
The Balancing Act: The Application of the Rights to Equality and Non-Discrimination in the Process of Adoption

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This article examines the application of the right to equality under international human rights law in relation to a crucial element of the right to respect for family life, namely the relationship between parent and child and, specifically, where a person seeks to create a parent-child relationship through one of the most commonly-used alternatives to natural procreation: adoption. The article first looks at whether international human rights law imposes a positive obligation on states to offer and regulate such services; secondly, it analyses human rights jurisprudence on justifications for differential treatment in the adoption process; and finally, it examines whether the jurisprudence in human rights law thus far sufficiently protects the right to equality in the field of adoption.

1. Background: The Rights to Equality and to Respect for Family Life, including Adoption Issues

1.1 The Right to Equality

The notion of equality lies at the very heart of international human rights law. Indeed, the very first article of the Universal Declaration of Human Rights boldly proclaims that “All human beings are born free and equal in dignity and rights.” Despite the elegant simplicity of this assertion, the “right to equality” has not been uniformly interpreted and developed in subsequent international human rights treaties.

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR), for example, imposes an obligation on every state party to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind”, with Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) using similar language.

The right is not, therefore, freestanding; nor does it impose any positive obligations upon the states. Instead it requires that there be no discrimination in the enjoyment of the rights contained within the Covenants. This limitation is remedied, however, through further Articles. Both Covenants contain provisions requiring state parties to take the necessary steps to ensure the rights contained therein are realised. Article 2(2) of the ICCPR, for example, requires the state party:

“[T]o take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”

Article 2(1) of the ICESCR contains a similar obligation, albeit worded to reflect the economic implications of ensuring the particular economic, social and cultural rights contained within it:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Article 2(3) of the ICCPR goes even further than any provisions contained within the ICESCR, requiring state parties to ensure that effective remedies are available for those whose rights under the Covenant have been violated.

This right to non-discrimination in the enjoyment of other protected rights stands in contrast to Article 26 of the ICCPR which contains no less than four separate elements relating to equality and non-discrimination. In addition to proclaiming both that “All persons are equal before the law” and that “[all persons] are entitled without any discrimination to the equal protection of the law”, Article 26 requires both that the law shall “prohibit any discrimination” and “guarantee to all persons equal and effective protection against discrimination on any ground”.

The notion of equality is broader than that of non-discrimination, as reflected in the Declaration of Principles on Equality (the Declaration), a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as “the current international understanding of Principles on Equality”. Principle 1 of the Declaration states:

“The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.”

The broader notion of the right to equality is described by Dimitrina Petrova in her Commentary to Principle 1 of the Declaration:

“In Principle 1 [The Right to Equality], the ‘right to equality’ is given a meaning which is richer than the notions of equality before the law and equality of opportunity. (...) Principle 1 [The Right to Equality], reaffirms the inter-relatedness of equality and dignity articulated in Article 1 of the Universal Declaration of Human Rights which asserts that: All human beings are born free and equal in dignity and rights’. Principle 1 further implies a vision of a just and fair society as one in which all persons participate on an equal basis with others in economic, social, political, cultural and civil life.

The content of the right to equality includes the following aspects: (i) the right to recognition of the equal worth and equal dignity of each human being; (ii) the right to equality before the law; (iii) the right to equal protection and benefit of the law; (iv) the right to be treated with the same respect and consideration as all others; (v) the right to participate on an equal basis with others in any area of economic, social, political, cultural or civil life.”

Treaties subsequent to the ICCPR and the ICESCR have developed the rights to equality and non-discrimination for particular
groups of people who have been historically disadvantaged, notably racial and ethnic minorities via the International Convention on the Elimination of All Forms of Racial Discrimination, women via the Convention on the Elimination of All Forms of Discrimination against Women, and persons with disabilities via the Convention on the Rights of Persons with Disabilities.

This article examines the relationship between two rights: the right to equality and the right to respect for family life. The most relevant provisions to turn to are therefore those which prohibit discrimination in the enjoyment of other rights protected under international human rights law, the most established being Article 2(1) of the ICCPR and Article 2(2) of the ICESCR. It is in that context that the right to respect for family life – which, as will be seen below, is a well-established human right – and the prohibition of discrimination in the enjoyment of that right shall be examined.

1.2 The Right to Respect for Family Life

The right to respect for one’s family life is often found alongside the right to respect for a number of other elements of one’s personal life: Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17(1) of the ICCPR both protect a person’s privacy, family, home, correspondence, and honour and reputation, as does Article 11(1) of the American Convention on Human Rights (ACHR). Article 8 of the European Convention on Human Rights, however, protects only the first four of these.

Article 12 of the UDHR provides that:

“No one shall be subjected to arbitrary interference with his (...) family (...). Everyone has the right to the protection of the law against such interference or attacks.”

Modelled on Article 12, the ICCPR includes a near identically-worded provision in Article 17, and similar provisions now appear in almost all major regional human rights treaties protecting civil rights. None of these provisions, however, includes a definition of what constitutes a “family”. Perhaps reflecting the wide cultural variations across the world – variations which are often closely tied to religious doctrine – there has been a tendency to avoid the creation of a single definition of “family” and, instead, to make determinations based on the facts of each individual case which comes before the court or treaty body. The Human Rights Committee, for example, in its General Comment No. 16, states:

“Regarding the term ‘family’, the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned (...) In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms ‘family’ and ‘home’.”

In its General Comment No. 19, the Committee looked at the term “family” in the context of Article 23 and stated:

“The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition.”

This article does not attempt to provide a definition of the term “family”. It does, however, assume that family life can exist both between a child and their natural parent, and a child and their adoptive parent. The former assumption follows the decision of the European Court of Human Rights in Bouhanemi v France (1996) where the Court stated:
"The concept of family life on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate (...). Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances (...)."21

For the latter, the assumption is based on the decision of the European Court of Human Rights in *Pini and others v Romania* (2004)22 in which the court stated that:

"[T]he relations between an adoptive parent and an adopted child are as a rule of the same nature as the family relations protected by Article 8 of the Convention (...) [A] relationship, arising from a lawful and genuine adoption, may be deemed sufficient to attract such respect as may be due for family life under Article 8 of the Convention."23

This assumption, and the interpretation of the right to respect for family life as prohibiting any distinction being drawn between natural children and adopted children, is also reflected in other human rights instruments. The Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, for example, provides at Article 9(a) that:

"In case of full adoption, adoptive legitimation, and similar institutions: (a) The relations between the adopter (or adopters) and the adoptee, including support relations, and the relations between the adoptee and the family of the adopter (or adopters), shall be governed by the same law as would govern the relations between the adopter (or adopters) and his legitimate family."24

Similarly, Article 16 of the UN General Assembly Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, provides, in part, that:

"Legislation should ensure that the child is recognized in law as a member of the adoptive family and enjoys all the rights pertinent thereto."25

2. Adoption under International Human Rights Law

While states have long regulated many aspects of family law such as marriage, separation and divorce, and inheritance, the involvement of the state in adoption is a much more recent phenomenon. In Europe, historically, it was common for unwanted children to be left at the door of churches where they would often be subject to oblation (the raising of children within religious institutions); those in the care of the state would be kept at state-run foundling hospitals and orphanages. The formal regulation of passing parental responsibility for a child to a new person or couple was not seen until the mid-19th century. The first legislation on adoption was the Adoption of Children Act 1851, passed by the General Court of Massachusetts in the United States of America. It was not until 1926 that the first legislation governing adoption was introduced in the United Kingdom via the Adoption of Children Act 1926.26

As is clear from the following analysis, there is no "right to adopt" under international human rights law in the sense either that the state has an obligation to provide for and regulate adoption services, or that, where such services are provided for and regulated, any particular person should be eligible to adopt a child.

