

Application No. 30141/04, Horst SCHALK & Johann KOPF v. Austria
European Court of Human Rights, First Section

WRITTEN COMMENTS OF FIDH, ICJ, AIRE CENTRE & ILGA-EUROPE
Submitted on 26 June 2007

1. Prof. Robert Wintemute, School of Law, King's College, University of London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), ICJ (International Commission of Jurists), AIRE Centre (Advice on Individual Rights in Europe), and ILGA-Europe (European Region of the International Lesbian and Gay Association). Their interest and expertise are set out in their "Application for leave to submit written comments" of 15 May 2007, granted on 25 May 2007, under Rule 44(2) of the Rules of Court.

Introduction

2. Since 1989, national legislatures and courts in Council of Europe (CoE) member states and other democratic societies have been accepting, at an ever faster rate, that lesbian women and gay men have the same human capacity as heterosexual women and men to fall in love with another person, to establish a long-term emotional and sexual relationship with them, to set up a joint home with them, and possibly to raise children with them. These national institutions have understood that same-sex couples therefore have the same emotional and practical needs as different-sex couples to have their relationships recognised by the law, and that same-sex couples can justly claim access to the same rights and obligations as different-sex couples.

3. The first judgment of the European Court of Human Rights (ECtHR) or the European Court of Justice (ECJ) to reflect these legal and social developments was *Karner v. Austria* (24 July 2003). The ECtHR held that unmarried same-sex couples must generally be granted the same rights and obligations as unmarried different-sex couples. *Schalk & Kopf* raises the questions of whether European consensus with regard to equal treatment of same-sex couples has now grown enough to permit the ECtHR: (1) to declare that a same-sex couple (without children) enjoys "family life" for the purposes of Art. 8; (2) to interpret Art. 12 (taken alone or together with Art. 14) as requiring CoE member states to grant equal access to legal (as opposed to religious) marriage to same-sex couples; or (3) to interpret Art. 14 combined with Art. 8 ("family life" or "private life") as prohibiting CoE member states from: (a) attaching rights and obligations to legal marriage, (b) excluding same-sex couples from legal marriage, and (c) providing same-sex couples with no other means of proving their relationships in order to qualify for these rights and obligations.

I. Do two men or two women who live together as an unmarried couple (without children) enjoy "family life" under Art. 8?

A. National courts need guidance on this question.

4. It is important that the ECtHR answer this question to provide guidance to national courts. In *M.*, [2006] UKHL 11, two judges of the United Kingdom's highest

court, the House of Lords, refused to interpret "family life" in Art. 8 as including a same-sex couple solely because the ECtHR has yet to do so (even though they would consider same-sex couples as "families" under UK law other than Art. 8).

5. Lord Nicholls said: "24. ... [F]amily life in Art. 8 is an 'autonomous' Convention concept having the same meaning in all contracting states. ... Under [ECtHR] case law same sex partners still do not fall within the scope of family life. 25. This was reiterated ... in [*Mata Estevez v. Spain*, 10 May 2001 [pre-*Karner* admissibility decision, male applicant not represented by a lawyer]. ... The [C]ourt held that ... the applicant's relationship with his late [male] partner 'does not fall within Art. 8 in so far as that provision protects the right to respect for family life'. 26. ... I do not understand the [C]ourt to be saying that each contracting state may decide for itself whether the relationship between same sex couples constitutes [Art. 8] family life ... If that were so, ... family life in Art. 8 would have a different content from one contracting state to another. That would be surprising. ... 28. ... *Estevez* ... is the most recent pronouncement by the ECtHR on this subject. The later case of *Karner* ... adds nothing. There [in para. 33] the court expressly did not decide whether the applicant's case fell within ... 'family life' or 'private life' ... 29. ... [T]he House [of Lords] will not depart from a decision of the ECtHR ... save for good reason. ... [I]t would be highly undesirable for [UK] courts ... to be out of step with [get ahead of] the Strasbourg interpretation ... 30. ... The increasingly widespread acceptance in [the UK] that same sex couples may have a family life just as much as heterosexual couples is not an adequate reason. ... [T]he time will come ... when a sufficiently developed consensus among contracting states will make it no longer appropriate for ... states to have a 'margin of appreciation' on this point. Then the *Estevez* ruling will be overtaken. ... [T]he ECtHR is the court best placed to judge when that time arrives. It is not for [UK] courts ... to pre-empt that decision."

6. Lord Mance added: "136. ... [T]he [ECtHR] spoke in categorical terms in ... *Estevez* [in 2001] when it said that ... 'long-term homosexual relations ... do not fall within the scope of the right to respect for family life ...'; ... [our] decisions ... establish that ... Art. 8(1) should be given 'a uniform interpretation throughout member states, unaffected by different cultural traditions'. ... 152. I have little doubt that the [ECtHR] would see the position now as having changed very considerably, and that, ... in 2006, Mrs M's same-sex relationship could very well be regarded, in both Strasbourg and the [UK], as involving family life for the purposes of Art. 8. But that is because there have been continuing changes in social attitudes and in the legislative picture across Europe. ... [T]he picture is overall one of radical change since ... 2001. Outside Europe, the list shows not dissimilar developments. ... The legal restructuring evidenced by this list marks a general recognition by legislatures and societies of the need for equal treatment of opposite and same-sex couples. ..."

7. Although national courts can be more generous than the ECtHR, and should not hesitate to find that same-sex couples enjoy "family life",¹ many (such as the UK's House of Lords) are unwilling to do so until the ECtHR does so.

