

Matko GUŠTIN\*

## The Best Interest of the Child in the Jurisprudence of the European Court of Human Rights in Adoption Cases

**ABSTRACT:** *In all procedures related to children, including the adoption procedure, the competent national authorities must act in accordance with the principle of the best interest of the child. The challenges of applying the principle of the best interest of the child are particularly reflected in cases related to adoption. This is also connected with the fact of the complexity of adoption, which results in the termination of (legal) relations between the child and the biological parents. The European Court of Human Rights also decided on the best interest of the child in adoption cases, in the context of the right to respect for family life, which contributed to the interpretation of this principle. Therefore, the aim of this paper is to determine the understanding of the best interest of the child in adoption cases in the jurisprudence of the European Court of Human Rights and present the criteria used by competent national authorities to justify adoption. In the first part of the paper, the principle of the best interest of the child is presented, indicating the non-existence of a single definition, guidelines for its interpretation and the relationship between the best interest of the child and adoption. Subsequently, the right to respect for family life is analysed, and besides, the relationship between this right and the principle of the best interest of the child. The views of the European Court of Human Rights on the best interest of the child in adoption cases are analysed in cases of child adoption without parental consent and intercountry adoptions. In this way, an insight into the meaning of the best interest of the child is given through special aspects of adoption.*

**KEYWORDS:** *the best interest of the child, adoption, the UN Convention on the Rights of the Child, the European Court of Human Rights, the rights to respect for family life*

\* Teaching Assistant, Ph.D. candidate, Faculty of Law Osijek, Josip Juraj Strossmayer University of Osijek, mgustin@pravos.hr, ORCID: <https://orcid.org/0000-0002-4577-0856>. This paper is a product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek under the project no. IP-PRAVOS-2 "Legal protection of family and vulnerable groups of society"

## 1. Introduction

Acting in the best interest of the child is the standard of contemporary society regulated by Art. 3 of the 1989 UN Convention on the Rights of the Child<sup>1</sup> (hereinafter: CRC). Pursuant to that Article, in all actions of public or private social welfare institutions, courts, and administrative or legislative bodies, the best interest of the child shall be a primary consideration. It is a dynamic principle adaptable to different circumstances. In general, referring to the interpretations of legal theory, principles are used to resolve disputed cases and as decision criteria.<sup>2</sup> This especially applies to issues related to children's rights, who enjoy a particular social status and sensibility. Therefore, the formulation of the best interest of the child indicates a multidimensional understanding.

Considering that the best interest of the child is analysed from the adoption perspective, it is necessary to emphasise its fundamental characteristics. Namely, adoption means transferring parental rights from biological parents to other persons, i.e. adoptive parents. In this way, the child becomes a (legally) equal member of the new family and fully integrates into it.<sup>3</sup> In contemporary society, the purpose of adoption is to provide permanent care for the child without adequate parental care. In this way, the right of the adoptive parents to find a family is realised, while the rights of the children still have priority.<sup>4</sup> Art. 21 of the CRC sets international standards for adoption. At the same time, this fundamental international instrument protecting the rights of the child is characterised by a neutral attitude towards adoption, declaring it only as one of the forms of alternative care for the child.<sup>5</sup> International standards applying to all forms of adoption refer to the official approval of the adoption only by a professional person in accordance with the available information and giving consent to the adoption.<sup>6</sup> Considering that it is the most difficult family law measure that leads to the termination of the relationship between the child and the biological parents, adoption is the last applicable measure, only when it is in accordance with the best interests of the child.<sup>7</sup> In that sense, adoption has a double meaning and thus represents the institute of family law, as well as the institute of social protection of a

1 UN General Assembly Resolution 44/25 of 20 November 1989.

2 Vrbanić, 2003, pp. 405 and 406.

3 Perry, 2020, p. 331.

4 Jakovac-Lozić, 2021, pp. 279 and 287; Sladović Franz, 2015, pp. 21 and 22; Jakovac-Lozić, 2013, p. 73; Jakovac-Lozić, 2000, p. 32.

5 Rešetar, 2022, p. 694.

6 Luhamaa and O'Mahony, 2021, p. 181.

7 Fortin, 2009, p. 608.

child lacking adequate parental care.<sup>8</sup> The theoretical definition of adoption makes it clear that it is a complex family law measure related to several human rights, so the best interest of the child is also interpreted from a different perspective.

The complexity of the best interest of the child in connection with adoption is mainly reflected in the correlation with the right to respect for family life contained in Art. 8 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms<sup>9</sup> of the Council of Europe (hereinafter: ECHR). When deciding on the right to respect for family life, including cases related to adoption, the European Court of Human Rights (hereinafter: ECtHR) applies the test of necessity. In this way, it is determined whether the adoption and other previous measures (of family protection) were justified, given that the competent national authorities have a wide margin of discretion.<sup>10</sup> Since it is a principle from which the guidelines for decision-making derive, one of the most appropriate ways of knowing the meaning of the best interest of the child is the analysis of the jurisprudence. In this sense, the jurisprudence of the ECtHR, which interprets the best interest of the child in adoption cases from the perspective of the right to respect for family life, is particularly noteworthy.

In numerous cases related to adoption, the ECtHR found a violation of the right to respect for family life, whereby a comprehensive analysis of each case provides insight into the understanding of the best interest of the child, as well as the protection of the rights of biological parents. Therefore, the aim of this paper is to determine how the ECtHR interprets the best interest of the child in adoption cases and according to which criteria competent national authorities justify adoption. To achieve this aim, the importance of the principle of the best interest of the child and its effects are analysed, with a particular focus on adoption. In addition, the right to respect for family life and its connexity to the principle of the best interest of the child are also analysed, followed by a (thematic) analysis of selected judgments of the ECtHR related to adoption.

