerable number of children are ready for adoption. It is, therefore, necessary to increase the number of potential adoptive parents: “*the best interests of children are served by making the pool of potential adoptive parents as large as possible, and by not excluding any qualified adult because of characteristics (e.g. sexual orientation) that bear no relation to their ability to provide good parental care*”.<sup>34</sup> Also, there is no scientific consensus on potential harm caused to a child when raised by a single lesbian, gay or bisexual parent or a same-sex couple.

32. ECtHR, *Fretté v. France*, Application no. 36515/97, Third Section, 26 February 2002. The adoption application of the applicant, a homosexual, was rejected by the *Conseil d’État* on 9 October 1996 “*regard being had to his lifestyle and despite his undoubted personal qualities and aptitude for bringing up children*”. The Court decided that the principle of non-discrimination had not been violated considering the absence of consensus of the scientific community regarding the consequences of a child being adopted by a homosexual, the wide differences in national and international opinion and the limited number of children available for adoption.

33. *Conseil d’État, Mlle Emmanuelle B.*, no. 230533, 5 June 2002.

<http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008090195&dateTexte=>

34. See FIDH, ILGA-EUROPE, BAAF, APGL written comments, 3 June 2005, §35: [http://www.fidh.org/IMG/pdf/eb\\_v\\_france\\_fidh\\_writtenccomments\\_june2005.pdf](http://www.fidh.org/IMG/pdf/eb_v_france_fidh_writtenccomments_june2005.pdf).

The Court, after analysing the reasoning adopted in national courts decisions and without making specific reference to the sexual orientation of the applicant, decided that: “(it) cannot but observe that, in rejecting the applicant’s request for the 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”.<sup>35</sup>

This decision was very important since it cleared the way for the granting adoption rights to unmarried persons, regardless of their sexual orientation.

## **2) Second-parent adoption**

In cases of second-parent adoption, a distinction needs to be made between the conditions in which the second-parent in an unmarried different-sex couple may adopt and those conditions which exclude this type of adoption.

FIDH and the other co-petitioners have pointed to a certain degree of incoherency: it is possible for one person in a same-sex couple to adopt but not both, jointly. The study run by Robert Wintemute on the legislations in Council of Europe Member States shows consensus on the issue of non-discrimination of same-sex couples in cases of second-parent adoption. He was able to demonstrate that while only 10 of the 47 Member States allowed second-parent adoption for unmarried couples in 2009, “the [vast] majority [of these States] (71%) have decided to extend the possibility of second-parent or step-parent adoption to same-sex couples” who are married, have officially registered their union, or live together<sup>36</sup>; and of course this also applies to same-sex couples.

## **3) Joint adoption**

The Court applies non-discrimination criteria very strictly. In *Gas and Dubois v. France*, the Court compared the situation of unmarried different-sex couples to that of same-sex couples who are unable to marry. To date, France only authorises joint adoption for married couples. The Court compared the situation of unmarried different-sex couples with that of same-sex couples and concluded that there was no discrimination because unmarried different-sex couples could not adopt: “[...] 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”.<sup>37</sup>

In Austria, however, the law authorises joint adoption for unmarried different-sex couples. A year after *Gas and Dubois v. France*, in *X and Others v. Austria*, the Court determined that there was a difference in the treatment of unmarried different-sex couples who had access to adoption, and same-sex couples, and sought to determine whether the difference had a legitimate and proportionate objective. The Court decided that the difference in treatment was unfair because a lesbian or gay person is authorised to adopt a child individually: “However, having regard to the considerations set out above, the Court finds that the Government has 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”<sup>38</sup>. The

35. ECtHR, *E.B. v. France*, Application no. 43546/02, Grand Chamber, 22 January 2008, §96: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84571>

36. Written comments by FIDH, ICJ, ILGA-EUROPE, BAAF, NELFA and ECSOL, 1 August 2012, §17 [http://www.fidh.org/IMG/pdf/xvaustria\\_fidh\\_writtencomments\\_aug2012.pdf](http://www.fidh.org/IMG/pdf/xvaustria_fidh_writtencomments_aug2012.pdf).