B. *Karner* implies that same-sex couples (without children) enjoy "family life".

8. The conclusion that same-sex couples enjoy "family life" is supported by all the evidence in these Written Comments of the growing consensus that same-sex couples should enjoy the same legal rights and obligations as different-sex couples. Whenever a different-sex couple is considered a "family", a same-sex couple in the same circumstances should be considered a "family". It is implicit in several of the ECtHR's judgments and decisions that an unmarried different-sex couple (without

¹ See R. Wintemute, "Same-Sex Couples in ... *M*", [2006] *Eur. Hum. Rights Law Review* 722, 726-30.

children) enjoys "family life".² Thus, *Karner* implies that an unmarried same-sex couple (without children) also enjoys "family life".

9. The ECtHR's conclusion in *Karner* (paras. 39-43), that there was no justification for excluding unmarried same-sex couples from rights granted to unmarried different-sex couples, implicitly overruled the statements about "family life" in *Mata Estevez*, which were in turn based on outdated case law of the European Commission of Human Rights.³ The ECtHR's references to "the family in the traditional sense" (to which Austria had added unmarried different-sex couples without children) suggest that Mr. Karner's "less traditional family" (an unmarried same-sex couple without children) also enjoyed "family life". The Third-Party Interveners respectfully urge the ECtHR to make this aspect of *Karner* explicit by declaring in the present case that a same-sex couple without children enjoys "family life", whenever a different-sex couple in the same circumstances enjoys "family life".

C. National courts in European and other democratic societies have treated unmarried same-sex couples (without children) as families.

10. The highest courts of the UK, New York, Canada and South Africa have all treated same-sex couples as families. The UK's House of Lords did so by 3 to 2 in *Fitzpatrick*, [1999] 4 All E.R. 705, holding that the male partner of the deceased male tenant qualified for protection against eviction as the tenant's "family member". Lord Nicholls found that "[a] man and woman living together in a stable and permanent sexual relationship are capable of being members of a family ... [T]here can be no rational ... basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or ... two women. ... [I]t cannot make sense to say that, although a heterosexual partnership can give rise to membership of a family ..., a homosexual partnership cannot. Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife. This love and affection and commitment can exist in same sex [or] ... heterosexual relationships. ..."

11. In *Braschi*, 543 N.E.2d 49 (1989), the New York Court of Appeals concluded that "the term family ... should not be rigidly restricted to those people who have formalized their relationship by obtaining ... a marriage certificate The intended protection against sudden eviction should not rest on fictitious legal distinctions ... but instead ... [on] the reality of family life. In [this] context ..., a more realistic, and certainly equally valid, view of a family includes two [different-sex or same-sex] adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence ..."

² See eg *Kroon v. Netherlands* (27 Oct. 1994) ("30. ... the notion of 'family life' ... is not confined solely to marriage-based relationships ... Although, as a rule, living together [but not having children] may be a requirement for such a relationship, exceptionally other factors [having children without living together] may also serve to demonstrate ... sufficient constancy to create de facto 'family ties'"); *Saucedo Gómez v. Spain* (26 Jan. 1999 decision) (without mentioning their children from prior marriages, the Court said that it had no doubt that a "family life" had existed between a woman and a man who had lived together outside marriage for 18 years); *Velikova (A.V.) v. Bulgaria* (18 May 1999) ("a couple who have lived together for many years constitute a 'family' for the purposes of Art. 8 ... and are entitled to its protection notwithstanding the fact that their relationship exists outside marriage").

³ See *X & Y v. UK* (No. 9369/81) (3 May 1983), 32 DR 220 (Art. 8); *Simpson v. UK* (No. 11716/85) (14 May 1986), 47 DR 274 (Art. 14 combined with Art. 8).

12. In *M. v. H.*, [1999] 2 S.C.R. 3, the Supreme Court of Canada had to decide whether the Ontario Family Law Act could exclude same-sex couples from its financial support obligations, by defining "spouse" as including "either of a man and woman who are not married to each other and have cohabited ... for ... not less than three years". By 8 to 1, the Canadian Court found the exclusion discriminatory: "58. ... [S]ame-sex couples will often form long, lasting, loving and intimate relationships ... 73. ... The exclusion of same-sex partners from ... the Act promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. ... [T]hey are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples ... [S]uch exclusion ... contributes to the erasure of their existence."

13. In *National Coalition for Gay & Lesbian Equality*, Case CCT10/99 (2 Dec. 1999), South Africa's Constitutional Court went further, holding by 11 to 0 that unmarried same-sex couples must be granted the same immigration rights as married different-sex couples. Justice Ackermann said: "49. The ... Act ... reinforce[s] harmful and hurtful stereotypes of gays and lesbians ... 53. ... Gays and lesbians in same-sex life partnerships are as capable as heterosexual spouses of expressing and sharing love in its manifold forms including affection, friendship, eros and charity ... They are ... as capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships; of furnishing emotional and spiritual support; and of providing physical care, financial support and assistance in running the common household ... [T]hey are capable of constituting a family, whether nuclear or extended, and of establishing, enjoying and benefiting from family life which is not distinguishable in any significant respect from that of heterosexual spouses. ..."

II. Should Art. 12 (taken alone or together with Art. 14) be interpreted as requiring equal access to legal marriage for same-sex couples?

14. In *Schalk & Kopf*, the ECtHR has been asked for the first time to interpret the EConvHR as requiring CoE member states to grant equal access to legal marriage to same-sex couples (two women or two men who are legally, physically and psychologically of the same sex, and neither of whom has ever undergone gender reassignment), rather than to a different-sex couple in which one partner is transsexual, as in *Christine Goodwin v. UK* (11 July 2002).