The paper is structured into five chapters. The first chapter provides a general analysis of the principle of the best interest of the child, a contemporary approach to its interpretation and an interpretation of the best interest of the child towards adoption. Then, the second chapter analyses the right to respect for family life, while the third chapter demonstrates the connexity between the best interest of the child and the right to respect for family life. The fourth chapter analyses the interpretation of the best interest of the child in adoption cases in the jurisprudence of the ECtHR, namely the general attitudes and the attitudes taken in adoption cases without parental consent and intercountry adoptions. Finally, the conclusion offers general guidelines for further actions to be taken by the competent national authorities in adoption cases.

8 Čović, 2017, p. 80.

9 Council of Europe Treaty Series (CETS) No. 5, Rome, 4 November 1950.

10 Killkely, 2016, p. 298.

## 2.

### Conceptual Determination of the Best Interest of the Child

In the context of international legal protection of children's rights, the principle of the best interest of the child has been known for a long time. It was also regulated by the 1959 Declaration on the Rights of the Child.<sup>11</sup> However, as the above-mentioned Declaration was a non-binding international instrument, the application of the principle of best interest was dependent on the will of the competent State authorities.<sup>12</sup> Considering that the CRC is a binding international instrument for the States Parties, it is mandatory to act in accordance with the best interest of the child, which is also subject to the supervision of the Committee on the Rights of the Child.<sup>13</sup> As stated in the introduction, the best interest of the child is characterised by a multidimensional understanding that requires a comprehensive analysis. Therefore, below is given: a) a general analysis of the best interest of the child, b) a contemporary approach to its interpretation and c) interpretation of the best interest of the child in relation to adoption.

#### ***2.1. Generally about the Best Interest of the Child***

By accepting the best interest of the child as a primary consideration, those liable for applying this principle are left with enough space for balancing interests. This is related to the fact that no other international instrument comprehensively protects children's rights. In addition, moral reasons related to the social vulnerability of children, as well as their lesser influence on shaping everyday life, are also taken into account.<sup>14</sup> In this way, children are enabled to become successful adults, or following the so-called Solomon's argument, one's own interests are sacrificed for the sake of the children.<sup>15</sup> The goal of this principle is to achieve a balance between the child's autonomy and protection, who is no longer exclusively a vulnerable individual, but a legal subject vested with certain rights.<sup>16</sup>

The best interest of the child does not have a single definition – it is an indeterminate, but definable principle.<sup>17</sup> The reason for this is the universality of the CRC, where

11 Šeparović, 2014, p. 29.

12 Takács, 2021, p. 98; Hrabar, 1994, p. 31.

13 Hrabar, 2021a, p. 25.

14 Krutzinna, 2022, p. 122; Takács, 2021, p. 98; Sutherland, 2016, pp. 35 and 36.

15 Freeman, 2007, p. 40.

16 Mørk et al., 2022, p. 10.

17 Hrabar, 2021b, p. 208.

different cultures understand childhood and what represents the best interest of the child differently.<sup>18</sup> The uniqueness of each child, as well as the situation in which a decision needs to be made, is a logical consequence of the absence of a definition of the best interest of the child and the necessity for its interpretation on a case-by-case basis.<sup>19</sup> Apart from the particular circumstances applying to each case, the understanding of the principle of the best interest of the child is connected to the other three principles of the CRC. These are the prohibition of discrimination, the child's right to development, and the right to be heard.<sup>20</sup> In other words, the best interest of the child is the basis for the interpretation of all other rights of the child.<sup>21</sup> To decide in accordance with the best interest of the child, it is necessary to take into account the opinion of the child, as well as all others whose opinion may influence the final decision related to the child.<sup>22</sup>

Many scholars have contributed to specifying the meaning of the best interest of the child and have made efforts to define it. The meaning of this principle is best reflected through the following two definitions. Thus, Eekelaar states that the best interest of the child is the primary interest, i.e. taking care of developmental interests, so that the child enters adulthood without defects.<sup>23</sup> Hrabar, on the other hand, points out that acting in accordance with the best interest of the child means to decide as the child himself would decide if he would be capable of that.<sup>24</sup> The best interest of the child must be analysed from a holistic perspective, which emphasises the importance of all the rights of the child without hierarchy. This confirms the dynamism of this principle, which encompasses various aspects related to children's rights that are continuously developing.<sup>25,26</sup> The role of the best interest of the child in realising his rights is multiple. It reinforces or clarifies problems arising in connection with the interpretation of the provisions of the CRC, resolves conflicts and serves as a basis for a

18 Ruggiero, 2022, p. 22; Freeman, 2007, p. 33. Nevertheless, Archard points out that it is precisely the different interpretation of the best interest of the child in each culture that indicates the absence of a general point of view among different cultures as to what is the best interest of the child. Archard, 2003, pp. 46-47.

19 Bubić, 2014, pp. 11 and 12.

20 Ruggiero, 2022, p. 23. See also: Hrabar, 2019, p. 166.

21 Fortin, 2009, pp. 40 and 41.

22 Koshier, Ben-Arieh and Hendelsman, 2016, p. 32. On the importance of the child's opinion in the context of the best interest of the child, as well as the connection of Art. 3 and Art. 12 of the CRC, see also: Doek, 2020, p. 259-263; Kloosterboer, 2017, p. 738 and 739; Sutherland, Barnes Macfarlane, 2016, pp. 14 and 15; Lansdown, 2016, pp. 31-35.