37. ECtHR, *Gas and Dubois v. France*, Application no. 25951/07, former Fifth Section, 15 March 2012, §69. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109572>.

38. ECtHR, *X. and Others v. Austria*, Application no.19010/07, Grand Chamber, 19 February 2013, §144 and §151.

legal argument developed by the Court could, logically, apply to joint adoption. The Court referred to international texts that do not make a distinction between the different types of adoption.<sup>39</sup>

Changes in family law are a step by step process. The impetus generated by ECtHR jurisprudence has led to a growing number of States to grant marriage and adoption rights to same-sex couples. The Austrian example shows the potential national impact of ECtHR decisions. On 4 July 2013, following the decision on *X and Others v. Austria*, the Austrian Parliament passed an amendment on second-parent adoption. The new legislation, which entered into force on 1 August 2013<sup>40</sup>, grants second-parent adoption rights to same-sex couples.

**FIDH calls on States to end discrimination against LGBTI persons with regard to adoption and to guarantee individual, second-parent and joint adoption under the same conditions as those granted to heterosexuals.**

In addition to the difficulties related to family rights and legal status, LGBTI individuals also have to cope with other types of discrimination based on sexual orientation and sexual identity.

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<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116735>

39. Articles 2 and 21 of the Convention on the Rights of the Child of 20 November 1989, Articles 4, 7 and 11 of the European Convention on the Adoption of Children of 27 November 2008.

40. <http://www.fidh.org/austria-becomes-the-13rd-european-country-to-allow-same-sex-second-parent-13749>

## II - Basic individual rights and discrimination on the grounds of sexual orientation

### A) Requests for asylum

**M.E.v. Sweden** (Application no. 71398/12)

Facts: Libyan married to a Swede applies for asylum in Sweden because of risk of reprisals and threats in Libya based on sexual orientation, and sees his application denied.

National proceedings (Sweden): application for residence permit in Sweden, on the grounds of marriage to a Swede, is rejected because the application should have been filed for family reunification in the country of origin.

Proceedings before the ECtHR: Petition lodged with the Court on 3 November 2012. / Case pending.

Arguments in the amicus brief of 13 March 2013: risks of persecution and ill treatment on grounds of sexual orientation constitute a reason accepted by many Member States of the Council of Europe to grant asylum status. The U.N. High Commission for Refugees recommends acceptance of this reason, regardless of the conduct of the asylum seeker in his/her country of origin\*. An assessment of the situation of homosexuals in Libya is then presented by the petitioners.

Participating NGOs: FIDH, ILGA-Europe, and ICJ.

\* *V. infra*.

**A.E. v. Finland** (Application no. 30953/11)

Facts: Iranian prosecuted for the crime of homosexuality in Iran seeks asylum in Finland; the request is denied.

National Proceedings (Finland): Rejection of application for asylum in Finland in 2010.

Proceedings before the ECtHR: Petition lodged with the Court on 19 May 2011. / The case was suspended because an alternative national recourse mechanism was presented.

Request for third-party intervention: 2 May 2012

Participating NGOs: FIDH, ILGA-Europe, ICJ, Finnish League for Human Rights (FLHR), European Council on Refugees and Exiles (ECRE).