A. Are there any arguments against this interpretation?

15. The argument for interpreting Art. 12 in this way is almost unanswerable. First, excluding same-sex couples from the public institution of legal marriage involves a difference in treatment that is directly based on sexual orientation. Different-sex couples are permitted to marry if they are not closely related, are not already married, and are willing and able to consent. Same-sex couples are not.

16. Second, differences in treatment based on sexual orientation, like those based on race, religion or sex, can only be justified by "particularly serious reasons".⁴

17. Third, no such reasons exist. As the ECtHR said in *Karner*: "41. ... It must ... be shown that it was necessary in order to achieve [the] aim [of protecting the family in the traditional sense] to exclude ... persons living in a homosexual relationship ..." The same reasoning applies to legal marriage. How does excluding same-sex couples from access to legal marriage "protect" different-sex couples, or in

⁴ See *Karner*, para. 37; *Mouta* (21 Dec. 1999), para. 36; *Smith & Grady* (27 Sept. 1999), para. 97.

any way improve their lives? There is no shortage of marriage licenses and no need to ration them. Tradition is not a justification, and sending the symbolic message that same-sex couples are inferior to different-sex couples is not a legitimate aim.

18. The only factual difference between different-sex and same-sex couples is that most different-sex couples are able to procreate without a third party's assistance, whereas no same-sex couple is able to do so. But in *Christine Goodwin*, the ECtHR rejected as justifications both absence of procreative capacity, and the fact that the Ms. Goodwin was legally male and able to marry a woman: "98. ... Art. 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to [marry] ... 101. ... [I]t is artificial to assert that post-operative transsexuals ... remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. ... [S]he may therefore claim that the very essence of her right to marry has been infringed." Thus, in the case of two men, it is irrelevant that they cannot produce a child on their own, or that each man could marry a woman. The ECtHR also observed: "100. ... There have been major social changes in the institution of marriage since the adoption of the Convention [in 1950] ... Art. 9 of the [2000] [EU] Charter of Fundamental Rights departs, no doubt deliberately, from the wording of Art. 12 [EConvHR] in removing the reference to men and women". In any case, this reference does not specify that a man must marry a woman and vice versa.

19. There is a long-term international trend towards the elimination of all discrimination in legislation that is directly based on sexual orientation.⁵ This trend began with the repeal of the death penalty for sexual activity between men, and will end when legal marriage is open to same-sex couples in every democratic society. The evolution towards full legal equality for lesbian and gay individuals and same-sex couples has been completed in the Netherlands, Belgium, Spain, Canada, South Africa & Massachusetts (not federal law). Sweden & Norway might follow in 2008.⁶

B. Have any national courts ordered that same-sex couples be allowed to marry?

20. In the Netherlands, Belgium and Spain, the final step⁷ needed for full legal equality was taken by the national legislature. In Canada, South Africa and Massachusetts, it resulted from judicial decisions (implemented by the national legislature in Canada and South Africa; see Appendix). The British Columbia Court of Appeal held in *EGALE Canada* (1 May 2003), 225 D.L.R. (4th) 472, that excluding same-sex couples from legal marriage is discrimination violating the Canadian Charter. The B.C. Court could not see: "127. ... how according same-sex couples the benefits flowing to opposite-sex couples in any way inhibits, dissuades or impedes the formation of heterosexual unions. ... 156. ... [T]he redefinition of marriage to include same-sex couples ... is the only road to true equality for [them]. Any other form of recognition of [their] relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality. This Court should not ... grant a remedy which makes same-sex couples 'almost equal', or ... leave it to governments to choose amongst less-than-equal solutions."

⁵ See R. Wintemute, "Same-Sex Marriage: When Will It Reach Utah?", (2006) 20 *Brigham Young University Journal of Public Law* (Provo, UT, USA) 527.

⁶ See <http://www.homo.se> (English) (proposals: Sweden, 21 March 2007; Norway, 17 May 2007).

⁷ Second-parent or joint adoption usually precedes marriage. See Wintemute, *supra* n. 5, 532-33.

21. The Ontario Court of Appeal agreed in *Halpern* (10 June 2003), 65 O.R. (3d) 161: "107. ... [S]ame-sex couples are excluded from a fundamental societal institution – marriage ... and the benefits that are available only to married persons ... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships ... [and] offends the dignity of persons in same-sex relationships." The Ontario Court ordered the issuance of marriage licenses to same-sex couples that day. The B.C. Court followed on 8 July 2003 (228 D.L.R. (4th) 416), as did the Québec Court of Appeal on 19 March 2004.⁸ A federal law (approved by the Supreme Court)⁹ extended these unanimous appellate decisions to all 10 provinces and 3 territories from 20 July 2005.¹⁰

22. On 18 Nov. 2003, the Supreme Judicial Court of Massachusetts reached the same conclusion, by 4 to 3, in *Goodridge*, 798 N.E.2d 941: "The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens. ... [Same-sex couples are] arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. ... [C]ivil marriage ... is a 'social institution of the highest importance' ... a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family ... [which] fulfils yearnings for security, safe haven, and connection that express our common humanity ... Without the right to ... choose to marry--one is excluded from the full range of human experience ... Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing ... [different-race marriage] devalues [same-race] marriage ... The marriage ban works a deep and scarring hardship on a ... segment of the community for no rational reason[,] ... suggest[ing] that [it] is rooted in persistent prejudices against persons who are ... homosexual. ... [C]ivil marriage mean[s] the voluntary union of two persons as spouses, to the exclusion of all others."