Explicit references to the practice of adoption can be found in three of the nine core United Nations human rights treaties: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),
the Convention on the Rights of persons with disabilities (CRPD), and the Convention on the Rights of the Child (CRC). The earliest of these, CEDAW, refers to the practice of adoption in Article 16(1)(f) (discrimination in marriage and family relations), the relevant part of which provides that:

"States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (...) (f) The same rights and responsibilities with regard to (...) adoption of children (...) where these concepts exist in national legislation; in all cases the interests of the children shall be paramount."

Article 23(2) of CRPD (respect for family life) makes reference to adoption in similar terms:

"States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to (...) adoption of children (...) where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities."

Thus, although they prohibit discrimination against women and persons with disabilities in the adoption process, both Conventions include the phrase “where these concepts exist in national legislation” and thereby impose no obligation upon states to provide for an adoption process.

Article 20 of the CRC approaches the issue of adoption through the lens of the rights of the child rather than the right of persons generally to non-discrimination. It provides that:

"A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

States Parties shall in accordance with their national laws ensure alternative care for such a child.

Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background."

Article 20 does not, therefore, require states specifically to provide adoption services for children to be provided with new parents, but merely that those children receive “special protection and assistance” from the state. Adoption is given as one potential example of how such “special protection and assistance” can be provided, alongside foster placement, kafalah of Islamic law, and placement in suitable institutions, although it gives great leeway to the state in determining what steps to take. The interpretation that Article 20 does not require adoption services to be established is reinforced by Article 21 (which provides that the best interests of the child be the paramount consideration in any system of adoption) which explicitly applies only to “States Parties that recognize and/or permit the system of adoption”. The CRC does not, therefore, impose any obligation on states specifically to provide adoption services, acknowledging that the rights of children can be sufficiently protected through other means.

International human rights treaties can therefore confidently be said to provide no explicit obligation for states to provide for
and regulate adoption services, let alone provide an explicit right for persons to adopt a child. However, as can be seen from the above, international human rights treaties do not ignore the topic of adoption; indeed, the treaties quoted impose a number of requirements upon states during the adoption process. First, the "best interests of the child" must be the paramount consideration during any adoption process; second, "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" during the adoption process; and third, the rights of women and persons with disabilities must be ensured with regard to the process of adoption.

3. Adoption and the Right to Equality: Current Jurisprudence

In this section, I will examine jurisprudence on the rights to equality within the adoption process in three jurisdictions: the Council of Europe, the state of Florida in the United States of America, and the United Kingdom. As will be seen, despite relying on different provisions which protect the right to equality in analysing differential treatment, the courts have consistently closely scrutinised the justifications put forward and have often referred to the requirement for a strong evidential link between the characteristic upon which the differential treatment is based and the impact it would have upon the child. There has been little case-law on the characteristics of the child and to what extent potential adoptive parents may select a child for adoption based on the child’s particular characteristics. Jurisprudence on whether provisions which allow such selection violate the child's right to equality is extremely limited and, as such, this article focuses on the situation which has been much more thoroughly explored, namely the right to equality of the potential adoptive parent.

3.1 The European Convention of Human Rights

The European Court of Human Rights first examined discrimination within the regulation of adoption services in Fretté v France (2002).27 The applicant, Philippe Fretté, applied to the Paris Social Services, Child Welfare and Health Department for approval to adopt a child. Although the Department held that "Mr Fretté ha[d] undoubted personal qualities and an aptitude for bringing up children", it questioned whether "his particular circumstances as a single homosexual man allow him to be entrusted with a child".28 The Department ultimately rejected his application for approval to adopt a child with the references to his “choice of lifestyle” implicitly, yet undeniably, making the applicant’s sexual orientation the decisive factor.

The applicant argued that this constituted a violation of Article 8 of the Convention (the right to respect for privacy and family life) taken in combination with Article 14 (the right to non-discrimination in the application of Convention rights). The Government of France argued that the applicant's sexual orientation was not the sole reason for his being refused authorisation to adopt, however it also put forward a number of reasons as to why any differential treatment was justified. First, the decision was taken with the best interests of the child as the paramount consideration. In that respect, “the rights of the child set the limits of the right to have children” and, so following, “the right to be able to adopt relied upon by the applicant was limited by the interests of the child to be adopted”.29

Secondly, the criteria applied for that purpose had been both objective and reasonable:

“The difference in treatment stemmed from the doubts that prevailed,
in view of what was currently known about the subject, about the development of a child brought up by a homosexual and deprived of a dual maternal and paternal role model. There was no consensus about the potential impact of being adopted by an adult who openly affirmed his homosexuality on a child’s psychological development and, more generally, his or her future life, and the question divided both experts on childhood and democratic societies as a whole.”

Thirdly, there was no consensus on the issue within the Council of Europe and states should therefore be allowed a wide margin of appreciation to determine who should be able to adopt.

By a narrow majority of four to three, the European Court of Human Rights accepted the arguments put forward by the French government. It acknowledged the lack of consensus within the Council of Europe and therefore held that “the delicate issues raised in the case” required “a wide margin of appreciation” to be left to the member states. Further, adoption means “providing a child with a family, not a family with a child”, and “the State must see to it that the persons chosen to adopt are those who can offer the child the most suitable home in every respect”. Because the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents, national authorities “were legitimately and reasonably entitled to consider that the right to be able to adopt was limited by the interests of children eligible for adoption”.

In a powerful dissenting judgment, three judges reiterated previous jurisprudence that differential treatment based on sexual orientation had to be justified by “very weighty”, “particularly serious” or “particularly convincing and weighty reasons”. In the present case, the government of France had put forward the protection of the rights and freedoms of the child as the legitimate aim, and the dissenters accepted this, even stating that this “in fact would even be the only legitimate aim”. However, the dissenting judges noted that:

“[T]he applicant’s personal qualities and aptitude for bringing up children were emphasised on a number of occasions. The Conseil d’Etat even specified in its statement of reasons that there was no reference in the case file ‘to any specific circumstance that might pose a threat to the child’s interests’. The legitimate aim was not therefore effectively established in any way.

In their general and abstract wording, the reasons given by the judicial authorities for their decision to refuse the applicant authorisation are based solely on the applicant’s homosexuality and therefore on the view that to be brought up by homosexual parents would be harmful to the child at all events and under any circumstances. The Conseil d’Etat failed to explain in any way, by referring for example to the increasing range of scientific studies of homosexual parenthood in recent years, why and how the child’s interests militated in the instant case against the applicant’s application for authorisation.”