23 Freeman, 2007, p. 27.

24 Hrabar, 2021b, p. 209.

25 Brakman, 2023, p. 370. Such an approach can also be connected with Wellman's understanding of the growth of children's rights, which is "individual, fragmented, overlapping and complex". Tucak, 2009, p. 74.

26 On the best interest as a basis for the enjoyment of other rights and the absence of a hierarchy between the rights of the child, see: Kraljić and Drnovšek, 2021, p. 265.

comparative analysis of children's rights in different countries.<sup>27</sup> Despite the absence of a single definition of the best interest of the child, the connection of this principle with other fundamental principles of the CRC, which correlate with other children's rights, guarantees consistent protection of children's rights and interests.

## ***2.2 Contemporary Approach to the Interpretation of the Best Interest of the Child***

General comment No. 14 of the Committee on the Rights of the Child from 2013<sup>28</sup> (hereinafter: General comment No. 14) contributes to the understanding of the principle of the best interest of the child in contemporary society. It confirms the complexity and adaptability of the principle of the best interest of the child and continues to omit its definition.<sup>29</sup> Nevertheless, a kind of attempt to define this principle stems from its determination as a threefold concept: a substantive right, a procedural rule and an interpretive principle.<sup>30</sup> The best interest of the child as a substantive right signifies the fundamental obligation of the State, it is directly applicable and can be invoked before courts. Notably, this approach to interpreting the best interest of the child means that the child's interests will take precedence over the conflict of multiple interests and that the decision made in this way will be implemented (General comment No. 14, para. 6(a)). If the child's interest conflicts with the interests of others, it is necessary to carefully consider the interests of all parties and reach a compromise. In case of impossibility of reaching a compromise, it is necessary to consider the interests of all parties, with the best interest of the child as a priority.<sup>31</sup> In other words, it is necessary to take into account the solution that would result in the least possible damage to other persons, but would not cause simultaneously any damage to the child.<sup>32</sup>

The best interest of the child as a procedural rule imposes an obligation on the bodies that decide on a child's right to consider all the positive and negative effects of that decision on the child's rights. The implementation of this approach to the interpretation of the best interest of the child implies ensuring the procedural rights of the child, whereby a kind of monitoring of their compliance is carried out by imposing the obligation to explain the decision in which it is stated that the best interest of the child has been taken into account (General comment No. 14, para. 6(b)). It is a step in the

27 Jakovac-Lozić and Vetma, 2006, p. 1410; Jakovac-Lozić, 2006, pp. 21 and 22.

28 General comment No. 14 (2013) on the rights of the child to have his or her best interest taken as a primary consideration (art. 3, para 1), Committee on the Rights of the Children, CRC/C/GC/14, 29 May 2013.

29 See: Ruggiero, 2022, p. 25.

30 See also: Rešetar, 2022, p. 17; Ruggiero, 2022, pp. 24 and 25; Takács, 2021, p. 100; Kilkelly, 2016a, pp. 56-62.

31 Rešetar, 2022, p. 16.

32 Rešetar, 2022, p. 17.

decision-making process that does not impose a final solution but obliges the State to establish appropriate mechanisms for procedural implementation of the best interest of the child.<sup>33</sup> Finally, the best interest of the child is also an interpretative principle according to which, of several possible interpretations of a legal provision, the one which is in accordance with the best interest of the child is always applied (General comment No. 14, para. 6(c)). Therefore, it is impossible to uniformly determine what is in the best interest of the child. Still, it is assessed through the rules of procedure and guidelines for its determination<sup>34</sup>, on a case-by-case basis.

In addition to determining the best interest of the child as a threefold concept according to General comment No. 14, the legal theory also lists three criteria for determining the best interest of the child. These criteria refer to the needs of the child,<sup>35</sup> the will of the parents and standard behaviour.<sup>36</sup> This also implies obligations for States to ensure the integration and consistent application of the best interest in the actions taken by public and private institutions in charge of children, as well as mechanisms for describing how to apply the best interest of the child, i.e. the weight attributed to it in a particular procedure (General comment No. 14, para. 14). The achievement of the best interest of the child is preceded by two levels: the first, in which it is necessary to assess what is in the best interest of the child, and the second, in which procedural guarantees aimed at determining the best interest of the child are implemented based on the assessment (General comment No. 14, para. 46).

The assessment of the best interest of the child depends on the child's opinion, identity, the need to preserve the family environment, vulnerability, education, health and other parameters. In doing so, different parameters are applied in each situation. On the other hand, at the level of realising the best interest of the child, it is necessary to implement measures of 'child-friendly justice', which include the child's right to express opinions, establishing facts, time perception, the expertise of persons who communicate with the child, explanation of the decision, etc.<sup>37</sup> Although there is no hierarchy between the rights of the child, in the context of determining the best interest of the child, his procedural rights are of particular importance – to determine the best interest of the child, it is necessary to listen to the child. By analysing the guidelines for the interpretation of the best interest of the child, it is still clear that the absence of a single definition does not constitute any obstacle to its application. In the broadest sense, applying the teleological interpretation of the best interest of the child in a specific time and situation, it is necessary to achieve what is good for the child.