23. On 3 Feb. 2004, the Massachusetts Court found unconstitutional a bill creating "civil unions" for same-sex couples.¹¹ "The history of our nation has demonstrated that separate is seldom, if ever, equal. ... '[C]ivil marriage' and 'civil union' is ... a considered choice of language that reflects a demonstrable assigning of same-sex ... couples to second-class status. ... [T]he ... bill palliates some of the financial and other concrete manifestations of the discrimination ... But the question ... in *Goodridge* was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens ..., and withhold from that class the right to participate in the institution of civil marriage ... Maintaining a second-class citizen status for same-sex couples ... is the constitutional infirmity ..." Same-sex couples began to marry on 17 May 2004.

24. On 30 Nov. 2004, South Africa's Supreme Court of Appeal agreed with the Canadian and Massachusetts courts, and restated the common-law definition of marriage as: "the union between two persons to the exclusion of all others for life."¹² On 1 Dec. 2005, South Africa's Constitutional Court concluded that the remaining statutory obstacle to marriage for same-sex couples was discriminatory: "71. ... The exclusion of same-sex couples from ... marriage ... represents a harsh if oblique statement by the law that same-sex couples are outsiders ... that their need for

⁸ See <http://www.jugements.qc.ca/primeur/documents/liguecatholique-19032004.doc>.

⁹ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

¹⁰ See R. Wintemute, "Sexual Orientation and the Charter", (2004) 49 *McGill Law Journal* 1143; Civil Marriage Act, Statutes of Canada 2005, chapter 33.

¹¹ *In re the Opinions of the Justices to the Senate*, 802 N.E.2d 605.

¹² *Fourie v. Minister of Home Affairs* (30 Nov. 2004).

affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples ... that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples ... 81. ... Same-sex unions continue ... to be treated with the same degree of repudiation that the state until [1985] reserved for interracial unions ... [The remedy] would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married. ... 150. ... Historically the concept of 'separate but equal' served as a threadbare cloak for covering distaste for ... the group subjected to segregation ..."¹³ South Africa's Parliament interpreted this judgment as not permitting the segregation of same-sex couples. On 30 Nov. 2006, the Civil Union Act (No. 17 of 2006) came into force, allowing any couple, different-sex or same-sex, to contract a "civil union" and choose to have it known as a "marriage" or a "civil partnership".

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C. Should European consensus be decisive?

25. Is there any reason for the ECtHR not to extend its judgment in *Christine Goodwin* to the right of a same-sex couple to enter a legal marriage? The only difference between the claims of a different-sex couple (in which one partner is transsexual and has undergone gender reassignment) and a same-sex couple is the state of European consensus. In *Christine Goodwin*, the ECtHR observed: "103. It may be noted from [Liberty's] materials ... that ... fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to ... Contracting States as ... within their margin of appreciation ... 57. ... Liberty's survey indicated that 54% of Contracting States permitted such marriage ... while 14% did not ... The legal position in the remaining 32% was unclear."

26. As of 26 June 2007, 3 of 47 CoE member states grant equal access to legal marriage to same-sex couples. This represents 6.4% of member states. The addition of Sweden and Norway in 2008 would make 5 out of 47 or 10.6%.

27. The Third-Party Interveners strongly believe that it is inevitable that the ECtHR will hold, at some point, that the exclusion of same-sex couples from the public institution of legal marriage violates Art. 12 (taken alone or together with Art. 14). The ECtHR need not wait until the majority of CoE member states have abolished this exclusion. The Third-Party Interveners respectfully urge the ECtHR to consider, in this case, attaching less weight to European consensus, and focussing instead on the absence of any justification for the difference in treatment (apart from its prevalence among CoE member states). If the ECtHR decides to do so, the Third-Party Interveners are confident that the ECtHR will reach the same conclusion as the Canadian, Massachusetts and South African courts.

III. If the EConvHR does not yet require equal access to legal marriage for same-sex couples, is it indirect discrimination based on sexual orientation (contrary to Art. 14 combined with Art. 8, "family life" or "private life") to limit a particular right or benefit to married different-sex couples, but provide no means for same-sex couples to qualify?

¹³ *Minister of Home Affairs v. Fourie, Lesbian & Gay Equality Project* (Cases CCT60/04, CCT10/05).

28. On 28 Nov. 2006, the ECtHR's 4th Section declared inadmissible Application No. 42971/05, *Wena & Anita Parry v. UK*, in which a gender reassignment had converted a different-sex couple into a same-sex couple. The Parrys' choices were to remain married as a legally different-sex couple and forgo legal recognition of Wena's gender reassignment, or to divorce, obtain legal recognition that Wena is female, and register a civil partnership as a same-sex couple. Under Art. 8, the Fourth Section ruled that: "the applicants may ... give [their relationship] a legal status akin, if not identical to marriage, through a civil partnership which carries with it almost all the same legal rights and obligations". The 4th Section also concluded: "Art. 12 ... enshrines the traditional concept of marriage as being between a man and a woman ... While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not ... flow from an interpretation of the fundamental right [in Art. 12] ... [T]he matter falls within the appreciation of the Contracting State ..."

29. *Parry* suggests that the ECtHR might not be ready yet to interpret Arts. 12 and 14 as requiring equal access to legal marriage for same-sex couples. However, it is important to stress that the two women in *Parry* could secure almost all the rights and obligations attached to legal marriage through a UK "civil partnership". In its letter of 18 Jan. 2007 to the lawyer of Mr. Schalk & Mr. Kopf, the ECtHR mentions (in connection with the claim of sexual orientation discrimination violating Art. 14 combined with Art. 8) that it has asked Austria: "In particular, should [the applicants] be afforded a possibility to have their relationship recognised by law?" Implicitly, the ECtHR has raised the possibility that recognition of the applicants' relationship through a means other than access to legal marriage might comply with the EConvHR, and that failure to provide any form of legal recognition might violate it.

A. Excluding same-sex couples from particular rights or benefits attached to legal marriage is prima facie indirect discrimination based on sexual orientation.

