

Children's rights in adoption procedure in international documents and case law of the ECtHR



ADOPTION IN INTERNATIONAL DOCUMENTS

Adoption is a family law measure whose purpose is to provide a child with a safe family environment on a permanent basis (O'Halloran, 2021). The feature of adoption in contemporary society is the rights-based approach. Adoption is in the best interest of the child when it is in accordance with other rights from the UN CRC (Tobin, 2023; Erdem Türkelli and Vandenhole, 2022; Kosher, Ben-Arieh and Hendelsman, 2016). Analyzing international documents, none of them regulate the right to adoption. According to the UN CRC, there is only the child's right to live in a family (Vandenhole, Erdem Türkelli and Lembrechts, 2019). Considering that adoption affects numerous rights of the child, several international documents regulate adoption and protect the rights of the child related to adoption.



UN CONVENTION ON THE RIGHTS OF THE CHILD (1989)

Art. 20 explicitly states adoption as a form of alternative care for a child (Vité and Boéchat, 2008), while Art. 21 determines international standards for adoption. Art. 21 defines the standards for intercountry adoption, whereby the characteristic of intercountry and national adoption is acting in the best interest of the child and making a decision on adoption by an official, taking into account the circumstances of the case (Lansdown, 2022; Vandenhole, Erdem Türkelli and Lembrechts, 2019). It is necessary to consider other rights related to adoption: the right of the child to live with his parents (Art. 9), the prohibition of discrimination (Art. 2), the primary duty and the right of parents to raise their child (Art. 18), the right of the child to express his opinion (Art. 12), the child's right to know and preserve his identity (Art. 7 and 8), the child's right to an adequate standard of living (Art. 27), as well as the prohibition of child trafficking (Art. 35) (Lansdown, 2022; O'Halloran, 2021). Therefore, adoption is the last applicable measure (Choudhry and Herring, 2010) that affects not only the rights of the child but also the rights of the biological parents. In the adoption procedure, the best interest of the child is the paramount consideration (Ruggiero, 2022; Davey, 2020; Vité and Boéchat, 2008, General Comment No. 14, 2013). Although this Convention explicitly mentions adoption in only one provision, a holistic approach enables children to enjoy all Convention rights in all stages of the adoption procedure (Vité and Boéchat, 2008). Speaking about the rights of biological parents, their rights in the context of adoption would arise from the state's obligation to take appropriate measures to empower and help the family (Art. 18/1).

EUROPEAN CONVENTION ON THE ADOPTION OF CHILDREN (REVISED) (2008)

This Convention provides guidelines for the interpretation of the provisions of the UN CRC and the legislative regulation of adoption (Fenton-Glynn, 2014), thus also the possibility of harmonizing adoption procedures in Europe. The preamble has prescribed the treatment in accordance with the best interests of the child as a paramount consideration. This Convention regulates the rights of the child during and after the adoption procedure. During the adoption procedure, the child has the right to consent to the adoption, according to age and maturity, whereby the age limit for giving consent should not exceed 14 years. At the same time, the child must be advised about the effects of the consent, which must be given freely, without coercion (Art. 5/1/b). If the child cannot express his consent, the right to express an opinion on adoption is guaranteed, which is also taken into account in accordance with the child's age and maturity (Art. 6). Adoption ensures the child's complete integration into the adoptive family, which implies rights and obligations as well as the parent-child relationship (Art. 11). After the adoption, the child is enabled to acquire the citizenship of his adoptive parents (Art. 12), counseling and support (Art. 20) and the right to access information on origin (Art. 22/3). Regarding the rights of the biological parents, their right to consent to the adoption or to express their opinion is highlighted (Art. 5) (O'Halloran, 2018; Shannon et al., 2013). Although it is not explicitly prescribed, it is understood that the prior duty of the state is to take appropriate measures to protect the biological family and, thus also the rights of the biological parents.