33 Zermatten, 2015, p. 32. On the implementation and application of the principle of the best interest of the child in national legislation, see also: Sutherland, 2016, p. 47.

34 Zermatten, 2015, p. 32.

35 Also: Archard, 2003, p. 45.

36 Hrabar, 2021b, p. 209.

37 Zermatten, 2015, p. 38.

### 2.3. *The Best Interest of the Child and Adoption*

Guided by the fact that adoption is the last applicable measure that results in the termination of all legal ties between the child and his or her biological family (as a rule)<sup>38</sup>, the best interest of the child in this sense has a particular meaning. While the general rule is that the realisation of the best interest of the child is preceded by balancing the interests of several parties as a primary consideration, in the case of adoption, the best interest of the child is a paramount consideration (General comment No. 14, para. 38), which overrides the interests of others (in this case parents).<sup>39</sup> Art. 21 of the CRC, together with international standards for adoption, defines the best interest of the child as the determining factor in adoption procedures.<sup>40</sup> This approach is also related to the rights-based approach to adoption that recognises a wide range of interests of children who deserve to be recognised as rights-holders.<sup>41</sup> Therefore, determining the best interest of the child as a paramount consideration in the adoption procedure means that it determines the course of the procedure and the actions to be taken. On the contrary, a primary consideration of the child's best interest would only mean prioritising his interests,<sup>42</sup> preceded by finding a balance of interests.

In addition, the purpose of interpreting the best interest of the child in the adoption procedure as a paramount consideration stems from the fact that the purpose of this procedure is to find a family for a child, not a child for a family.<sup>43</sup> As regards the application of the best interest of the child as a paramount consideration, it is applied to the entire procedure – from the separation of the child from the family to the final decision on adoption.<sup>44</sup> The best interest of the child is to live with the biological parents, so in the context of adoption, this includes several practical considerations.<sup>45</sup> It is in the best interest of the child to be adopted only when the previous measures aimed at supporting and preserving the biological family did not lead to

38 Namely, most countries regulate only full adoption, which results in the termination of all the child's legal ties with the biological parents (family) and the creation of a parental relationship with the adoptive parents. However, some countries, in addition to full adoption, have retained a form of simple adoption that does not have the feature of terminating all ties with the biological parents (family). See: O'Halloran, 2021, pp. 5 and 6.

39 Davey, 2020, p. 13.

40 Ruggiero, 2022, p. 26; Jakovac-Lozić, 2021, pp. 278 and 279.

41 Tobin, 2023, p. 41.

42 Freeman, 2007, pp. 60 and 61.

43 Fenton-Glynn, 2014, p. 15.

44 Vité and Boéchat, 2008, p. 24.

45 Luhamaa and O'Mahony, 2021, pp. 184 and 185.

positive changes that would justify the child's stay in that family.<sup>46</sup> Therefore, following the principle of proportionality and gradualness, adoption must be preceded by an assessment of the termination of legal ties with the biological family and it must be the last applicable measure which seriously changes the course of the child's life.<sup>47</sup>

The 2008 European Convention on the Adoption of Children (revised)<sup>48</sup> (hereinafter: ECAC 2008) and the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>49</sup> (hereinafter: HC 1993) are international instruments that are directly related to adoption, and are based on the principle of the best interest of the child.<sup>50</sup> The ECAC 2008 is an international instrument of the Council of Europe that regulates in detail the issues related to adoption. In other words, it provides guidelines for the interpretation of the CRC in its section addressing adoption and the legislative regulation of adoption.<sup>51</sup> As regards the ECAC 2008, the best interest of the child is highlighted as a paramount consideration already in the Preamble, thus following Art. 21 of the CRC. The best interest of the child in the ECAC 2008 is particularly important for the adoption decision (Art. 4), an exception to the child's consent to adoption, i.e. expressing an opinion (Art. 6), the age difference between the child and the adoptive parent and exceptions to that rule (Art. 9), possibility of revocation and annulment of adoption (Art. 14) and probationary period (Art. 19). The emphasis put on the best interest of the child in the ECAC 2008 enables its additional explanation and definition.<sup>52</sup>

In relation to intercountry adoption, which is regulated by the HC 1993, the best interest of the child is also emphasised already in the Preamble. Furthermore, it is explicitly stated as a criterion for the selection of adoptive parents (Art. 16), proceedings in the case when it is determined that the choice of adoptive parents is not in the best interest of the child (Art. 21) and when the adoption is refused in the receiving country (Art. 24). However, for intercountry adoption, to be based on the best interest

46 Rešetar, 2022, p. 701. In this sense, Kraljić and Drnovšek point out that in connection with adoption, the double principle of the best interest of the child must be respected - when the child is separated from the family and during the adoption procedure itself. Kraljić and Drnovšek, 2021, p. 271.

47 Sladović Franz, 2019, p. 41.

48 Council of Europe Treaty Series (CETS) No. 202, Strasbourg, 27 November 2008.

49 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, concluded 29 May 1993. Available at: <https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf>.

50 At the same time, other international documents that are (indirectly) applied in the adoption procedure, and which also emphasise the best interest of the child, are highlighted, e.g. the European Convention on the Exercise of Children's Rights, Council of Europe Treaty Series (CETS) No. 160, Strasbourg, 25 January 1996.