30. In *Thlimmenos v. Greece* (6 April 2000), the ECtHR recognised that: "44. [t]he [Art. 14] right not to be discriminated against in the enjoyment of [EConvHR] rights ... is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different. ... 48. ... [Greece] violated the applicant's right not to be discriminated against in the enjoyment of his right under Art. 9 ... by failing to introduce appropriate exceptions [eg, for persons convicted because of their religious beliefs] to the rule barring persons convicted of a felony from the profession of chartered accountants." The *Thlimmenos* reasoning applies to a same-sex couple who seek a right or benefit attached to marriage but are legally unable to marry. Failure to treat them differently because of their legal inability to marry, by providing them with another means of qualifying for the right or benefit, requires an objective and reasonable justification.

31. The concept of indirect discrimination, recognised by the ECtHR for the first time under Art. 14 in *Thlimmenos*, is spelled out in greater detail in Council Directive 2000/78/EC, Art. 2(2)(b). Indirect discrimination occurs where "an apparently neutral ... criterion [eg, requiring a marriage certificate] ... would put persons having a ... particular sexual orientation at a particular disadvantage compared with other persons unless [it] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate [suitable] and necessary." In *Maruko*, Case C-267/06 (heard on 19 June 2007), a surviving same-sex registered partner is

seeking an exemption from the requirement that he have been married to his late partner in order to qualify for a survivor's pension.

32. The ECJ effectively granted such an exemption in *K.B.*, Case C-117/01, [2004] ECR I-541. It was implicit in the ECJ's judgment that Ms. K.B. and Mr. R. (her transsexual male partner) were entitled to an exemption from the marriage requirement until UK legislation was amended. If Ms. K.B. had died on 8 Jan. 2004, the day after the ECJ's judgment, Mr. R. would have been entitled to a survivor's pension despite his not being married to Ms. K.B., because the Gender Recognition Act 2004, implementing *Christine Goodwin* and allowing Mr. R. to marry Ms. K.B., did not come into force until 4 April 2005.

33. An ECJ judgment extending *K.B.* to the situation in *Maruko* would establish a principle preventing an employer or pension scheme from creating an employment benefit of great value to couples, and then attaching to that benefit a condition (being married) which same-sex couples are legally unable to satisfy. The employer or pension scheme could justifiably maintain the condition for different-sex couples¹⁴ (just as the rule on felony convictions could be maintained in *Thlimmenos*), but must exempt same-sex couples and find some alternative means for them to qualify for the benefit (eg, presenting a registered partnership certificate, a sworn statement, or other reasonable evidence of a committed relationship).

34. In *Christine Goodwin*, the ECtHR required CoE member states to legally recognise gender reassignment, but left the details of recognition to each member state. An obligation to exempt same-sex couples from a marriage requirement, to avoid indirect discrimination, would leave to member states the choice of the method used to do so. The ECtHR's approach in *Christine Goodwin* (paras. 85, 91, 103) applies *mutatis mutandis*: "The Court ... attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems [of same-sex couples], than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of [same-sex couples] but of legal recognition of [their relationships]."

35. A member state would find at least 5 options within its margin of appreciation: (1) it could grant same-sex couples, who could prove the existence of their relationship for a reasonable period, a permanent exemption from the marriage requirement attached to the right or benefit, like the implicit exemption in *K.B.*; (2) it could grant the same exemption to unmarried different-sex couples; (3) it could grant a temporary exemption to same-sex couples until it had created an alternative registration system, with a name other than marriage, allowing same-sex couples to qualify; (4) it could grant access to the same system to different-sex couples; or (5) if it did not wish to grant the right or benefit to unmarried couples or create an alternative registration system, it could grant a temporary exemption to same-sex couples until it had time to pass a law granting them equal access to legal marriage. A member state would also be able to decide (subject to ECtHR supervision) whether any exceptions could be justified, eg, in relation to access to parental rights.

B. Excluding same-sex couples from particular rights or benefits attached to legal marriage generally cannot be justified.

36. As the ECtHR said in *Karner*: "41. In cases in which the margin of appreciation ... is narrow, as ... where there is a difference in treatment based on ... sexual orientation, the principle of proportionality does not merely require that the

¹⁴ See *Irizarry v. Board of Education of City of Chicago*, 251 F.3d 604 (7th Cir. 2001).

measure chosen is ... suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude ... persons living in a homosexual relationship ..." The ECtHR found no evidence of necessity where the difference of treatment was between unmarried different-sex and same-sex couples. As suggested above at paras. 17-19, the necessity test is very hard to satisfy in relation to the exclusion of same-sex couples from access to legal marriage. The same will generally be true with regard to prima facie indirect discrimination resulting from applying a marriage requirement to same-sex couples who are unable to satisfy it.

C. Consensus in European and other democratic societies increasingly supports finding an obligation to use some means to legally recognise same-sex couples.

37. There is an emerging consensus, in European and other democratic societies (see Appendix), that a government may not limit a particular right, benefit or obligation to married couples, and then tell same-sex couples that it is impossible for them to qualify for it, because they are not permitted to marry. Of the 47 CoE member states, 19 or 40% have already passed some kind of legislation recognising same-sex couples: Andorra, Belgium, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, and the UK. Legislation is being considered in Austria, Ireland, and Italy.

38. Outside of Europe, legislation has been adopted in all eight states and territories of Australia, at the federal level and in all 13 provinces and territories of Canada, in New Zealand, and in South Africa. In the US, of the 20 states and the District of Columbia that prohibit employment discrimination based on sexual orientation¹⁵ (as Directive 2000/78/EC does), 10 states and the District of Columbia have granted substantial legal recognition to same-sex couples, under a registration system resulting from legislation or a judicial decision: Calif., Connecticut, Hawaii, Maine, Mass., New Hampshire, New Jersey, Oregon, Vermont, and Washington.