It was not many years before the same question returned to the court in E.B. v France (2008). The applicant was a French nursery teacher and a lesbian in a long-term relationship with her partner. She applied to the Jura Social Services Department for authorisation to adopt a child and, in her application, mentioned that she was in a stable lesbian relationship with her partner. The adoption board made a recommendation that her application be rejected and the European Court of Human Rights found that the applicant’s sexual orientation was “a decisive factor leading to the decision to
refuse her authorisation to adopt”. The arguments put forward by the government of France were similar to those put forward in Fretté: there remained a lack of consensus within the Council of Europe on the question of whether same-sex couples should be permitted to adopt, the scientific community was still divided as to whether adoption by a same-sex couple had any impact upon the development of the adopted child, and the Adoption Board had simply made their decision on the internationally-accepted test of who was best able to provide the child with a suitable home.

The court, by a majority of ten to seven, found for the applicant, overturning, in effect, its previous decision in Fretté. The majority spent little time analysing the arguments put forward by the French Government. Given that the legislation in France allowed single people – regardless of sexual orientation – to adopt, the arguments of the French government could not be regarded as “particularly convincing and weighty such as to justify refusing to grant the applicant authorisation”. The court noted the finding of the domestic courts in France that the applicant possessed “undoubted personal qualities and an aptitude for bringing up children” and that these “were assuredly in the child’s best interests”.

Of the seven dissenting judges, four (Judges Costas, Turmen, Ugrekhelidze and Jociene) accepted that, in principle, discrimination on grounds of sexual orientation in the adoption process could not be justified, but that on the specific facts in this case the decision not to allow the applicant to adopt was made based on factors other than her sexual orientation and thus Article 14 was not applicable. Another dissenting judge (Judge Mularoni) believed that the facts of the case did not even fall within Article 8 and that therefore Article 14, which is ancillary to the other Convention rights, only applies where the facts of the case fall within one of them substantively.

Only two of the seventeen judges, therefore (Judges Zupancic and Loucaides), held that there had been differential treatment on grounds of sexual orientation and that this could be justified.

The dissent of Judge Loucaides is the most striking in that he explicitly argued that a person’s sexual orientation, like their religion or any other characteristic, could justifiably be taken into consideration during the adoption process. In his dissent, he argued that there were differences between heterosexuals and homosexuals which could impact upon the child, and that:

“[T]he erotic relationship with its inevitable manifestations and the couple’s conduct towards each other in the home could legitimately be taken into account as a negative factor in the environment in which the adopted child was expected to live (...) [Homosexuals] (...) must, like any other persons with some peculiarity, accept that they may not qualify for certain activities which, by their nature and under certain circumstances, are incompatible with their lifestyle or peculiarity.”

The most recent case on this particular issue is X. and others v Austria (2013). The applicants were a lesbian couple and the child of one of the couple, was born outside marriage. The child’s father had recognised paternity, but the child lived with and was cared for by his mother and her partner. The mother’s partner wished to adopt the child; however, the relevant provisions of the Austrian Civil Code did not permit a legal relationship between a child and more than one person of the same sex. If the partner adopted the child, the child’s relationship
with the biological mother would be severed, as they were both of the same sex. In the case of an opposite-sex couple, however, the adoption by one partner of the child of the other partner would not affect the other partner’s legal relationship.

The court considered that there were three possible situations in which a homosexual person may want to adopt a child: first, he may wish to adopt by himself (individual adoption); secondly, he may be in a same-sex relationship and wish to adopt his partner’s child with the aim of giving both of them legally recognised parental status; and thirdly, a same-sex couple may wish to adopt a child together (joint adoption). The court noted that in the first of these three situations, it had already ruled, in E.B. v France, that the person’s sexual orientation could not prohibit them from adopting.

The court considered that the applicants were in a comparable position to an unmarried opposite-sex couple where one partner wished to adopt the other partner’s child. The relevant provisions of the Austrian Civil Code allowed for second-parent adoption by an unmarried opposite-sex couple but not an unmarried same-sex couple since it did not allow for a child to have a legal relationship with two persons of the same sex. The court therefore quickly found that the legislation made a “difference of treatment between the applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner’s child” and that this difference was “inseparably linked to the fact that the first and third applicants formed a same-sex couple, and was thus based on their sexual orientation”.39

The court then looked at whether this difference in treatment pursued a legitimate aim and was proportionate. The aim put forward by the government of Austria was that its adoption law was “aimed at recreating the circumstances of the biological family” and “to protect the ‘traditional family”’; it did this by ensuring that a minor child should have two persons of the opposite sex as parents.40 The court accepted that the protection of the family in the traditional sense was a legitimate reason which could justify differences in treatment. However, it also considered that the protection of the interests of the child was also a legitimate aim. It therefore went on to examine whether the principle of proportionality was adhered to. The court referred to its previous case-law in which it stated that:

“In cases in which the margin of appreciation is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people, in this instance persons living in a homosexual relationship, from the scope of application of the provisions at issue.”41

In examining the proportionality, the court looked at Austrian legislation more broadly, and considered that it lacked coherence. The law allowed individual adoption by a homosexual person. The law also allowed for registered partnerships between same-sex couples, and, indeed, made it a condition that a registered partner consent before an individual in a registered partnership could adopt a child. The legislature therefore accepted that a child could grow up in a family based on a same-sex couple, and that this was not detrimental to the child. That Austrian legislation recognised same-sex couples and the possibility of a child growing up with such a couple meant the court casted “considerable doubt” on
the proportionality of the absolute prohibition on second-parent adoption for a same-sex couple, and ultimately concluded that the government had failed to show any weighty or convincing reasons to show how excluding second-parent adoption in a same-sex couple was necessary for the protection either of the family in the traditional sense or for the protection of the interests of the child and, by a majority of 11 votes to 6, held that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

3.2 Florida

The issue of whether a prohibition on gay persons from adopting children could be justified was also addressed by the courts in Florida in the USA. An amendment to the Florida Statutes in 1977 provided that “No person eligible to adopt under [the statute] may adopt if that person is a homosexual.” This law was challenged in 2007 by a gay man seeking to adopt two children who had been placed in foster care with him. One of the main arguments put forward was that the legislation was unconstitutional and violated the equal protection clause of the Constitution of Florida, Article I§2 of which provides that “All natural persons, female and male alike, are equal before the law”. Specifically, the petitioner argued that the law violated the right to equal protection under in the law in that it singled out a class of persons based on their sexual orientation for unequal treatment, and failed to serve a rational basis, i.e. it could not be justified. Under Florida constitutional law, because the petitioner was not a member of a “suspect class” and the issue did not concern a “fundamental right”, the State of Florida needed only to show that “there [was] any reasonably conceivable set of facts that could provide a rational basis for the classification”, the classification being homosexuals as a distinct class prohibited from adopting.

The State of Florida put forward three rational bases: first, the best interests of children were served since, when compared to straight persons, gay persons experienced higher levels of stressors disadvantageous to children; second, the best interests of children were protected by placing them in adoptive homes which minimised social stigmas; and third, it was in the societal moral interest of the child.