The European Convention on Human Rights does not guarantee the right to asylum.<sup>41</sup> However, a dynamic interpretation of Articles 2(1) and 3 of the Convention by the Court prohibits Member States from deporting foreigners to their home country if their life is threatened or if they risk torture or degrading or inhuman treatment. The Court indeed decided: “[...] *where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country*”.<sup>42</sup>

The asylum cases pending before the European Court of Human Rights provide an opportunity to reconsider the existing jurisprudence. In 2004, the Court handed down decisions on two cases of requests, submitted by Iranians, for asylum based on the risk of persecution or degrading or inhuman treatment the applicants would suffer if they were deported to Iran: cases *F. v. United Kingdom*<sup>43</sup> and *I.I.N. v. The Netherlands*.<sup>44</sup> Their arguments, based on Articles 2 and 3 of the Convention, were rejected by the Court because it was not convinced of the existence of any real danger in the event of deportation. The Court stipulated: “*Although it must be acknowledged that the general situation in Iran does not foster the protection of human rights and that homosexuals may be vulnerable to abuse, the applicant has not established in his case that there are substantial grounds for believing that he will be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention on grounds of his homosexuality*”.<sup>45</sup>

FIDH, ILGA-Europe and ICJ pointed out that the risk of persecution and/or ill-treatment for homosexuality are recognised as grounds for asylum in 34 Member States of the Council of Europe, 27 of the 34 are part of the European Union.<sup>46</sup> This consensus cannot be ignored by the Court.

The litigious issue in these cases is the interpretation of the degree of risk in the country of origin. The ECtHR analysed the situation of gay or lesbian persons in the countries involved and determined the existence, or lack of, a real risk for individuals in the event of deportation. The petitioning NGOs criticised the new criterion used by the Court to reject asylum applications, because it was based on the assumption that the asylum-seeker would remain “discrete” about his/her sexual orientation.<sup>47</sup>

The right to physical integrity should not be conditioned by criteria such as being discrete about one’s lifestyle, which would be impossible to define. Moreover, it is contrary to the U.N. High Commissioner for Refugees 2012 Guideline on International Protection no. 9, that states: “[...] *that an applicant may be able to avoid persecution by concealing or by being ‘discrete’ about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status*”.<sup>48</sup>

FIDH referred to the reasoning of the Supreme Court of the United Kingdom concerning asylum seekers from Iran up to 2010. The Court applied the ‘HJ Test’ or ‘discretion test’. The test was used by the Supreme Court to deny asylum in cases of persecution based on sexual orientation because the asylum-seeker could remain ‘voluntarily discrete’ about his/her sexual orientation if deported to his/her country of origin. In this situation, the refusal of asylum was deemed ‘reasonably tolerable’.

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41. ECtHR, *Saasi v. Italy*, Application no. 37201/06, 28 February 2008, § 124.: The Court notes that “*neither the Convention nor its Protocols confer the right to political asylum*”: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85275>.

42. *Ibid.* § 125.

43. ECtHR, *F. v. United Kingdom*, Application no. 17341/03, Fourth Section, 22 June 2004. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-24020>

44. ECtHR, *I.I.N. v. The Netherlands*, Application no. 2035/04, Third Section, 9 December 2004. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67880>

45. *Ibid.*, p. 13

46. Written comments by FIDH, ILGA-EUROPE, ICJ in *ME v. Sweden* case, Application no. 71398/12, 13 March 2013, § 9: [http://www.fidh.org/IMG/pdf/fidh-icj-ilga\\_europe\\_intervention\\_-\\_me\\_v\\_sweden\\_-\\_app\\_no\\_71398\\_-\\_12\\_-\\_9th\\_april\\_2013.pdf](http://www.fidh.org/IMG/pdf/fidh-icj-ilga_europe_intervention_-_me_v_sweden_-_app_no_71398_-_12_-_9th_april_2013.pdf)

47. *Ibid.* § 3.

48. UNHCR, *Guidelines on international protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, §31.

In 2010, however, the Supreme Court decided that this method was illegal and contrary to the “right to live freely and openly as a gay man without fear of persecution”.<sup>49</sup> The Court changed the criteria so that it could delve deeper into the real reasons why the asylum seeker would have to remain ‘discrete’ in case of deportation. The Court subsequently applied detailed guidelines when deciding on asylum applications. The test consists of the following questions:

“(i) Is the applicant gay or lesbian, or perceived to be ?