51 Fenton-Glynn, 2014, p. 18. On issues regulated by the ECPD 2008, see: O'Halloran, 2018, p. 78.

52 Explanatory Report on the European Convention on the Adoption of Children (Revised), para. 14. Available at: <https://rm.coe.int/16800d3833>. See also: Jakovac-Lozić, 2007, p. 97 and 98.

of the child, the existence of subsidiarity is also necessary. Therefore, intercountry adoption can be established in the best interest of the child only after the child cannot be provided with an appropriate form of alternative care in the country of origin.<sup>53</sup> As for the best interest of the child in intercountry adoption, diversity of the cultural environment that affects the determination of the best interest of the child (by the country of origin of the child) is particularly noteworthy.<sup>54</sup> The implications arising from adoption justify its determination in that context, i.e. the absence of a balancing of interests and an exclusive focus on the child. In addition, the influence of the best interest of the child on other international instruments confirms its universality.

### 3.

## The Right to Respect for Family Life

To fully understand the best interest of the child in adoption cases decided by the ECtHR, it is necessary to explain the right to respect for family life. Therefore, Art. 8 of the ECHR stipulates that everyone has the right to respect for private and family life, home and correspondence, whereby the public authorities shall not interfere in the exercise of this right, except in exceptional, justified cases.<sup>55</sup> Consequently, the right to respect for family life is a qualified right that can be limited only in justified cases.<sup>56</sup> Similarly to the best interest of the child, the right to respect for family life is an indeterminate but definable concept in the ECtHR's jurisprudence, on a case-by-case basis, in different contexts and times.<sup>57</sup> This indicates that the ECHR is also a "living instrument" that adapts to social and legal standards, which is why family life does not refer exclusively to the nuclear family.<sup>58</sup> Therefore, the concept of family life refers to close relatives, relationships between parents and children, relationships between grandparents and children, blood relatives in the collateral line, as well as relationships between foster parents, adoptive parents and potential adopters with a child.<sup>59</sup>

53 Tobin, 2023, p. 49; Brakman, 2023, pp. 366 and 368; Vandenhoele et al., 2019, p. 230; Čović, 2017, p. 110; Fenton-Glynn, 2014, pp. 21 and 22; Vité and Boéchat, 2008, pp. 44 and 45.

54 See more: Cantwell, 2017, pp. 67 and 68.

55 As determined by Art. 8, para. 2 of the ECHR: "(...) in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

56 For more details on qualified and unqualified rights under the ECHR, see: Choudhry and Herring, 2010, p. 5.

57 Also: Korać, 2002, p. 250.

58 Killkely, 2016b, p. 13; Rešetar, 2022, pp. 30, 32; Choudhry and Herring, 2010, p. 6.

59 Rešetar, 2022, p. 31; Davey, 2020, pp. 60 and 61.

If the existence of family life was not established, the person would still enjoy protection based on Art. 8 of the ECHR, but in the context of the right to respect for private life.<sup>60</sup> The task of the ECtHR is not to replace the competent national authorities and decide instead of them, but to review whether the competent authorities acted in accordance with Art. 8 of the ECHR.<sup>61</sup> The fundamental determinant of family life is common life, which enables the normal development of family relations and the enjoyment of family members in each other's company.<sup>62</sup> In addition to living together, important determinants of family life are the efforts of people to establish a "family community" and the reality of these relationships, although the interest in establishing family life can replace its real existence.<sup>63</sup> In general, there are three possible ways of creating a family life through the interpretation of the ECtHR: by showing attachment to the family, by showing attachment to the child through a social relationship, and by showing the motivation to establish such a family relationship.<sup>64</sup>

The right to respect for family life implies positive and negative obligations for the State. Positive obligations have a disjunctive character and indicate an obligation that should result in the realisation of a particular right. On the other hand, negative obligations have a conjunctive character and mean the prohibition of actions that would unjustifiably limit a particular right.<sup>65</sup> Thus, the positive obligations of the State in the context of the right to respect for family life include the protection of family life between parents and children, enabling the reunification of the biological family or enabling contacts between the child and the parents.<sup>66</sup>

Contrary to a positive obligation, a negative obligation in the context of the right to respect for family life would mean actions that prevent the violation of this right. As regards the violation of the right to respect for family life, it can occur due to unjustified State interference in family life or failure to take measures aimed at protecting family life,<sup>67</sup> which in the example of adoption may mean that it is not necessary, that

60 Case of *Paradiso and Campanelli v. Italy*, application no. 25358/12, judgment of the ECtHR, 24 January 2017, para. 165. According to Korać Graovac, private life is a broader concept than family life. Therefore, family life always represents private life, in contrast to private life, which is a broader term and does not always refer to family life. Korać Graovac, 2013, p. 37.

61 Skivenes and Harald Søvig, 2016, p. 349.

62 Case of *Marckx v. Belgium*, application no. 6833/74, judgment of the ECtHR, 13 June 1979, para. 31; *Olsson v. Sweden* (no. 1), application no. 10465/83, judgment of the ECtHR, 24 March 1988, para. 59. Among other things, in the case of *Marckx v. Belgium*, the ECtHR defined the relationship between parents and children also as part of the right to respect for family life. Kilkelly, 2010, p. 249.

63 Rešetar, 2022, p. 32; Kilkelly, 2016b, p. 195; Kilkelly, 2010, p. 251.

64 Fenton-Glynn and Sloan, 2023, p. 175. Rešetar states that family life, in the jurisprudence of the ECtHR, is based on origin, legal ties and functionality. See: Rešetar, 2022, p. 31.