39. As for the specific argument that a marriage requirement puts same-sex couples at a particular disadvantage compared with different-sex couples, and is therefore indirect discrimination based on sexual orientation, it has been accepted by at least 3 US appellate courts¹⁶ and South Africa's Constitutional Court.¹⁷ In *Satchwell*, the S.A. Court held that unmarried same-sex partners of judges are entitled to the same employment benefits as married different-sex partners of judges.

40. The Parliamentary Assembly of the CoE has recommended: (a) that member states "review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnership[s] and families are treated on the same basis as heterosexual partnerships and families", Recommend. 1470 (2000); and (b) that they "adopt legislation which makes provision for registered [same-sex] partnerships", Recommend. 1474 (2000), para. 11(iii)(i).¹⁸ The EU's European Parliament called for equal treatment of different-sex and same-sex couples in a 1994 resolution seeking to end "the barring of [same-sex] couples from marriage or from an

¹⁵ http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_05_07_color.pdf.

¹⁶ *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (Oregon Cts of Appeals 1998); *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (New York Ct. of Appeals 2001) (justification not considered); *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Supreme Ct. of Alaska 2005).

¹⁷ *National Coalition*, Case CCT10/99 (2 Dec. 1999); *Du Toit*, CCT40/01 (10 Sept. 2002); *Satchwell*, CCT45/01, CCT48/02 (25 July 2002, 17 March 2003); *J. & B.* (28 March 2003), CCT46/02.

¹⁸ See also Resolution 1547 (2007), para. 34.14.

equivalent legal framework".¹⁹ In 2000, it again urged EU member states "to ... recognis[e] registered partnerships of persons of the same sex and assign[] them the same rights and obligations as ... [marriages] between men and women".²⁰

41. In 2004, the EU's Council amended the Staff Regulations to provide for benefits for the non-marital partners of EU officials.²¹ The Regulations now state that "non-marital partnership shall be treated as marriage provided that ... the couple produces a legal document recognised as such by a Member State ... acknowledging their status as non-marital partners, ... [and] ... has no access to legal marriage in a Member State". In 2005, the Statute of the Members of the European Parliament was amended so as to provide that "[p]artners from relationships recognised in the Member States shall be treated as equivalent to spouses".²²

42. In 2006, the International Labour Organisation's Administrative Tribunal held that the ILO must treat German and Danish same-sex registered partnerships as equivalent to different-sex marriages for the purpose of employment benefits.²³ The United Nations' Administrative Tribunal had reached the same conclusion in 2004 in relation to a French same-sex civil solidarity pact.²⁴

43. Finally, in 2006, the Committee of Ministers of the CoE agreed to add to the Staff Regulations of the CoE the principle that: "[s]taff members shall be entitled to equal treatment under the Staff Regulations without direct or indirect discrimination, in particular on grounds of ... sexual orientation ..."²⁵

Conclusion

44. There is a growing consensus in European and other democratic societies that same-sex couples must be provided with some means of qualifying for rights or benefits attached to marriage. As the ECtHR noted in *Smith & Grady v. UK* (27 Sept. 1999): "104. ... 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".

¹⁹ "Resolution on equal rights for homosexuals ... in the EC" (8 Feb. 1994), OJ C61/40 at 42, para. 14.

²⁰ "Resolution on respect for human rights in the [EU] ..." (16 March 2000), A5-0050/00, para. 57.

²¹ Staff Regulations of [EC] officials ..., Article 1d(1) and Annex VII, Article 1(2)(c) and Annex VIII, Art. 17, as amended by Council Regulation 723/2004/EC (22 March 2004), OJ L124/1.

²² Decision No. 2005/684/EC of the European Parliament, Art. 17(9) (28 Sept. 2005), OJ L262/6.

²³ *A.H.R.C.-J. v. ILO* and *D.B. v. ILO*, 101st Session, Judgments Nos. 2549 and 2550 (12 July 2006).

²⁴ *Jean-Christophe Adrian v. Secretary-General*, 30 Sept. 2004, Case No. 1276, Judgment No. 1183.

²⁵ Art. 3(1), as amended by CM Resolution 2006 (4), 3 May 2006 (emphasis added).

APPENDIX – NATIONAL (FEDERAL, REGIONAL, LOCAL) LEGISLATION RECOGNISING SAME-SEX COUPLES²⁶

Council of Europe Member States

Andorra - *Llei 4/2005, del 21 de febrer, qualificada de les unions estables de parella*, (23 March 2005) 17 *Butlletí Oficial del Principat d'Andorra* no. 25, p. 1022 ("unions estables de parella"; "stable unions of couples")

Belgium - *Loi du 23 novembre 1998 instaurant la cohabitation légale*, *Moniteur belge*, 12 Jan. 1999, p. 786 ("cohabitants légaux"; "statutory cohabitants"); *Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil*, *Moniteur belge*, 28 Feb. 2003, Edition 3, p. 9880, in force on 1 June 2003

Croatia - Law on Same-Sex Civil Unions (*Zakon o istospolnim zajednicama*), passed by Parliament on 14 July 2003, signed by President on 16 July 2003 ("partneri" or "partnerice"; "partners")

Czech Republic - Registered Partnership Act (final approval by Chamber of Deputies on 15 March 2006)

Denmark - Law on Registered Partnership (*Lov om registreret partnerskab*), 7 June 1989, nr. 372 ("registrerede partnere"; "registered partners")

Finland - Law 9.11.2001/950, Act on Registered Partnerships (*Laki rekisteröidystä parisuhteista*) ("parisuhteen osapuolet"; "registered partners")

France - *Loi no. 99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, ("partenaires"; "partners"); also inserting a new Art. 515-8 into the *Code civil*: "*Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple.*"

Germany

Federal Level - Law of 16 Feb. 2001 on Ending Discrimination Against Same-Sex Communities: Life Partnerships (*Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften*), [2001] 9 *Bundesgesetzblatt* 266 ("Lebenspartner"; "life partners")

Hungary – Civil Code, Art. 685/A, as amended by Act No. 42 of 1996: "Partners – if not stipulated otherwise by law – are two people living in an emotional and economic community in the same household without being married."