(ii) Do openly gay and lesbian individuals in the country of origin face a well-founded fear of persecution;

(iii) Will the individual be “open” on return? If so, they qualify as a refugee. If the individual is voluntarily discreet then,

(a) is it only because of family or social pressure? Then the individual does not qualify as a refugee; or

(b) is a material reason for being discreet the fear of persecution? If it is, then the individual qualifies as a refugee”.<sup>50</sup>

FIDH and the other co-petitioners considered there was a need to go further by expanding the criteria to include the “risk of family and social pressure”, which are not included in the current criteria used by the Supreme Court when considering asylum requests.

*M.E. v. Sweden* brought to the fore the problems encountered when a step by step, incremental process is applied for the recognition of LGBTI rights. The applicant was married to a Swedish man but was unable to apply for family reunification because, according to the Swedish *Aliens Act*, the request has to be made in the country of origin, a country to which he could not return because of the risk of persecution and of inhuman and degrading treatment. Situations like these are likely to re-occur unless the ECtHR makes its jurisprudence regarding asylum on grounds of sexual orientation more flexible.

It is important for the Court to hand down clear decisions on the criteria to be applied to requests for asylum. An individual’s right to live his/her homosexuality openly must be part of these criteria. Bearing this principle in mind, on 7 November 2013 the Court of Justice of the European Union decided in *X., Y., & Z. v. Minister voor Immigratie en Asiel* that: “When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation”.<sup>51</sup>

**FIDH recalls that the risk of persecution and inhuman or degrading treatment on the grounds of sexual orientation are admissible criteria in asylum applications and calls on the Court to indicate those criteria it believes comply with the Convention and can be used to determine the degree of risk incurred by asylum seekers.**

49. UK Supreme Court, *HJ (Iran) (FC) (Appellant) v Secretary of State for the Home Department (Respondent) and one other action*, 7 July 2010, §82. [http://www.supremecourt.gov.uk/docs/UKSC\\_2009\\_0054\\_Judgment.pdf](http://www.supremecourt.gov.uk/docs/UKSC_2009_0054_Judgment.pdf).

50. FIDH, ILGA-Europe, ICJ written comments in *ME v. Sweden* case, Application no. 71398/12, 13 March 2013, § 14: [http://www.fidh.org/IMG/pdf/fidh-icj-ilga\\_europe\\_intervention\\_-\\_me\\_v\\_sweden\\_-\\_app\\_no\\_71398\\_-\\_12\\_-\\_9th\\_april\\_2013.pdf](http://www.fidh.org/IMG/pdf/fidh-icj-ilga_europe_intervention_-_me_v_sweden_-_app_no_71398_-_12_-_9th_april_2013.pdf)

51. CJEU, Fourth Chamber, 7 November 2013, *X., Y., & Z. against Minister voor Immigratie en Asiel*, joint cases C-199/12, C-200/12, C-201/12, point 76. <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=144215&occ=first&dir=&cid=514545>



## B) Articulation with freedom of religion

**Eweida and Others v. United Kingdom (Ladele and McFarlane)** (Application no. 51671/10 and no. 36516/10)

Facts: State employee dismissed for refusing to register civil partnership between persons of the same sex. Marriage counsellor dismissed for refusing to receive same-sex couples.

National proceedings (United Kingdom): The Tribunal recognises the existence of discrimination based on religion in 2008. The Appeals Tribunal declares null the decision, which is confirmed by the Appeals Court in 2009. / The Tribunal does not recognise discrimination based on religion in 2009; the Appeals Tribunal confirms the decision.

Proceedings before the ECtHR: Petition lodged with the Court on 3 September and 24 June 2010 / Hearing on 4 September 2012 / Decision of the Court on 15 March 2013.

Arguments in amicus brief of 15 September 2011: third-parties insisted on the reduced number of legislations and judicial decisions authorising special conditions at the workplace to accommodate religious beliefs.