65 Wibye, 2022, pp. 488 and 489.

66 See more: Choudhry and Herring, 2010, pp. 9 and 10.

67 Rešetar, 2022, pp. 33 and 34.

is, applied as the last applicable measure. In other words, a violation of this right can occur by not taking preventive measures, which indicates a violation of a positive obligation, or by taking repressive measures in an unjustified manner, which in turn indicates a violation of a negative obligation. As it has been stated, interference in family life is permitted only exceptionally, so according to the test of necessity, it must be a) in accordance with the law, b) legitimate and c) necessary in a democratic society.<sup>68</sup> Therefore, the interpretation of the right to respect for family life is related to discretionary treatment and proportionality. Consequently, the ECtHR respects the diversity, that is, the specificity of each legal system, leaving the States a wide margin of appreciation in choosing the way to protect a certain right. The more important the right, the narrower the margin of appreciation,<sup>69</sup> and the proportionality of the action is also connected to this. On the other hand, proportionality means the obligation to find a fair balance between the interests of the community and the protection of the fundamental rights of the individual.<sup>70</sup>

Although the provision of the ECHR on the right to respect for family life does not explicitly state the rights of children, the interpretation of this right in the jurisprudence of the ECtHR covers a number of areas related to children, *inter alia*, alternative care for children – foster care and adoption, child abduction, guardianship.<sup>71</sup> In the context of adoption, proportionality would mean that the State should intervene in the rights of the child only to the extent that is really necessary to help the child, and at the same time prevent excessive interference in the rights of the individual, which also refers to the right to respect for family life.<sup>72</sup> In this sense, proportionality is interpreted as the deprivation of the right to parental care is provided by family legislation, that it achieves a legitimate goal (e.g. protection of the child's interests, health or life) that cannot be achieved by more lenient measures, and that the deprivation of the right to parental care and finally adoption, are necessary in a democratic society.<sup>73</sup>

However, it is particularly important to emphasise that the right to respect for family life does not guarantee the right to adoption, nor the right to found a family, since its purpose is to provide the child with a family and protect his or her rights and interests.<sup>74</sup> Necessity in a democratic society, when it comes to adoption, includes the State's obligation to respect the right to family life of both the child and the parents, the protection of the child's rights, the discretion of action and the finality or the

68 Choudhry and Herring, 2010, p. 5.

69 Davey, 2020, p. 25; Choudhry and Herring, 2010, p. 11.

70 Killkely, 2016b, p. 9.

71 Kil Kelly, 2010, p. 248.

72 Kraljić and Drnovšek, 2021, p. 270.

73 Kraljić and Drnovšek, 2021, p. 271; Davey, 2020, p. 18; Skivenes and Harald Søvig, 2016, p. 348.

74 Bracken, 2023, p. 306; Jakovac-Lozić, 2021, p. 280.

permanence of the decision.<sup>75</sup> As a rule, it is about the fact that the previous preventive measures did not result in the preservation of the biological family, and adoption turned out to be the only solution for the child. In addition to material violations, the ECtHR has also found procedural violations of the right to respect for family life in cases related to adoption, especially in relation to the length of the procedure.<sup>76</sup> Although the ECtHR accepts the best interest of the child in adoption cases as a paramount consideration, the justification of those decisions has also contributed by the necessity of acting as a criterion for the protection of broader interests.

#### 4.

### **The Relationship between the Best Interest of the Child and the Right to Respect for Family Life**

Although the best interest of the child and the right to respect for family life are contained in two different international instruments, they are aimed at the protection of fundamental human rights. At the same time, the best interest of the child is aimed exclusively at children, while the right to respect family life, together with limitations, applies to everyone, including children.<sup>77</sup> When deciding on the right to respect for family life in a specific case, the ECtHR takes into account various international instruments, including the CRC, as well as customary law relevant to the case.<sup>78</sup> However, the ECtHR has no obligation to directly apply the provisions of the CRC or other international instruments that interpret its provisions, but their application contributes to a more comprehensive understanding of children's rights.<sup>79</sup> Since the ECHR does not directly regulate the rights of children, the principle of the best interest of the child provides guidelines for the interpretation of the right to respect for family life (as well as other rights arising from the ECHR).<sup>80</sup> However, the ECtHR is guided by an international consensus that determines the best interest of the child as the most important in all actions concerning children, which at the same time facilitates the achievement of a balance of conflicting rights.<sup>81</sup>

75 Skivenes and Harald Søvig, 2016, p. 352.

76 On the criteria that need to be taken into account when assessing the (un)justification of the duration of the procedure, see: O'Halloran, 2018, p. 90.

77 Breen et al., 2020, p. 6; Grgić, 2016, p. 105.

78 Takács, 2021, p. 102. On the reference to the CRC in ECtHR judgments, see: Helland and Hollekim, 2023, p. 220.

79 Breen et al., 2020, p. 9.

80 Vandenhoe and Türkelli, 2020, p. 217.

81 Jensdóttir, 2016, p. 83.

The best interest of the child is an integral part of the right to respect for family life, thus the test of necessity (proportionality),<sup>82</sup> which is argued as follows. Notably, it is the fundamental obligation of every State to ensure the rights arising from the ECHR to everyone within their jurisdiction, which is followed by the obligation to protect fundamental rights not only by interpreting the ECHR but also other international instruments to which States are Parties.<sup>83</sup> The relationship between the best interest of the child and the right to respect for family life is also reflected in the following. Considering that the ECHR does not explicitly regulate children's rights, in the absence of appropriate standards, the best interest of the child provides guidelines for the interpretation of its provisions, as long as the result of such interpretation is in accordance with the goals and purpose of the ECHR.<sup>84</sup>

