

**Observations by the Attorney General for Northern Ireland in X and Others v. Austria (Application No. 19010/07)**

**Introduction**

1. The Attorney General for Northern Ireland is grateful to the President of the Court for granting leave pursuant to Rule 44 §3 for written observations to the Court on the above case. Naturally these observations are framed in general terms and do not deal with, or otherwise address, the facts of this particular case, nor do they request any specific disposal for it.

2. This case raises issues of great importance concerning democratic accountability for questions about the welfare of children and the margin of appreciation that States enjoy in this area. It is submitted that the Court will be slow to find a breach of the Convention where States have conscientiously adopted a judgement reflective of local tradition and circumstance about where the best interests of children lie.

**The Nature and Functions of the Intervener**

3. The Attorney General of Northern Ireland is statutorily independent in the exercise of his functions. Chief among his responsibilities is that of guardian of the rule of law. An important aspect of this is ensuring that the law in Northern Ireland respects fundamental human values, including those underpinned by the European Convention on Human Rights. The Attorney is chief legal adviser to the Northern Ireland Executive and additionally has a statutory duty to issue guidance to a number of public bodies on the exercise of their functions in a manner consistent with international human rights standards.

**The European Convention on the Adoption of Children (Revised) 2008**

4. The Council of Europe Convention on Adoption ("the Adoption Convention")(now in force but not yet acceded to (inter alia) by the United Kingdom) is relevant both in terms of gauging the applicable European consensus with respect to adoption, and, also, in relation to the purpose for which adoption exists.

5. At the core of the Adoption Convention lies a governing principle set out in Article 4 which provides as follows:

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

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

6. It may be seen that in emphasising the child welfare purpose of adoption that Article 4 of the Adoption Convention echoes Article 21 of the UN Convention on the Rights of the Child.

7. Subject to this governing principle, Article 7 of the Adoption Convention permits the adoption of children by (1) two persons of different sex who are either married to one another or (2) have entered into a registered partnership where such an institution exists or (3) by one person. Article 7(2) specifies that States are free to extend the scope of the Adoption Convention to same sex couples who are married to each other or have entered into a registered partnership. States are also free- but not required- to extend the scope of the Adoption Convention to different sex couples who are living together in a stable relationship. The position most favourable to the present application is to regard the Adoption Convention as reflective of a European consensus. If the Adoption Convention can be so regarded then it is clear that there is no European consensus requiring adoption by couples of the same sex.

8. Importantly, by Article 27 (Reservations) among the limited provisions of the Adoption Convention from which States may enter reservations are those parts of Article 7 which permit adoption by individuals and persons of the same sex who are in a registered partnership. Plainly, the Council of Europe has recognised that there is no European consensus other than in respect of adoption by married couples and that states are free to exercise judgement about how the best interests of children are to be protected and assured in the adoption process.

9. The Adoption Convention is premised on an acceptance that adoption is a field where judgements about what the best interests of the child require vary from country to country.

10. It is submitted that, against this background, the Court should not go further than what can, at most, be said to be the existing European consensus reflected in the terms of the Adoption Convention. Alternatively, if there is no European consensus, decisions about eligibility to adopt are, and should be, for member states

to take as they are best placed to decide on the most appropriate legal and administrative measures to secure the best interests of children.

**The United Nations Convention on the Rights of the Child**

11. In this context Article 21 of the United Nations Convention on the Rights of the Child is also illuminating. In relevant part this provides as follows:

*"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary..."*

**Northern Ireland – a common law comparison**

12. An Applicant in a Northern Ireland case in which judgment is currently awaited from the High Court in Belfast alleges that Article 14 of the Adoption (NI) Order 1987 ("the 1987 Order") unlawfully prohibits same sex couples from adopting in contravention of Article 8 ECHR in conjunction with Article 14 ECHR. Furthermore, that as a result of the amendment introduced by section 203(4) of the Civil Partnership Act 2004, no individual lesbian or gay person may adopt if they have entered into a civil partnership. Cumulatively, this has the effect that a same sex couple, within a civil partnership or not, cannot adopt as a couple by virtue of Article 14 of the 1987 Order. Nor can an individual who has entered into a civil partnership apply to adopt as an individual under Article 15(1) of the 1987 Order (although a single person regardless of their sexual orientation who is not in a civil partnership may apply to adopt provided they fulfil the other statutory criteria).