Having heard expert testimony directly contradictory to the first rational basis suggested, the court rejected that argument outright, stating:

“Here, the evidence proves quite the contrary; homosexuals are no more susceptible to mental health or psychological disorders, substance or alcohol abuse or relationship instability than their heterosexual counterparts. Accordingly, such governmental interest does not justify the legislation.”

With regard to the second rational basis put forward, the court again rejected it, having heard expert evidence which was contrary to the argument:

“In this regard, the professionals and the major associations now agree there is a well established and accepted consensus in the field that there is no optimal gender combination of parents. As such, the statute is no longer rationally related to serve this interest.”

Finally, the court rejected the third rational basis suggested stating that “public morality per se, disconnected from any separate legitimate interest, is not a legitimate government interest to justify unequal treatment”, high-
lighting the fact that there was no similar bar on gay persons from fostering children.

3.3 The United Kingdom

In the case of Re P (2008), the House of Lords was asked to review the compatibility of Article 14 of the Adoption (Northern Ireland) Order 1987 with the European Convention on Human Rights, incorporated into United Kingdom law via the Human Rights Act 1998. Article 14 of the 1987 Order prohibited adoption in Northern Ireland by unmarried couples. It did, however, permit adoption by single persons and married couples. The applicants argued that this was incompatible with Articles 8 (the right to respect for privacy and family life) of the European Convention when taken in conjunction with Article 14 (the right to non-discrimination in the application of Convention rights). The House of Lords readily accepted that the case fell within the ambit of Article 8 and that therefore the sole issue was whether or not the prohibition constituted discrimination within Article 14 on grounds of status as part of an unmarried couple rather than a married couple.

The government argued that the differential treatment pursued a legitimate aim, namely the best interests of the child, and relied upon statistics which showed that “married couples, who have accepted a legal commitment to each other, tend to have more stable relationships than unmarried couples, whose relationships may vary from quasi-marital to ephemeral” (45). This argument, however, was rejected by the court by a majority of four to one. Lord Hoffman, giving the lead judgment, stated that:

“It is one thing to say that, in general terms, married couples are more likely to be suitable adoptive parents than unmarried ones. It is altogether another to say that one may rationally assume that no unmarried couple can be suitable adoptive parents. Such an irrebuttable presumption defies everyday experience. The Crown suggested that, as they could easily marry if they chose, the very fact that they declined to do so showed that they could not be suitable adoptive parents. I would agree that the fact that a couple do not wish to undertake the obligations of marriage is a factor to be considered by the court in assessing the likely stability of their relationship and its impact upon the long term welfare of the child. Once again, however, I do not see how this can be rationally elevated to an irrebuttable presumption of unsuitability.” (46)

Although not requiring any particular scientific, medical or psychological evidence demonstrating a link between a person’s marital status and its impact upon the best interests of the child, Lord Hoffman nevertheless required that there be a rational relationship between the two. The court did not find any rational relationship and, indeed, that to connect a person’s status as part of an unmarried couple with an inability to meet the best interests of the child as adoptive parents “[defied] everyday experience”.

Whilst ultimately agreeing with the majority, the judgment of Baroness Hale, the sole family lawyer on the court, was far more nuanced and open-minded towards the possibility of such differential treatment being justified, going so far as to say that her initial view was that it could. (47) After stating that the promotion of the best interests of the child was a legitimate aim, she added that children need a “stable and harmonious home in which to grow up” and therefore the stability of the parental relationship was an important factor in assessing the couple’s suitability to adopt. (48) Whilst acknowledging that this alone would not justify differential treatment between married and unmarried
couples given that both are capable of breaking down, she stated that:

“[B]eing married does at least indicate an initial intention to stay together for life. More important, it makes a great legal difference to their relationship. Marriage brings with it legal rights and obligations between the couple which unmarried couples do not have. There is, for example, the right to live in the family home irrespective of who is its owner or tenant; the right to financial relief and property adjustment should the marriage break down; the right to succeed to a substantial portion of the estate of a spouse who has died intestate; and the right to financial provision from the estate if the provision made in any will or on intestacy is insufficient. (...) If the relationship does break down, the parent who is the primary carer of the child will be much less financially secure if the parents are unmarried. And if the primary carer is less secure then so will the child.”

Baroness Hale continued by questioning whether there were good reasons why an unmarried couple wishing to adopt a child should not get married:

“It is (...) appropriate to look with deep suspicion at the reasons why a couple who wish to adopt are unwilling to marry one another. These are not the olden days when the husband and wife were one person in law and that person was the husband. A desire to reject legal patriarchy is no longer a rational reason to reject marriage. It is not expensive to get married. Marriage should not be confused with the wedding. The only rational reason to reject the legal consequences of marriage is the desire to avoid the financial responsibilities towards one another which it imposes on both husband and wife. Why should any couple who wish to take advantage of the law in order to become the legal parents of a child be anxious to avoid those responsibilities which could become so important to the child’s welfare if things went wrong in the future?”

Her analysis thus far suggested that marital status is relevant to the best interests of the child. If, in the future, the couple separates, the parent who is the primary carer of the child would be more financially secure if the couple were married than if they were not. Because many couples do separate, it would therefore be in the best interests of the child to place him with a couple, both of whom would better be able to provide financially for the child were they to separate.

Ultimately, however, Baroness Hale concluded that despite this, there were circumstances in which such a justification would not apply or would have much less force, for example where the couple could not marry (due to the conscientious objection to divorce of one or both of the parties), or where the unmarried couple have been looking after the child for a long time and wish the parent-child relationship to be secured. In the latter circumstances, the choice was not between placing a child with a married or an unmarried couple for the first time but between the child remaining in that home with one legal parent or two. Baroness Hale also referred to the fact that the law permitted single people to adopt, even if they were in a long-term relationship. Again, the choice was between the child having one new legal parent or two.

Baroness Hale also contrasted the situation from the perspective of the couple with that of the child. Whilst if the case was only viewed from the point of view of the couple, she stated that her inclination would be that any difference in treatment would not be disproportionate:
“[I]f one looks at this from the point of view of a child, whose best interests would be served by being adopted by this couple even if they remain unmarried, then the difference in treatment does indeed become disproportionate. At bottom the issue is whether the child should be deprived of the opportunity of having two legal parents.”

This further analysis reduced the relevance of the relationship between the marital status of the potential adopters and the best interests of the child. Whilst relevant to the extent that it demonstrated the stability of the relationship between the adopting couple, an absolute prohibition deprived many potential children available for adoption from having two legal parents instead of one and the benefits that this would bring.

Despite the decision of the House of Lords, and the declaration that Article 14 of the 1987 Order was unlawful, the Northern Ireland Executive made no changes to the Order. In 2010/11, the Northern Ireland Human Rights Commission brought judicial review proceedings in the Northern Ireland courts, challenging both Article 14 (which prohibited unmarried couples from adopting) and Article 15 (which prohibited individuals in a civil partnership from adopting either jointly or as individuals).