The ECtHR separately analyses acting in accordance with the best interest of the child and (un)justified interference in family life. In this way, the best interest of the child, in relation to the right to respect for family life, constitutes an important guideline for decision-making, especially when it comes to the implementation of practical measures.<sup>85</sup> Theoretically, because of this, the decision of the ECtHR may establish a violation of Art. 3 of the CRC and Art. 8 of the ECHR, only one of them or none of them,<sup>86</sup> whereby (in cases related to adoption), the ECtHR is invoked in different forms in the best interest of the child.<sup>87</sup> The relationship between the best interest of the child and the right to respect for family life is presented in the following example. It is in the best interest of the child to grow up and develop in a family environment with biological parents, which is why family ties may only be severed as the last applicable measure, such as adoption. In addition, severing family ties must not be based on the fact that the child would be better off in a different environment and that must be strictly justified. In this sense, the ECtHR accepts the best interest of the child as a paramount consideration, so if the maintenance of these relationships would endanger the interests of the child, the best interest of the child may override the rights of the biological parents covered by the right to respect for family life.<sup>88</sup> Therefore, in relation to the respect for family life, the best interest of the child represents an additional protective mechanism to children, at the same time indicating the importance of previous preventive measures aimed at protecting the biological family.

82 Bracken, 2023, p. 308; Collinson, 2020, pp. 171, 172.

83 Takács, 2021, p. 101.

84 Killkely, 2016b, pp. 15, 16.

85 Jensdóttir, 2016, p. 83.

86 Collinson, 2020, pp. 178, 179. Collinson analysed this relationship between the best interest of the child and the right to respect for family life through the so-called immigration cases decided by the ECtHR.

87 See more: Skivenes and Harald Søvig, 2016, pp. 351, 352.

88 See: Breen et al., 2020, p. 7; Grgić, 2016, p. 112.

## 5.

### Interpretation of the Best Interest of the Child in the Jurisprudence of the ECtHR in Adoption Cases

As previously pointed out, the ECHR does not contain provisions directly referring to children, nor does the right to respect for family life guarantee the right to found a family or adoption. The rights enshrined in the CRC are incorporated in the right to respect for family life, so the ECtHR, in every case related to children, including in cases related to adoption, directly or indirectly interprets the best interest of the child.<sup>89</sup> Therefore, the following are analysed: a) general interpretations of the best interest of the child in adoption cases, b) interpretations in cases related to adoption without parental consent, and c) intercountry adoption.

#### **5.1. General Attitudes of the ECtHR on the Best Interest of the Child in Cases related to Adoption**

According to Fenton-Glynn,<sup>90</sup> in the cases of *Johansen v. Norway*,<sup>91</sup> *R. and H. v. the United Kingdom*,<sup>92</sup> *Y.C. v. the United Kingdom*<sup>93</sup> and *Strand Lobben and Others v. Norway*,<sup>94</sup> the ECtHR gave a general interpretation of the best interest of the child to adoption. These cases represent an evolution of the interpretation of the best interest of the child in the jurisprudence of the ECtHR as a fundamental international standard in the protection of children's rights, to which the right to respect for family life is also connected.

Apart from the fact that the ECtHR emphasised the best interest of the child for the first time,<sup>95</sup> the case of *Johansen v. Norway* also resulted in the so-called Johansen test which has been applied for almost two decades in adoption cases decided by the ECtHR. Thus, the best interest of the child could override the interests of the parents, depending on the specific case and its seriousness.<sup>96</sup> However, the ECtHR pointed out that it is necessary to achieve a fair balance of interests between the child (to

89 Fortin points out that the terms "welfare and best interest of the child" do not have a single definition in the jurisprudence of the ECtHR's, which confirms the need for their interpretation on a case-by-case basis. Fortin, 2009, pp. 69-72.

90 Fenton-Glynn, 2021, pp. 365-367.

91 Application no. 17383/90, judgment of the ECtHR, 7 August 1996.

92 Application no. 35348/06, judgment of the ECtHR, 31 May 2011.

93 Application no. 4547/10, judgment of the ECtHR, 13 March 2012.

94 Application no. 37283/13, judgment of the ECtHR, 10 September 2019.

95 Breen et al., 2020, p. 13.

96 Fenton-Glynn, 2021, p. 365.

be in appropriate form of alternative care outside the biological family when the circumstances justify it) and the parents (in the context of family reunification).<sup>97</sup> Despite the best interest of the child as a paramount consideration, this should not be the reason for automatic (unjustified) interference in the family life of the parents.<sup>98</sup> The ECtHR considered the placement of the child in a foster family with adoption as the ultimate goal justified, considering that child was placed in that family after birth, which would enable him to live in a safe and emotionally stable family environment (para. 80). However, the previous inadequate care for the second child, the probability of the mother's non-cooperation and the risk of disrupting the care of the daughter were not sufficient reasons for not implementing family reunification. Moreover, the mother showed positive progress that was not taken into account in the assessment of interference in family life (paras. 82-85), whereby adoption was highlighted as the last applicable measure.<sup>99</sup> Although there was no questionable treatment in accordance with the best interest of the child, in this case, the ECtHR found a violation of the right to respect for the mother's family life because of non-implementation of reunification (para. 93). By implementing the test of necessity in a democratic society, the legality and legitimacy of the treatment was determined, but not a necessity.