13. This cumulative effect is challenged as being in contravention of the Article 8 rights, in conjunction with Article 14 ECHR, of same sex couples and lesbian and gay individuals who have entered into a civil partnership.<sup>1</sup>

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<sup>1</sup> I refer the Court to the Appendix attached hereto for the relevant Northern Ireland legislation. The relevant Articles for consideration in the Northern Ireland context are Article 14 and Article 15(1) of the Adoption (Northern Ireland) Order 1987 as amended by section 203(4) of the Civil Partnership Act 2004. Furthermore a number

14. Adoption is an important way, but not the only way, in which the welfare of children is secured in Northern Ireland, as elsewhere in Europe. Adoption in Northern Ireland has as its fundamental objective the safeguarding and promotion of the welfare of children. This policy priority of the Northern Ireland legislature finds formal legislative expression in Article 9 of the 1987 Order which puts the best interests of the child at the centre of the process.

15. As a matter of the domestic law of Northern Ireland there can be no question of the existence of a right to adopt nor is it useful to speak even of a right to apply to adopt. The law of adoption in Northern Ireland has as its sole purpose the welfare of children; the gratification of a parental impulse, and the desire to 'complete' a relationship are not relevant considerations in the evaluation of the best interests of the child.

16. The position in paragraph 15 above may be contrasted with what might be said to be the origins of modern European adoption law<sup>2</sup> in Title VIII of the Code Civil in 1804. Introducing a *projet de loi* on adoption before the Conseil d'État on November 27 1801 *Berlier* observed that:

*"...l'adoption sera la consolation des mariages stériles, et une vaste carrière de secours pour les enfans souvent très-nombreux de pères et mères pauvres."*<sup>3</sup>

17. Even if the welfare of children was noted as a secondary consideration in 1801 the primary purpose – that of providing heirs – quickly became dominant<sup>4</sup>. Even in 1801 it was observed that the welfare of children did not necessarily require adoption.<sup>5</sup>

18. Articles 14 and 15 of the 1987 Order dealing with adoption eligibility criteria continue to represent the democratically accountable decision of the Northern Ireland legislature as to how the best interests of the child in Northern Ireland – as

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of Articles of the Children (NI) Order 1995 referred to below are contained in the Appendix.

<sup>2</sup> In Fenet Recueil Complet des Travaux Préparatoires du Code Civil Tome Dixième at p. 249 (Paris, 1836) *Berlier* notes the existence of adoption already (in 1801) in Prussia. Plainly the Prussian provisions have had much less European impact.

<sup>3</sup> Fenet Recueil Complet des Travaux Préparatoires du Code Civil Tome Dixième p. 247 (Paris, 1836)

<sup>4</sup> See Les Cahiers du Conseil constitutionnel Cahier 30 Decision 2010-39 OPC October 6 2010 « (une « fabrique à héritiers », disait-on) »

<sup>5</sup> See the observation of *Tronchet* in Fenet Recueil Complet des Travaux Préparatoires du Code Civil Tome Dixième at p. 258-9 (Paris, 1836)

required by Article 9 of the 1987 Order – should be secured<sup>6</sup>.

19. Furthermore, joint adoption (currently available to only married couples under the Northern Ireland legislation) is not the only means of securing the welfare of the child. An individual can apply to adopt, regardless of his or her sexual orientation, provided the statutory criteria are fulfilled. In addition, a number of options are also open to persons unable (under the eligibility criteria) to jointly adopt, options which provide stability and security for the child and serve to satisfy the best interests of the child. Northern Ireland family law contains a flexibility capable of delivering the best interests of the child, respecting his or her family life, in a variety of different factual contexts. These include Residence Orders and Parental Responsibility Orders.

20. A Residence Order is defined under Article 8(1) of the Children (Northern Ireland) Order 1995 as an order settling the arrangements to be made as to the person with whom a child is to live. Where a domestic court makes a Residence Order, pursuant to Article 12 (2) of the 1995 Order a Parental Responsibility Order is granted automatically by operation of law and that Parental Responsibility Order will remain in force for the duration of the Residence Order. Parental responsibility is defined by Article 6 of the 1995 Order as:

*"all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child."*

These provisions appear similar in some respects to § 137 and § 186 of the Austrian Civil Code.

#### **No "right to adopt"? The Court's jurisprudence**

21. The notion of family life under Article 8 is an autonomous one and it is clear that the family life to be considered is not *de iure* family life, but *de facto* family life. The Convention does not guarantee the right to adopt as such and the right to respect for family life presupposes the existence of a family and does not safeguard the desire to found one<sup>7</sup>.