Third parties: FIDH, ILGA-EUROPE, ICJ.

Decision of the ECtHR, 15 March 2013: No violation of Article 9 of the Convention nor of Article 14 in conjunction with Article 9 of the Convention.

In *Ladele v. United Kingdom* (Application no. 51671/10) and *McFarlane v. United Kingdom* (Application no. 36516/10), heard jointly by the Court, FIDH and co-petitioners intervened as a third party to address the way to reconcile the right to non-discrimination based on sexual orientation and the right to freedom of religion.

*Ladele v. United Kingdom* involves a public servant, responsible for registering marriages, who refused, on the basis of her religious beliefs, to register the civil union between two persons of the same sex and wanted an arrangement with her colleagues so that she did not have to conduct civil union ceremonies. Following complaints and because of the heavy workload she created for her colleagues, she was dismissed.

*McFarlane v. United Kingdom* involves a person working for a marriage counselling and sex therapy firm who refused to provide the company's services to same-sex couples because of his religious beliefs. He was dismissed for serious misconduct because he failed to comply with the company's principle of non-discrimination.

The comparative study conducted by Allison Jernow on the legislations of Member and non-member States of the Council of Europe that allow exceptions for religious beliefs, demonstrated that exceptions are only provided for religious institutions and organisations: “*Where they are granted, statutory exemptions are for religious institutions and organizations. This stems from the belief that religious communities should not be obliged by the State to celebrate marriages that do not conform to their tenets. Exemptions for religious individuals, however, are extremely rare.*”<sup>52</sup>

Moreover, some national tribunals in Council of Europe countries consider it a criminal offence for individuals to refuse to provide a service because of a client's or beneficiary's sexual orientation. In The Netherlands, for instance, a builder was sentenced to pay a fine for having refused to provide a service to a man whom he suspected was living with another man. The Court said that a person's freedom of religion was restricted by the right of the other person not

52. Written comments by FIDH, ILGA-EUROPE, ICJ, Dr. Robert Wintemute, 15 September 2011, § 9 : [http://www.ilga-europe.org/home/how\\_we\\_work/litigation/ecthr\\_litigation/interventions/submission\\_in\\_ladele\\_and\\_mcfarlane\\_v\\_uk](http://www.ilga-europe.org/home/how_we_work/litigation/ecthr_litigation/interventions/submission_in_ladele_and_mcfarlane_v_uk)

to suffer from discrimination.<sup>53</sup> FIDH and its co-petitioners pointed out that the Human Rights Committee accepts legal restrictions to freedom of religion guaranteed under Article 18(2) of the 1966 International Covenant on Civil and Political Rights.<sup>54</sup>

Clearly, freedom of religion cannot supersede an individual's right to non-discrimination and equality.

In its reasoning, the ECtHR decided that the dismissals of the persons in both cases were justified. The Court referred to earlier jurisprudence which gives the State a considerable margin of appreciation when two rights protected by the Convention are involved: "*According to its settled case-law, the Court leaves to the States party to the Convention a certain margin of appreciation in deciding whether and to what extent interference is necessary... The Court's task is to determine whether the measures taken at national level were justified in principle and proportionate*"<sup>55</sup>.

The Court decided that despite the serious consequences for the applicants, the dismissals were justified.

In *Ladele v. United Kingdom*, the Court decided that dismissal was justified by the employer's requirement to "*all its employees to act in a way which does not discriminate against others*"<sup>56</sup> and proportionate with regard to Member States' margin of appreciation when two fundamental rights are involved.

In *McFarlane v. United Kingdom*, the Court applied the same line of reasoning and "*[did] not consider that this margin of appreciation was exceeded in the present case*"<sup>57</sup>.

The position of the ECtHR is clear: persons who provide goods and services to the public, in either the public sector or the private sector, cannot obtain accommodation in the workplace because of their religious belief if such accommodation means excluding part of society on the grounds, *inter alia*, of sexual orientation.