²⁶ An earlier version appeared in R. Wintemute (ed.) & M. Andenæs (hon. co-ed.), *Legal Recognition of Same-Sex Partnerships* (Oxford, Hart Publishing, 2001).

Iceland – Law on Confirmed Cohabitation (*Lög um staðfesta samvist*), 12 June 1996, nr. 87 ("parties to a confirmed cohabitation")

Luxembourg - *Loi du 9 juillet 2004 relative aux effets légaux de certains partenariats*, *Mémorial A*, nr. 143, 6 August 2004 ("*partenaires*"; "partners")

Netherlands - Act of 5 July 1997 amending Book 1 of the Civil Code and the Code of Civil Procedure, concerning the introduction therein of provisions relating to registered partnership (*geregistreerd partnerschap*), *Staatsblad* 1997, nr. 324 ("*geregistreerde partners*"; "registered partners"); Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage), *Staatsblad* 2001, nr. 9 ("*echtgenoten*"; "spouses")

Norway – Law on Registered Partnership (*Lov om registrert partnerskap*), 30 April 1993, nr. 40 ("*registrerte partnere*"; "registered partners")

Portugal – *Lei No. 7/2001 de 11 de Maio, Adopta medidas de protecção das uniões de facto*, [2001] 109 (I-A) *Diário da República* 2797 ("*uniões de facto*"; "de facto unions")

Slovenia - Registered Partnership Law, published in July 2005, in force on 23 July 2006

Spain

Spanish State – see, e.g., Law on Urban Leasing (*Ley de Arrendamientos Urbanos*) of 24 Nov. 1994, Art.s 12, 16, 24, *disposición transitoria segunda B(7)*: housing rights granted to a person cohabiting "in a permanent way in an emotional relationship analogous to that of spouses, without regard to its sexual orientation [*con independencia de su orientación sexual*]"; *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio* (Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage), *Boletín Oficial del Estado* no. 157, 2 July 2005, pp. 23632-23634 (in force 3 July 2005)

Autonomous Communities (*Comunidades Autónomas*):

Andalucía - *Ley de parejas de hecho*, (5 Dec. 2002) 422 *Boletín Oficial del Parlamento de Andalucía* 23987 ("*parejas de hecho*"; "de facto couples")

Aragón - *Ley relativa a parejas estables no casadas*, (26 March 1999) 255 *Boletín Oficial de las Cortes de Aragón* ("*parejas estables no casadas*"; "unmarried stable couples")

Asturias - *Ley 4/2002, de 23 de mayo, de Parejas Estables* ("*parejas estables*"; "stable couples")

Balearic Islands - *Llei 18/2001 de 19 de decembre, de parelles estables* ("*parelles estables*"; "stable couples")

Basque Country - *Ley 2/2003, de 7 de mayo, reguladora de las parejas de hecho*, (9 May 2002) 92 *Boletín Oficial del Parlamento Vasco* 9760 ("*parejas de hecho*"; "de facto couples")

- Canary Islands - *Ley 5/2003, de 6 de marzo, para la regulación de las parejas de hecho*, (13 March 2003, V *Legislatura*) 150 *Boletín Oficial del Parlamento de Canarias* 2 ("parejas de hecho"; "de facto couples")
- Cantabria - *Ley 1/2005, de 16 de mayo, de parejas de hecho*, (24 May 2005) 98 *Boletín Oficial de Cantabria* ("parejas de hecho"; "de facto couples")
- Catalonia - *Llei 10/1998, de 15 de juliol, d'unions estables de parella*, (10 July 1998) 309 *Butlletí Oficial del Parlament de Catalunya* (BOPC) 24738 ("unions estables de parella"; "stable unions of couples")
- Extremadura - *Ley de Parejas de Hecho*, (26 March 2003) 377 *Boletín Oficial de la Asamblea de Extremadura* 13 ("parejas de hecho"; "de facto couples")
- Madrid - *Ley de Uniones de Hecho de la Comunidad de Madrid*, (28 Dec. 2001) 134 *Boletín Oficial de la Asamblea de Madrid* (V *Legislatura*) 160003 ("uniones de hecho"; de facto unions)
- Navarra - *Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables*, [7 July 2000] 82 *Boletín Oficial de Navarra* ("parejas estables"; "stable couples")
- Valencia - *Ley por la que se regulan las uniones de hecho*, (9 April 2001) 93 *Boletín Oficial de las Cortes Valencianas* 12404 ("uniones de hecho"; "de facto unions")

Sweden – Homosexual Cohabitees Act (*Lag om homosexuella sambor*), SFS 1987:813 (replaced by SFS 2003:376); Law on Registered Partnership (*Lag om registrerat partnerskap*), 23 June 1994, SFS 1994:1117 ("registrerade partner"; "registered partners")