The Northern Ireland High Court considered the application in 2012. Mr Justice Treacy, hearing the application alone, first examined Article 14 of the Order. After summarising the decision of the House of Lords in Re P, he concluded that the decision “demolished” any argument that restricting the eligibility of who could adopt to married couples was in the best interests of the child, quoting from Lord Hoffman:

“It is quite irrational. In my opinion, such a rule is quite irrational. In fact, it contradicts one of the fundamental principles stated in Art 9, that the court is obliged to consider whether adoption ‘by particular ... persons’ will be in the best interest of the child. A bright line rule cannot be justified on the basis of the needs of administrative convenience or legal certainty, because the law requires the interests of each child to be examined on a case-by-case basis. Gillen J said that ‘the interests of these two individual applicants must be balanced against the interests of the community as a whole’. In this formulation the interests of the particular child, which Art 9 declares to be the most important consideration, have disappeared from sight, sacrificed to a vague and distant utilitarian calculation. That seems to me to be wrong. If, as may turn out to be the case, it would be in the interests of the welfare of this child to be adopted by this couple, I can see no basis for denying the child this advantage in the interests of the community as a whole.”

Mr Justice Treaty concluded that “Re P has shown that the purpose of the 1987 Order is hampered by the current eligibility criteria” and that “[I]n light of this, it is clear that the difference in treatment cannot be justified on any grounds”.

In respect of Article 15, Mr Justice Treacy focused not on the different treatment between same-sex and opposite-sex couples to see whether a justification could be found, but instead on the fact that the prohibition extended to same-sex couples in a civil partnership “despite the fact that the commitment evinced by choosing to enter a civil partnership ought to be similar to marriage in indicating the security of that relationship.” With no substantive analysis, the judgment briefly states that “[t]his is quite irrational and plainly unlawful” before citing Baroness Hale in Re P where she
stated that “it is difficult to see how this [total exclusion] could survive challenge under Article 14 of the European Convention, which takes a particularly firm line against discrimination on the ground of sexual orientation”.

The decision of the High Court was appealed at the Court of Appeal in Northern Ireland where it was unanimously upheld. The Court of Appeal reviewed the relevant authorities, including Re P and X. v Austria and quickly concluded that Articles 14 and 15 discriminated against unmarried couples and couples in a civil partnership contrary to Articles 8 and 14 of the European Convention of Human Rights, without providing any new analysis of the substantive issues.

3.4 Summary

Despite drawing upon different provisions protecting the right to equality in deciding the cases, the judgments of the courts in these jurisdictions suggest three consistent conclusions: first, the justifications put forward for any differential treatment are invariably couched within the general legitimate aim of protecting the interests of the child, albeit using slightly different phraseology. The approach of the courts appears to be that this is the sole legitimate aim under which differential treatment may ever be justified. Indeed, Judge Bratza in his dissent in Fretté explicitly stated that this would be the only legitimate aim. Second, the courts will not readily accept justifications put forward but will instead closely scrutinise them and demand a real and significant relationship between the relevant characteristic and the interests of the child. Third, the courts frequently required that relationship to be established by some kind of scientific, medical or psychological evidence as opposed to public opinion or morality.

4. Justifying Differential Treatment

International human rights law makes a distinction between direct discrimination (defined in the Declaration of Principles on Equality as occurring where “for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment”) and indirect discrimination (defined by the Declaration as occurring “when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”). In the context of the adoption process, direct discrimination is most evident where persons with a particular characteristic are excluded entirely from eligibility to adopt, and indirect discrimination most evident where a general consideration which applies to all persons (for example, taking due regard of their race, religion, etc.) may impact disproportionately upon persons with a certain characteristic if the proportions of children up for adoption with a particular relevant characteristic differ from the proportions of potential adopters with that characteristic. For example, if, in a largely homogenous society, the vast majority of children eligible for adoption are of a particular race, and the relevant law governing adoption requires adoptive parents to be of the same race as the child that they seek to adopt, then racial minorities would be directly discriminated against given that they would only be eligible to
adopt a minority of potential adoptees, as opposed to those of the majority race.

Some have argued that the test of justification should differ depending on whether the discrimination was direct or indirect, with a stricter test for direct discrimination; however others, such as the Committee on Economic, Social and Cultural Rights (CESCR) has accepted that there should be a single test which it lays out as follows:

"Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects."

In essence, the Committee establishes a two-stage test: the justification for the differential treatment must be reasonable and objective, and there must be a relationship of proportionality between the differential treatment and that legitimate aim. As the interpretation of the right to equality used in this article uses as sources both the Declaration of Principles on Equality and Articles 2(1) of the ICCPR and 2(2) of the ICESCR, it is appropriate to use the source containing the broader exceptions as that differential treatment which is prohibited using the broader exceptions will always be prohibited by that using the narrower exceptions; the same is not true of the reverse. Although the test for justification is largely similar in respect of indirect discrimination, by using the same test also for direct discrimination (as opposed to the stricter test contained within the Declaration), the permissible exceptions contained within the interpretation provided by General Comment No. 20 of the CESCR can be considered as broader. This article therefore uses the single, two-stage test laid out by the Committee in General Comment No. 20 in analysing whether differential treatment which would otherwise amount to discrimination (whether direct or indirect) may be justified.

4.1 Adoption Regimes which Discriminate Based on Particular Characteristics

Adoption regimes may treat persons with a particular characteristic differently either directly or indirectly. This section of the article examines differential treatment on four characteristics (or sets of related characteristics):

- **Age**: where a state imposes a minimum or maximum age for eligibility to adopt, thereby directly discriminating against persons underneath or above that age in excluding them from the adoption process;

- **Race, Colour, Ethnicity, Descent, Language, Religion or Belief, National or Social Origin, and Nationality**: where a state permits or requires these characteristics to be taken into consideration during the adoption process, potentially discriminating against persons with a particular characteristic; it can also amount to direct discrimination if, for example, a state allows adopters to reject a child because of the child’s race or ethnicity, in which case the child would be directly discriminated against;

- **Disability, Health Status, or Genetic or Other Predisposition toward Illness**: where a state either excludes persons with a particular disability, health status, or genetic or other predisposition toward illness, or permits or requires that characteristic to be taken
into consideration during the adoption process; and

- **Sexual Orientation:** where a state either excludes persons with a particular sexual orientation from eligibility to adopt or permits or requires their sexual orientation to be taken into consideration during the adoption process.

### 4.2 Legitimate Aims: Objective and Reasonable

The starting point under international human rights law, when determining whether differential treatment of a certain group of persons in the adoption process is a legitimate aim, is whether that restriction is in the “best interests of the child”. This is, after all, the paramount consideration in the adoption process. However, although the term is frequently used in treaties and in case-law, there is no standard definition of what the “best interests of the child” are. It is easy to see how different elements of what those “best interests” are could conflict with one another, most poignantly when attempts to ensure that what are considered to be the “best interests of the child” are met create delay in placing the child in an adoptive family. Is it, for example, in the best interests of the child to place them in an adoptive family as quickly as possible, or is it in their best interests to wait until an adoptive family becomes available which would provide the most suitable match and which most meets the needs of that particular child? Inevitably a balance has to be drawn: a child cannot be kept in care indefinitely until a family constituting a “perfect match” is available. Nor should a child be given to the first adoptive family available, regardless of suitability, for the sole reason of ensuring the process is as quick as possible.