**FIDH reasserts the importance of the principle of non-discrimination on the grounds of sexual orientation, including in the workplace.**

53. LJN BN8113, Rechtbank Arnhem, 05/720597-10, September 2010.

54. Art. 18 of the International Covenant on Civil and Political Rights: "*1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*

2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice*".

55. ECtHR, *Bayatyan v. Armenia*, Application no. 23459/03, Grand Chamber, 7 July 2011, § 121.

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105611>

56. See ECtHR, *Eweida and Others v. United Kingdom*, Applications no. 51671/10 and 36516/10, Fourth Section, 15 January 2013, § 105. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881>

57. *Ibid.* §109.

# Conclusion

While some progress has been made in LGBTI rights as a result of Court decisions (the right to individual and second-parent adoption, reaffirmation of the prohibition of discrimination based on sexual orientation), in many areas there are still obstacles to the recognition and effective exercise of these rights. As an example of the continuation of violations of LGBTI rights at national level, the Court only recently decided that Moldova violated the Convention for denying the right to freedom of peaceful assembly and to freedom of association to a LGBT association.<sup>58</sup>

Also, with the right to marry, the Court leaves a large margin of appreciation to the States. According to the Court, direct discrimination based on sexual orientation can be justified by referring to the text of the Convention and the traditional values of marriage, which exclude same-sex couples. With regard to the legal recognition of same-sex couples, the Court appears to hold the same position and leaves a large margin of appreciation for the adoption of laws that would legally recognise their status. The Court however reasserted the principle of non-discrimination based on sexual orientation in the case of *Vallianatos v. Greece*, thus forbidding the States from denying same-sex couples the legal recognition granted to unmarried different-sex couples.

FIDH believes that there is no argument that can justify direct discrimination of same-sex couples with regard to marriage and couple recognition. FIDH underlines, moreover, that an international and European consensus is growing for the recognition of same-sex couples and their right to marriage. This implies that national legislations must ensure equal rights to marriage and to any other form of civil union for same-sex and different-sex couples. Considering the jurisprudence now applied by the Court, FIDH calls on the Member States of the Council of Europe to eliminate all forms of indirect discrimination with regard to rights stemming from marriage (especially inheritance rights, and entitlement to social benefits), bearing in mind that the jurisprudence created with *Karner v. Austria* requires particularly serious reasons for discrimination. In this area, the Court will have to decide if banning an unmarried same-sex partner in a bi-national couple from seeking a residency permit violates the Convention<sup>59</sup>.

With regard to adoption, the Court has limited its focus to the principle of non-discrimination. For both individual and second-parent adoption, unmarried same-sex couples may not be denied the right to adoption if unmarried different-sex couples have this right. The Court however avoided considering the question of joint adoption, a subject that it will certainly have to consider in the future. FIDH points out that certain States have already authorised joint adoption by same-sex couples.

The Court will also have to state its position on asylum claims for reasons of persecution and inhuman or degrading treatment on the grounds of sexual orientation. More specifically, it will have to articulate what criteria comply with the Convention and may be applied to determine the degree of risk incurred by asylum-seekers in relation to their attitude towards their own homosexuality.

The Court plays an important role in advancing LGBTI rights. Its case-law should be applied by the Member States of the Council of Europe, including when they are not parties in a

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58. ECtHR, *GENDERDOC-M v. Moldova*, Application no. 9106/06, Third Section, 16 June 2012. <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111394>

59. Case *Taddeucci and McCall v. Italy*, Application no. 51362/09.

dispute. States have the duty to comply with the principles set out in the Convention by enacting new laws and applying judicial decisions. FIDH urges the Member States of the Council of Europe to take into consideration the Court's jurisprudence and to incorporate it into their national law.



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inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest, detention or exile. Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Article 11: (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

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