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<sup>6</sup> The House of Lords considered this legislation in a challenge by an unmarried heterosexual couple. Interestingly, the Court did not make a general declaration on the invalidity of the 1987 Order but made a declaration only affecting the two appellants. See *Re G* [2009] 1 AC 173

<sup>7</sup> *Fretté v France* ECHR 2002-I

22. In both *Fretté v France* and *EB v France*<sup>8</sup> the Court considered that Article 8 was engaged but did so in both cases on the basis of what a majority of the Court considered was the specific content of the French *Code Civil*. Those cases both concerned the right of an individual under French law to adopt. The applicants in both cases contended that they had been rejected only on the ground of their homosexual orientation.

23. It is interesting to note parenthetically that the French Conseil constitutionnel has separately confirmed the constitutionality of the French law of adoption which restricts adoption as a couple to married couples<sup>9</sup>. The clear recent stream of jurisprudence from the Cour de cassation is to similar effect<sup>10</sup>. The Court de cassation regards the matter as settled; in France only a married couple may apply to adopt as a couple<sup>11</sup>.

24. In *EB v France*, where it appears that a single homosexual woman was ineligible to adopt, what was significant in that case also was the existence under French law of "the right to apply for authorisation to adopt"<sup>12</sup>. In contrast, the Northern Ireland legislation makes it clear that no right to apply to adopt (such as that contained in Articles 343 and 343-1 of the *Code Civil: L'adoption peut être aussi demandée par toute personne âgée de plus de vingt-huit ans.*) exists as a matter of Northern Ireland law. In France adoption is a matter regulated by the general civil law and confers certain rights on citizens. In Northern Ireland adoption under the 1987 Order is a matter of child welfare and not the general law of persons.

25. The decisive importance for the Court of the Court's views about the content of French law (particularly in *EB*) is magnified when the respective texts of Article 8 and Article 12 are recalled. As the Strasbourg Commission observed in *Di Lazzaro v Italy*<sup>13</sup> in which an unmarried woman challenged her inability to adopt under Italian law under both Articles 8 and 12 of the Convention:

"... there can be no question of lending the provisions of the Convention a scope which

<sup>8</sup> *EB v France* No. 43546/02, 22 January 2008

<sup>9</sup> See Décision 2010-39 QPC October 6 2010

<sup>10</sup> See (Arrêt n° 756 du 7 juin 2012 (11-30.262) - Cour de cassation - Première chambre civile ; Arrêt n° 755 du 7 juin 2012 (11-30.261) - Cour de cassation - Première chambre civile ; Arrêt n° 263 du 9 mars 2011 (10-10-385) - Cour de cassation - Première chambre civile.)

<sup>11</sup> The Court will, of course, be aware that eligibility to adopt was, quite properly, a matter on which the two final candidates in the French Presidential election had adopted different policy positions.

<sup>12</sup> *E.B. v France* at paragraph 26.

<sup>13</sup> Application no. 31924/96, Commission decision of 10 July 1997, Decisions and Reports (DR) 90-B, p.134

*the High Contracting Parties expressly intended to exclude. ... The Commission recalls that the right to adopt is not, as such, included among the rights guaranteed by the Convention and that Article 8 does not oblige States to grant to a person the status of adoptive parent or adopted child. .... The Commission also recalls that Article 12 of the Convention, which recognises the right of man and woman at the age of consent to found a family, implies the existence of a couple and cannot be construed as including the right of an unmarried person to adopt."*

26. In *Schalk and Kopf v Austria*<sup>14</sup> the Court held that Article 12 of the Convention does not impose an obligation on States to grant a same-sex couple access to marriage and, in the same case, held that a right to marry could not be derived from Article 14 taken in conjunction with Article 8.

27. Importantly the Austrian law (the Registered Partnership Act) at issue in *Schalk and Kopf* does not permit adoption by registered partnership, nor does it permit the adoption of one partner's child by the other partner. This Austrian distinction between the rights of married couples and the rights of persons in a registered partnership did not lead to any finding in *Schalk and Kopf* that there had been a breach of Article 8 in conjunction with Article 14. The Court has, accordingly, acknowledged that the position of married couples and persons in civil partnerships does not have to be identical

28. In *Gas and Dubois v France*<sup>15</sup> the Court held, by six votes to one, that there had been no violation of Articles 14 and 8 in respect of the refusal of Ms Gas' application for a simple adoption order of her partner Ms Dubois' child. The Court found no evidence of a difference of treatment based on the applicant's sexual orientation, as opposite sex couples who had entered into a civil partnership were likewise prohibited from obtaining a simple adoption order.