THE HAGUE CONVENTION ON ADOPTION (1993)

The HC 1993 regulates intercountry adoption (Fenton-Glynn, 2014). As a rule, this Convention prescribes the prerequisites and procedure for intercountry adoption, whereby the provisions of other international documents related to adoption are applied to the child's rights. According to Art. 21 of the UN CRC, for intercountry adoption to be based on the best interests of the child as a paramount consideration (Brakman, 2023), the following assumptions must be met: a) that an appropriate form of care for the child in the country of origin could not previously be ensured (Martínez-Mora, 2023), b) that the child enjoys the same protection as in national adoption and c) that intercountry adoption does not result in impermissible material benefit (Vandenhole, Erdem Türkelli and Lembrechts, 2019). The HC 1993 guarantees procedural rights, so the child should be advised and informed about the effects of adoption in accordance with age and maturity, it is necessary to take into account his wishes and opinion, and the child's consent must be given freely without any fees (Art. 4/d). Also, the child has the right to access information about the adoption and to know his identity. Intercountry adoption must result in long-term benefits for the child, and the competent authorities provide counseling and support after the adoption is established (O'Halloran, 2021). Speaking of the rights of biological parents, it is their right to give consent to adoption, to be informed of the legal effects of consent, and to give consent freely (Art 4/c) (Fenton-Glynn, 2014).



EUROPEAN CONVENTION ON THE EXERCISE OF CHILDREN'S RIGHTS (1996)

Children's participation in the procedures contributes to the quality of the decision, children become active participants in the procedure and thus become empowered (Fenton-Glynn, 2014). According to this Convention, the child has the right to be informed and to express his opinion in the procedure, which means: a) to receive appropriate information, b) to express an opinion and be consulted, and c) to be informed about the legal effects of the opinion and decision (Art. 3). Also, the child has the right to a special representative (Art. 4). On the other hand, the competent authorities conducting the proceedings must consider whether the child has the appropriate information, that is, make sure that the child has received the appropriate information and give the child's opinion the appropriate meaning (Art. 6). Also, the competent authorities are obliged to act quickly, take actions on their own initiative and appoint a representative for the child (Art. 7 - 9). The representative must provide the child with the necessary information and acquaint him with the legal effects of opinions and decisions, and to present the child's opinion before the competent authority (Art. 10/1). Providing the child with the previously mentioned procedural rights means acting in accordance with the best interest of the child.



EUROPEAN COURT OF HUMAN RIGHTS: THE RIGHT TO RESPECT FOR FAMILY LIFE AND ADOPTION

The right to respect for family life (Art. 8) of the ECHR does not explicitly regulate children's rights or adoption. The vagueness but determinability of this term and the dynamism of the ECHR enable its application to cases related to children (Kilkelly, 2016; Choudhry and Herring, 2010). In the context of adoption, the positive obligation of the state would refer to the attempt to reunify the biological family (which derives from Art. 18 and 27 of the UN CRC), while the negative obligation would refer to the prohibition of unjustified interference in family life (Wibey, 2022; Choudhry and Herring, 2010). In other words, only when positive obligations would not result in the necessary changes, adoption as a necessary measure is allowed. Although the best interest of the child is the paramount consideration in adoption cases before the ECtHR (Breen et al., 2020), the ECtHR analyzes not only the rights of the child but also the rights of the biological parents. Fenton-Glynn (2021) highlights cases in which the ECtHR took general positions related to adoption and the best interests of the child. In the case of *Johansen v. Norway* (1996), the ECtHR emphasized the importance of achieving a balance of interests between the child and the biological parents, whereby the best interests of the child could override the biological parents' interests. Furthermore, in the cases of *R. and H. v. the United Kingdom* (2011) and *Y.C. v. the United Kingdom* (2012), the ECtHR pointed out that in adoption cases, the best interests of the child must take absolute priority over the interests of the biological parents. This emphasizes understanding the best interest of the child in adoption procedures as a paramount consideration (Helland and Hollekin, 2023; Mørk et al., 2022; Skivenes and Harald Søvig, 2016). At the same time, the ECtHR pointed out the right of the biological parents to participate in the adoption procedure, where the child's interest can override their rights (O'Halloran, 2021; Davey, 2020). In the case of *Strand Lobben and others v. Norway* (2019), the ECtHR continues to emphasize the best interest of the child as a paramount consideration, emphasizing the importance of balancing the interests of the child and the biological parents (Helland and Hollekin, 2023; Mørk et al., 2022; Handbook on European law, 2022). In this sense, the importance of networking the interests of the child and the biological parents, thus including the parents in the adoption procedure, is highlighted. In addition to the above, the ECtHR interpreted the best interest of the child as a paramount consideration in other cases as well. Therefore, the cases of *Fretté v. France* (2002), *Pini and others v. Romania* (2004), *Ageyevy v. Russia* (2013), *Zhou v. Italy* (2014), *S.H. v. Italy* (2015) are emphasized, as well as other cases (O'Halloran, 2021; Handbook on European law, 2015). Without questioning the best interests of the child, the ECtHR, through the right to respect for family life, in previous measures to preserve the biological family, balances the rights and interests of the child and the biological parents.