A person’s characteristic will only ever be relevant to the adoption process where that characteristic impacts upon the best interests of the child. International human rights law appears to divide these characteristics into three categories:

(i) those which have such an impact on the ability of those possessing them to raise and care for a child that it would never be in the best interests of the child to allow such persons to adopt children;

(ii) those which have no impact (or a minimal impact) on the best interests of the child, the possession of which is therefore irrelevant for the purposes of the adoption process;

(iii) those which do have an impact upon the best interests of the child but are only a factor to take into consideration during the adoption process rather than amounting to a justified exclusion of all persons possessing them from the adoption process.

Analyses of whether a characteristic impacts upon the best interests of a child appear to require scientific, medical, psychological or other evidence on child-raising as opposed to considerations of “morality” or “public opinion”, the latter arguments being rejected relatively easily by the courts.

It will be rare for a characteristic to fall within category (i) such that possession of that characteristic has such an impact upon the person’s ability to raise and care for a child that it will never be in their best interests for them to be adopted by a person possessing that characteristic. However, that is not to say that such characteristics do not exist. The clearest and least controversial example is age: a minimum age for potential adoptive parents is not only justified, but arguably mandated by international human rights law, so long as that minimum age is consistent with scientific and medical understanding as to when a person develops sufficient mental
and emotional maturity to raise and care for a child. A second example would be persons who suffer from a mental or physical disability such that they would not be capable of raising a child, e.g. persons with Down’s syndrome or who are deaf-mute, or persons whose circumstances or condition are such that the child would be put at risk, e.g. individuals with a criminal record involving harm to children, those who are homeless, or persons with addictions to alcohol or drugs.

A significant number of characteristics will fall within category (ii), those characteristics which have no impact whatsoever upon the person’s ability to raise a child. Despite arguments put forward by national and regional governments in cases involving the sexual orientation of the potential parent, that would appear to be one example of a characteristic where worldwide scientific, medical and psychological opinion has reached a consensus that it is irrelevant in respect to the ability of that person to care for and raise a child. A second example may be those disabilities which are of such a nature that they do not impact upon the ability to child-raise in any meaningful way such as being colour-blind or having a slight physical impairment.

Many characteristics, however, will fall within category (iii), those characteristics which should not prevent a person possessing them from adopting, but which can legitimately be taken into account during the adoption process, and so may have some impact (albeit indirectly) on the person’s ability to raise children. International human rights law is explicit with regards to some of these characteristics: ethnicity, religion and language are all given as examples in Article 20(3) of CRC as characteristics of the child (and, by implication, the prospective adoptive parents) which should be given due regard during the adoption process. However, even for those characteristics which are explicit in international human rights law, there must still be a scientific, medical and psychological consensus (or a not insignificant opinion held by some within the scientific, medical and psychological community) that that characteristic does impact upon the best interests of the child, or they will fall into category (ii). Were a consensus to be reached that, for example, the race of the child and the adoptive parents had no impact whatsoever on the child’s upbringing and welfare, then this may well be considered an irrelevant characteristic, and one which should be given no (or minimal) weight during the adoption process.

This article does not attempt to classify each and every characteristic into one of the above categories. Instead, it suggests that the decision-making body must ask itself three questions:

(1) Does scientific, medical, psychological or other evidence suggest that the characteristic impacts upon the best interests of the child? If the answer is no, then the characteristic falls into category (ii) and the classification is not justified.

(2) If the answer to question (1) is yes, does that characteristic have such an impact upon the person’s ability to raise and care for a child that it will never be in their best interests for them to be adopted by persons with them? If the answer is yes, the characteristic falls into category (i) and the classification is justified.

(3) If the answer to question (2) is no, the characteristic falls into category (iii) and the decision-making body must balance the competing interests (usually the interest in placing the child into adoptive care as quickly as possible with the interest in ensuring the child is matched with an adoptive family that best meets its particular needs) to determine where the best interests of the child
lay. This balancing exercise is likely to vary within each state’s particular adoption system and, even on a case-by-case basis.

4.2.1 Age

States are not only justified in prohibiting children from certain activities, but are required under international human rights law to ensure the wellbeing of children, and therefore to prevent them from entering into activities which – due to their physical or emotional immaturity – would be inappropriate for them. As such, restrictions on the ability of young persons to marry, vote, purchase alcohol or tobacco, etc., are all justified under international human rights law. Similarly, it is axiomatic that children – due to their emotional immaturity – are unsuitable as parents, and that it would breach the rights of the adopted child to be placed with parents incapable of effectively looking after his or her needs. States would therefore be justified – perhaps even required – in setting a minimum age before which a person or persons can adopt a child in order to ensure that the child’s best interests are met. Such is a requirement under Article 9 of the European Convention on the Adoption of Children, for example, which requires that there be a minimum age “being neither less than 18 nor more than 30 years” and that “there shall be an appropriate age difference between the adopter and the child, having regard to the best interests of the child, preferably a difference of at least 16 years”. Both the United Kingdom and Ireland have a minimum age of 21 for potential adopters.61

It is more controversial whether a maximum age could ever be prescribed. Sara Mills has argued that discrimination on grounds of age by way of excluding older persons from adopting children is not justifiable.62 She refers to age-related arguments frequently made by courts when reaching decisions denying a petition to adopt:

- the relationship between an adoptive parent’s advanced age and the likelihood that the child will suffer the loss of the parent during a period of the child’s growth;
- the problem that age can be a factor affecting the ability of the adoptive parent to supply the material needs of the child;
- the problem that a child might be under a psychological burden in having an adoptive parent old enough to be a grandparent;
- the circumstance that as people grow old they tend to become more fixed and inflexible in their mental attitudes;
- the consideration that advanced age limits the ability of the adoptive parent to participate in various social and school activities with the child; and
- the problem that an older adoptive parent may find it more difficult to muster the physical effort required to control a young child.63

Whilst an individual’s age is likely to impact upon some of these circumstances, such as the ability to control a child physically, or participate in certain social activities with the child, it will not always be decisive. There are older persons who are fit and active and younger persons who are not physically strong or active. In these circumstances, their age would fall into category (iii) and be a relevant consideration to take into account on a case-by-case basis. Although it may be more difficult to challenge the particular problem as one gets older, age alone should not be an absolute bar, as it is not inextricably linked to the particular problem or circumstance.

For some of these problems and circumstances, however, particularly the risk of the
adoptive parent dying, the link between age and the circumstance is so strong as to be almost intrinsically linked. Although a person’s life expectancy cannot be predicted with absolute certainty, for those who are particularly advanced in years, the likelihood of death within a specified period of time will be very high. This will certainly impact upon the best interests of the child and, in those circumstances, their age would fall into category (i) and the classification may well be justified.

4.2.2 Race, Colour, Ethnicity, Descent, Language, Religion or Belief, National or Social Origin, and Nationality

The characteristics on this wide-ranging list are linked by virtue of Article 20(3) of the CRC which governs the potential methods by which states can ensure the “special protection and assistance” of a child who is “temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment”. Article 20(3) requires states, when considering solutions, to pay due regard to “the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background”. This requirement is reflected in Article 10(2)(f) of the European Convention on the Adoption of Children which requires enquiries to be made into the adopter, the child and his or her family, which include enquiries into “the ethnic, religious and cultural background of the adopter and of the child.”