Switzerland

Federal Level - *Bundesgesetz vom 18. Juni 2004 über die eingetragene Partnerschaft gleichgeschlechtlicher Paare (Partnerschaftsgesetz)*, *Bundesblatt*, 2004, No. 25 (29 June 2004), p. 3137; *Loi fédérale du 18 juin 2004 sur le partenariat enregistré entre personnes du même sexe (Loi sur le partenariat)*, *Feuille fédérale*, 2004, No. 25 (29 June 2004), p. 2935 ("Partner/Partnerinnen"; "partenaires"; "partners") (approved by 58% of voters in a referendum on 5 June 2005; entered into force on 1 January 2007)

United Kingdom - Civil Partnership Act 2004 ("civil partners")

Other Democratic Societies

Australia

- Australian Capital Territory – eg, Domestic Relationships Act 1994 ("parties to a domestic relationship"); Family Provision (Amendment) Act 1996 ("eligible partners"); Legislation (Gay, Lesbian and Transgender) Amendment Act 2003 ("domestic partners")
- New South Wales - Property (Relationships) Legislation Amendment Act 1999; Miscellaneous Acts Amendment (Relationships) Act 2002 (eg, "de facto spouses", "de facto partners", "parties to a de facto relationship")

Northern Territory - Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003, Act. No. 1 of 2004 ("de facto partners")
 Queensland - eg, Property Law Amendment Act 1999 ("de facto spouses")
 South Australia - Statutes Amendment (Domestic Partners) Act 2006 ("domestic partners")
 Tasmania - Relationships Act 2003, Relationships (Consequential Amendments) Act 2003 ("partners" include two persons in a "significant relationship", ie, "who have a relationship as a couple", and who may register a "deed of relationship")
 Victoria – Statute Law Amendment (Relationships) Act 2001 ("domestic partners")
 Western Australia - Acts Amendment (Lesbian and Gay Law Reform) Act 2002 ("de facto partners")

Canada

Federal Level - Modernization of Benefits and Obligations Act, Statutes (S.) of Canada 2000, chapter (c.) 12 ("common-law partners", "*conjoints de fait*"); Civil Marriage Act, Statutes of Canada 2005, c. 33 ("spouses", "*époux*")

Provinces and Territories:

Alberta - Adult Interdependent Relationships Act, S.A. 2002, c. A-4.5 ("adult interdependent partners")
 British Columbia - Definition of Spouse Amendment Acts, S.B.C. 1999, c. 29, S.B.C. 2000, c. 24 ("spouses")
 Manitoba - Charter Compliance Act, S.M. 2002, c. 24 and Common-Law Partners' Property and Related Statutes Amendment Act, S.M. 2002, c. 48 (registered and unregistered "common-law partners")
 New Brunswick - eg, Family Services Act, N.B. Acts, c. F-2.2, section (s.) 112(3), as amended in 2000 (spousal support obligations of unmarried persons living in a family relationship)
 Newfoundland - Same Sex Amendment Act, S.N. 2001, c. 22 ("cohabiting partners")
 Northwest Territories - Family Law Act, S.N.W.T. 1997, c. 18, s. 1(1), as amended by S.N.W.T. 2002, c. 6 ("spouses")
 Nova Scotia - Law Reform (2000) Act, S.N.S. 2000, c. 29 (unregistered "common-law partners", registered "domestic partners")
 Nunavut - eg, An Act to amend the Labour Standards Act, S. Nunavut 2003, c. 18 ("common-law partners")
 Ontario - Amendments Because of the Supreme Court of Canada Decision in *M. v. H.* Act, S.O. 1999, c. 6 ("same-sex partners"); An Act to amend various statutes in respect of spousal relationships, S.O. 2005, c. 5 ("spouses")
 Prince Edward Island - Family Law Act, R.S.P.E.I. 1988, c. F-2.1, s. 29(1), as amended by S.P.E.I. 2002, c. 7 ("common-law partners")
 Québec - An Act to amend various legislative provisions concerning de facto spouses, S.Q. 1999, c. 14, 1st session, 36th legislature, Bill 32 ("*conjoints de fait*", "de facto spouses"); An Act instituting civil unions and establishing new rules of filiation, S.Q. 2002, c. 6, 2nd session, 36th legislature, Bill 84 ("*conjoints en union civile*" or "*conjoints unis civilement*" or "civil union spouses"; capacity to become "*conjoints mariés*" or "*époux*" or "married spouses" is governed by the 2005 federal law)

Saskatchewan - Miscellaneous Statutes (Domestic Relations) Amendment Acts, 2001, S.S. 2001, cc. 50-51 ("common-law partners", or persons "cohabiting as spouses" or "cohabiting in a spousal relationship")

Yukon Territory – eg, Family Property and Support Act, R.S.Y. 1986 (Vol. 2), c. 63, ss. 1, 30, 31, as amended by S.Y. 1998, c. 8, s. 10 ("spouses")

New Zealand - Civil Union Act 2004, Relationships (Statutory References) Act 2004 ("parties to a civil union")

South Africa - Civil Union Act, No. 17 of 2006 (same-sex or different-sex "civil union partners", who include "spouses in a marriage" and "partners in a civil partnership")

United States

- California - "domestic partners" - 1999, 2001, 2003
- Connecticut - "parties to a civil union" - 2005
- District of Columbia - "domestic partners" - 1992
- Hawaii - "reciprocal beneficiaries"- 1997
- Maine - "domestic partners" - 2004
- Massachusetts - "spouses" - 2004
- New Hampshire - "spouses in a civil union" - 2007
- Oregon - "domestic partners" - 2007
- New Jersey - "civil union partners" - 2006
- Vermont - "parties to a civil union" - 2000
- Washington - "domestic partners" - 2007

Specific citations for the US laws, and more detailed citations for the laws in the Czech Republic and Slovenia, can be provided if the ECtHR would find them helpful. They have not been included here because of time constraints in preparing these Written Comments.