29. With regard to married couples, the Court held that in view of the social, personal and legal consequences of marriage, the applicant's legal situation could not be said to be comparable to that of married couples when it came to adoption by the second parent. The Court reiterated that the Convention did not require Member State Governments to grant same-sex couples access to marriage. If a State chose to provide same sex couples with an alternative means of recognition, it enjoyed a certain margin of appreciation regarding the exact status conferred. Interestingly, where unmarried couples are statutorily barred from adopting jointly, regardless of

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<sup>14</sup> Application no. 30141/04 2010 ECHR 995

<sup>15</sup> Application no. 25951/07 2012 ECHR 108

their sexual orientation, the Court in *Gas & Dubois v France* stressed that in France, opposite sex couples who had entered into a civil partnership were likewise prohibited, and it therefore saw no evidence of a difference in treatment based on the applicant's sexual orientation.

30. It is submitted that the decision of the Chamber in *Gas & Dubois v France* is correct and, *mutatis mutandis*, should be followed by the Grand Chamber. On the margin of appreciation, the nature of judicial restraint, and the indispensability of democratic political decision-making there is, it is submitted considerable value in Judge Costa's concurring opinion in *Gas & Dubois* particularly in his conclusion:

*« En réalité, et ce sera ma dernière remarque, la jurisprudence admet qu'il y a des domaines dans lesquels le législateur national est mieux placé que le juge européen pour changer des institutions qui concernent la famille, les rapports entre les adultes et les enfants, la notion de mariage. Je prends un exemple. La question du mariage homosexuel est un sujet de débat démocratique, dans plusieurs pays d'Europe. C'est largement pour cette raison que la Cour, dans un arrêt récent, a préféré exercer un contrôle restreint sur les choix nationaux (Schalk et Kopf c. Autriche, no 30141/04, CEDH 2010). Il me semble que la cohérence de la politique jurisprudentielle commande une démarche aussi réservée dans la présente affaire, même si l'économie de l'article 365 du code civil ne me paraît guère convaincante ... Puisse donc le législateur français ne pas se contenter de la non-violation à laquelle nous avons conclu, et décider, si je puis dire, de revoir la question. »*

31. Similarly, *Décision n° 2010-39 QPC* (6 October 2010) of the Conseil constitutionnel referred to in Judge Costa's opinion furnishes a similarly convincing approach to the respective roles of International Court and domestic legislature.

32. Adoption policy in the Contracting States of the Council of Europe now has, at least for those who have acceded to the Adoption Convention, as its fundamental object the best interests of children, reflecting the requirements of international law. Contracting States may well consider themselves obliged to act precautiously in developing policy that is properly concerned with the best interests of children. The various Contracting States have made democratically accountable judgements as to what serves the best interests of children in their own jurisdictions. These States are, it is submitted, correct to do so as there is no right in international law to adopt a child.



33. In *S.H. v Austria*<sup>16</sup> which concerned Austria's prohibition on the use of donor ova and sperm for in vitro fertilisation, the Court held such a prohibition did not breach Article 8 of the Convention. In paragraph 94 of the judgment, the Court observed that where assessing the margin of appreciation accorded to the Member State with respect to Article 8;

*"Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues the margin will be wider. By reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the "exact content of the requirement of morals" in their country, but also on the necessity of a restriction intended to meet them. There will usually be a wide margin of appreciation accorded if the State is required to strike a balance between competing private and public interests or Convention rights."*<sup>17</sup>

Furthermore, the Court went on to re-emphasise the proper nature of its task under Article 8 in paragraph 106 as follows:

*"However, the central question in terms of Article 8 of the Convention is not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, the Austrian legislature exceeded the margin of appreciation afforded to it under that Article."*

In determining this question, the Court attached some importance to the fact that there was no established European consensus on the issue at challenge. It is not the Court's role to examine domestic law in the abstract, it must, rather, confine itself, as far as possible, to examining the issues raised by the case before it<sup>18</sup>.

34. States and competent regions are entitled in the light of local and national conditions<sup>19</sup> to make their own conscientious judgements about what is required in order to secure the best interests of children. Social conditions and circumstances change and the rate and direction of such change, and its consequences, are all

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<sup>16</sup> 2011 ECHR Application no. 57813/00

<sup>17</sup> As above, at paragraph 94

<sup>18</sup> See *Taxquet v Belgium* [2010] ECHR 926/05

<sup>19</sup> And it may be noted that adoption by homosexual couples is possible in England and Wales, and Scotland but not in Northern Ireland.

difficult to evaluate. Opinions will vary about whether and to what extent changes in social conditions and circumstances are desirable or undesirable. Against this background, it is a modest submission, that States and competent regions are entitled to make precautionous judgements about eligibility to adopt and have a wide margin of appreciation within which to do so.



John F Larkin QC  
Attorney General for Northern Ireland

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