The inclusion of these characteristics in international human rights treaties has not eliminated their controversy. Recent debate in the United Kingdom on adoption law has centred on the perceived conflict between ensuring the continuity of children’s upbringing in terms of ethnicity, religion, culture and language, and the desire to get children in care into adoptive families as quickly as possible. Reflecting Article 20(3) of the CRC, section 1(5) of the Adoption and Children Act 2002, which reformed the law on adoption in England and Wales, requires adoption agencies to “give due consideration to the child’s religious persuasion, racial origin and cultural and linguistic background” when placing the child for adoption. The government announced in 2012 that it intended to remove this requirement “because of the concern that the express provision has caused local authorities to have undue regard to that factor”. A report by the House of Lords Select Committee on Adoption Legislation, however, found “the evidence we have received does not suggest that this is such a significant problem” and rejected the need for legislative change.

Nowhere has it been suggested that it would ever be in a child’s best interests for certain groups of potential adopters to be excluded from the adoption process because of their particular race, colour, ethnicity, descent, language, religion or belief, national or social origin or nationality. Indeed, nowhere has it been seriously argued that any particular group of people is unable to raise a child so as properly to meet its needs because of one of these characteristics. Such a conclusion could clearly breach the right to equality. However, international human rights law does require such characteristics to be given “due regard” and the argument has therefore focused on to what extent such characteristics should be taken into consideration when matching children to potential adoptive parents when other competing considerations, particularly the effects of delay and the benefit of children being raised within an adoptive family rather than in state care. This article does not propose to go into the arguments put forward as to what extent it is necessary or desirable for a child to be adopted into a family which
shares its ethnic, religious, cultural or linguistic background. However, it is clear that international human rights law justifies the taking into consideration of such characteristics during the adoption process.

In practice, this might result in a disproportionate impact upon potential adopters of a certain ethnicity, culture, religion or language as the proportion of potential adoptive children sharing such characteristics may not reflect the proportion of potential adoptive parents with them, and this could be considered indirect discrimination. However, it is submitted that such indirect discrimination would be objectively justified by the legitimate aim of ensuring compliance with other strands of international human rights law and the right of the child to have his or her ethnicity, culture, religion or language given due regard in the adoption process.

4.2.3 Disability, Health Status, Genetic or Other Predisposition toward Illness

Similar to the arguments relating to age, a person’s disability, health status, or genetic or other predisposition toward illness may well impact upon their ability to meet the physical, mental and emotional demands of raising a child or their likely lifespan. Where the disability, health status, or genetic or other predisposition toward illness does impact upon either of those two factors, a state may well be justified in preventing the individual from adopting a child. This is acknowledged by Article 9(2)(a) of the European Convention on the Adoption of Children which requires enquiries to be made prior to adoption of the “personality, health and social environment of the adopter, particulars of his or her home and household and his or her ability to bring up the child”.

Where the disability or other characteristic was irrelevant or only minimally affected their ability to raise a child – such as colour-blindness, minimal physical impairment or food allergy – and, as such, does not affect either of the two factors, then it would certainly be unjustified if they were discriminated against in the adoption process, and the characteristic would fall into category (ii). Individuals whose disability, health status, or genetic or other predisposition toward illness is such that it does impact upon their physical, mental or emotional ability to care for a child properly would fall into category (iii) and an assessment made of the interest in placing the child into adoptive care as quickly as possible with the interest in ensuring the child is matched with an adoptive family that best meets its needs. Certain disabilities or conditions such as Down syndrome or Münchausen syndrome may mean that, in practice, almost no-one who possesses them would be able to care for a child properly and it would never be in the best interests of a child to be adopted by a person who possesses them as opposed to a person who does not, even if it would mean a delay in the adoption process. In such situations, the different treatment may be virtually indistinguishable from direct discrimination; however, as described below at section 4.3.1, decisions should be made on a case-by-case basis rather than through a blanket prohibition on persons with particular disabilities or conditions from being able to adopt.

4.2.4 Sexual Orientation

One of the arguments put forward by the government of France in Fretté v France was that there were:

“[D]oubts that prevailed, in view of what was currently known about the subject, about the development of a child brought up by a homosexual and deprived of a dual ma-
ternal and paternal role model. There was no consensus about the potential impact of being adopted by an adult who openly affirmed his homosexuality on a child’s psychological development and, more generally, his or her future life, and the question divided both experts on childhood and democratic societies as a whole."\textsuperscript{67}

That argument would now seem to be out of step with current thinking by experts in child-raising. The North American Council on Adoptable Children has stated that “all prospective foster and adoptive parents, regardless of sexual orientation, should be given fair and equal consideration” and that it “opposes rules and legislation that restrict the consideration of current or prospective foster and adoptive parents based on their sexual orientation.”\textsuperscript{68} A literature review produced by the Australian Psychological Society concluded that:

“[T]he main reason given (by law makers) for not allowing people to marry the person of their choice if that person is of the same gender has been the inaccurate assertion that this is in the best interest of children, and that children ‘need’ or ‘do better’ in a family with one parent of each gender. As the reviews, statements, and recommendations written by these bodies indicate, this assertion is not supported by the family studies research, and in fact, the promotion of this notion, and the laws and public policies that embody it, are clearly counter to the well-being of children.”\textsuperscript{69}

Using the test established in international human rights law, it is clear that the sexual orientation of the potential adoptee has no impact upon the best interests of the child. The characteristic therefore falls into category (ii) and differential treatment based on sexual orientation cannot be justified.

4.3 Proportionality Assessment

4.3.1 Proportionality under Direct Discrimination

The above analysis suggests that there is at least one characteristic upon which persons who share them can be prevented from being able to adopt a child: age. Where the person is under a certain age (or, potentially, over a certain age) that fact alone will mean that they are entirely unable to meet the best interests of a child and a total exclusion of such persons may be justified under international human rights law, for example, persons under the age of eighteen. Here, proportionality plays a very limited role. The exclusion is absolute. Where the characteristic is such that any person who shares it, rather than a majority, is unable to raise a child, then an absolute exclusion will be proportionate as it is the only option available in the adoption process to ensure the best interests of the child are met.

Other characteristics – disability, health status, and genetic or other predisposition toward illness raise similar issues to considerations based on age. A person’s particular disability, health status or genetic or other predisposition toward illness may – in the same way as a person’s age – mean that they do not possess the necessary physical, mental or emotional ability to care for a child properly. However, whereas a blanket prohibition on all persons under a certain age may be justified under international human rights law, a blanket prohibition on persons possessing a particular disability, health status or genetic or other predisposition toward illness is less likely to be so justified. The Convention on the Rights of Persons with Disabilities uses the “social model” of disability which, instead of focusing on the particular impairment of the individual as the cause of their limita-
tions, looks at the relationship between the individual and the way society is organised and considers the disadvantage suffered by the individual to be a consequence of the society’s failure to take account of the impairments possessed by the individual rather than of the impairments themselves.

Consequently, any different treatment in the adoption process which is based on disability, health status, or genetic or other predisposition toward illness should not attach itself automatically to any particular disability or condition but can only be justified where the consequence of the individual’s disability or condition is such that they do not possess the necessary physical, mental or emotional ability to care for a child properly. Whether or not this is the case for a particular individual should be made on a case-by-case basis.

Such a consideration is likely to discriminate indirectly against persons with disabilities of a particular nature. For example, there are certain disabilities and conditions which impact upon the person’s physical, mental or emotional ability to care for a child such that it will be in the child’s best interests for them to be placed, if possible, with an adoptive parent who does not possess that particular disability or condition. It may be almost impossible for individuals with certain intellectual disabilities (such as Down syndrome) to be able to meet the needs of raising a child, and there will be cases where it would violate the rights of the child to be placed with individuals due to their particular disability or conditions (such as individuals who have Münchausen syndrome). In such circumstances, the different treatment may be virtually indistinguishable from direct discrimination. However, such a decision should be made on a case-by-case basis.

4.3.2 Proportionality under Indirect Discrimination

The situation is more complex where any potential discrimination is indirect, i.e. that the characteristic is given due regard during the adoption process rather than excluding persons who share it from the process in its entirety. In such circumstances, processes which take into consideration those characteristics will be proportionate so long as (a) the process does not exclude them (either formally or in practice) from eligibility to adopt, and (b) the characteristic is given only as much weight as is necessary based upon the impact it would have upon the child’s best interests. The impact should be determined based on medical, scientific or psychological evidence. As noted above, it is possible that such considerations could also amount to direct discrimination if, for example, in a largely homogenous society, the vast majority of children eligible for adoption are of a particular race, and the relevant law governing adoption requires adoptive parents to be of the same race as the child that they seek to adopt. In these circumstances, racial minorities would be directly discriminated against given that they would only be eligible to adopt a minority of potential adoptees, as opposed to those of the majority race.

In the case of disability, for example, there is a broad spectrum of disabilities ranging from those which have a minimal impact upon the ability of the person to best meet the needs of the child (for example, a minor speech impediment or colour-blindness) to those which have a much more substantial impact (such as a significant physical impairment). The weight given to that characteristic must be proportionate to the impact it has upon the person’s ability to meet the best interests of the child. This will vary on a case-by-case basis and it will be up to the court, based on
the evidence, to determine whether undue weight was given to that particular characteristic in order to determine whether the impact on that person's eligibility to adopt can be justified.

5. Conclusion

Where the interests of more than one person or group of people are taken into consideration, there will frequently need to be a balancing act. In the case of the right to respect for family life in the adoption process, the competing rights are those of the child and those of the potential adopter. International human rights law is explicit in stating what those rights are: the child's best interests must be the paramount consideration and, simultaneously, the potential adopter has a right to equality and not to be discriminated against during the adoption process. The requirement that the best interests of the child be the "paramount consideration" during the adoption process has resulted in courts treating the child's best interests as the only legitimate aim where there is differential treatment. Courts have repeatedly, and with strict scrutiny, examined the arguments put forward as to why the characteristic upon which the differential treatment is based has an impact upon the child's best interests. They have required scientific, medical, psychological or other evidence of some sort to establish a real and significant link between the characteristic and the child's best interests, and have rejected arguments that morality or public opinion provides sufficient evidence. If a sufficiently significant link can be established, and differential treatment per se is reasonable and objective, the second stage will be to establish whether or not the particular differential treatment is proportionate. This will involve an analysis of the level of impact the particular characteristic has upon the person's ability to meet the best interests of the child. Only when the level of weight given to the characteristic corresponds to the impact that characteristic has on the potential adopter's ability to meet the best interests of the child should it be considered proportionate. Where, and only where, the characteristic means that the person is entirely unable to meet the best interests of the child, direct discrimination in the form of total exclusion from eligibility to adopt will be justified. Where the characteristic does not render that person entirely unable to meet the best interests of the child, then a total exclusion will not be proportionate and only an appropriate weight may be attached to the characteristic.

1 Richard Wingfield is Advocacy and Programmes Assistant at The Equal Rights Trust. The views expressed are the author's own and should not be considered those of The Equal Rights Trust.
2 See, for example, the comment of the Human Rights Committee in its General Comment No. 18: Non-discrimination, at Para 1 that "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights." Human Rights Committee, General Comment No. 18: Non-discrimination, UN Doc. HRI/GEN/1/Rev.1 at 26, 1994.
5 Article 2(2) reads, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." G.A. Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316, 1966.

7 Naz Foundation v Government of NCT of Delhi and Others WP(C) No. 7455/2001, Para 93.


12 See above, note 3.

13 See above, note 4.


15 European Convention on Human Rights, European Treaty Series 213; UNTS 221.

16 See above, note 3.

17 See, for example, Article 8 of the European Convention on Human Rights, Article 7 of the Charter of Fundamental Rights of the European Union and Article 11(2) of the American Convention on Human Rights. One notable exception is the African Charter on Human and Peoples’ Rights.

18 Human Rights Committee, General Comment No. 16: Article 17 (right to privacy), UN Doc. HRI/GEN/1/Rev.6 at 142, 2003.

19 Human Rights Committee, General Comment No. 19: Article 23 (the family), UN Doc. HRI/GEN/1/Rev.6 at 149, 2003.


21 Ibid., Para 35.

22 Pini and others v Romania, Application Nos. 78028/01, 78030/01, 22 June 2004.

23 Ibid., Para 148.


25 UN Doc. A/RES/41/85.


28 Ibid., Para 10.

29 Ibid., Para 36.

30 Ibid.

31 Ibid., Para 41.

32 Ibid., Para 42.

33 Ibid.


35 Ibid., Para 89.

36 Ibid., Para 94.

37 Ibid., Para 95.

38 X. and Others v Austria, Application No. 19010/07, 19 February 2013.

39 Ibid., Para 130.

40 Ibid., Para 137.

41 Ibid., Para 140.

42 Article 63.042(3) of the Florida Statutes.
43 In the Matter of the Adoption of John Doe and James Doe, Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, Juvenile Division, decided 25 November 2008.

44 In Re P and others [2008] UKHL 38.


46 Ibid., Para 18.

47 Ibid., Para 108.

48 Ibid.

49 Ibid.

50 Ibid., Para 109.

51 Ibid., Para 112.


53 Ibid., Para 72, repeating Paragraph 13, in part, of the decision of the House of Lords (see above, note 44).

54 Ibid., Para 75.

55 Ibid., Para 76.

56 Ibid., repeating Paragraph 101, in part, of the decision of the House of Lords (see above, note 44).


58 See above, note 6, Principle 5, pp. 6-7.

59 See above, note 8.


61 For England and Wales, see sections 50 and 51 of the Adoption and Children Act 2002 (c. 38); for Scotland, see sections 29 and 30 of the Adoption and Children (Scotland) Act 2007 (asp 4); for Northern Ireland, see Articles 14 and 15 of the Adoption (Northern Ireland) Order 1987 (S.I. 1987/2203 (N.I. 22)); for the Republic of Ireland, see Section 33 of the Adoption Act 2010 (Act No. 21 of 2010).


63 Ibid., p. 15.

64 See, for example, Harrison, A., “Adoption: David Cameron vows to cut adoption delays”, BBC News, 9 March 2011.


67 See above, note 27, Para 36.