Unlike the case of *Johansen v. Norway*, which emphasised the importance of balancing the interests of the child and his parents, in the case of *R. and H. v. the United Kingdom*, it is more clearly emphasised that even when balancing interests, the best interest of the child must have absolute priority over the interests of the biological parents.<sup>100</sup> In relation to the procedural aspect of the right to respect for family life, which was invoked by the parents, the interpretation of the best interest of the child is also reflected in this sense. As it was a procedure in which the parents were first deprived of the right to parental care, followed by the adoption procedure itself, the ECtHR took the position that such an approach represents acting in accordance with the best interest of the child. At the same time, it does not call into question the importance of the parents' participation in the adoption procedure, but if the child's interest determines the adoption, and the parents' non-participation in the procedure promotes it, then the child's interests override all other interests (para. 77). In the context of the right to respect for family life, the ECtHR particularly

97 Davey, 2020, p. 19; Skivenes and Harald Søvig, 2016, p. 352.

98 Davey, 2020, p. 16.

99 O'Halloran, 2021, p. 142; Choudhry and Herring, 2010, p. 328.

100 Helland and Hollekim, 2023, p. 228; Mørk et al., 2022, p. 12; Fenton-Glynn, 2021, p. 366. For the factual description of this case, see: Doughty, Meakings and Shelton, 2019, p. 6; Jakovac-Lozić, 2013, p. 88.

emphasises the importance of the reunification of the biological family.<sup>101</sup> However, the aforementioned attitude is 'mitigated' by the fact that the competent national authorities are not obliged to undertake endless attempts to reunify the biological family, but are expected to take reasonable steps that would lead to reunification. In addition, long-term separation of the child from the biological family may override the interest of reunification and thus justify adoption (para. 88).<sup>102</sup> In addition, the importance of timely protection of children is emphasised, which justifies a wide margin of appreciation of the competent national authorities (para. 81).<sup>103</sup> Although the parents participated in the adoption procedure (para. 77), the expert assessment concluded that the child's return to the family would not be in his interest and that there is a justified fear of further harming the child's safety (para. 85).<sup>104</sup> Respecting the child's interest to be adopted, the rights of the parents are also adequately protected, preventing arbitrary treatment by involving them in the adoption procedure.<sup>105</sup> Therefore, in this case, the ECtHR did not find a violation of the right to respect for family life (paras. 89 and 90).

In the case of *Y.C. v. the United Kingdom*, the ECtHR upholds the position previously taken in *R. and H. v. the United Kingdom*, repeating that the best interest of the child must be a paramount consideration in adoption cases.<sup>106</sup> In other words, the rule stipulated by Art. 21 of the CRC is confirmed. Although the ECtHR emphasises the best interest of the child as a paramount consideration in this case as well, it states that this principle is twice as important as adoption. It is primarily in the best interest of the child to maintain his or her ties with the biological family, while secondarily, the inappropriateness of those ties imposes the obligation to ensure the child's development in a safe environment (para. 134), which adoption undoubtedly provides. Acting in accordance with the best interest of the child, as previously stated, requires the analysis of several factors, *inter alia*, the age and maturity of the child, his wishes (para. 135), which also refers to the comprehensiveness of the treatment and the assessment of the family situation (para. 147). Naturally, this also includes the 'balancing' of interests, whereby it is necessary to take into account the best interest of the child (para. 138), which confirms this principle as a substantive right. The possibility of the child's return to the biological family, or more precisely, the assessment of further

101 This confirms the state's duty to take appropriate previous actions to reunify the biological family. According to McCormick's interpretation, children's rights (to be permanently placed in another family) precede duties (in this case, states and parents, which are reflected in the attempt to reunify the biological family). Tucak, 2009, pp. 76 and 77.

102 Also: Šeparović, 2014, pp. 184-186.

103 See also: Skivenes and Harald Søvig, 2016, p. 350.

104 Jakovac-Lozić, 2013, p. 88.

105 See: Kilkelly, 2003, p. 55.

106 Fenton-Glynn, 2021, p. 367. For the factual description of this case, see: Doughty, Meakings and Shelton, 2019, p. 4.

care for the child, may be overridden by the risk of emotional harm to the child. The fact that positive changes in the child's biological family have not been achieved justifies adoption and the creation of a permanent and stable family environment for the child (paras. 145 and 146). On the other hand, it also confirms that terminating family ties is possible only exceptionally with a prior obligation to attempt reunification.<sup>107</sup> In addition, the mother had the opportunity to participate in the procedure and present her views regarding the adoption of the child (para. 149), thereby justifying the child's return to the biological family. For this reason, even in this case, the ECtHR did not find a violation of the right to respect for family life (paras. 149 and 150).

In the case of *Strand Lobben and Others v. Norway*, the ECtHR 'moves' from the previously adopted attitudes that the best interest of the child is a paramount consideration, pointing to the importance of balancing the interest of the child and the biological parents.<sup>108</sup> In this case, the ECtHR analysed the best interest of the child in the context of adoption through several levels. Thus, the importance of Art. 9 of the CRC was highlighted, according to which a child may not be separated from his parents without their will, and the separation itself must be in accordance with the best interest of the child (para. 207). In this sense, the necessity of constantly review of alternative care measures for children, characterised by temporality and mostly precede adoption, is particularly emphasised. In addition, stricter control of all measures that impose a certain restriction on contact between parents and children is necessary.<sup>109</sup> The ECtHR points out that the long-term placement of a child in a *de facto* family community, such as a foster family, can result in overriding the reunification of the biological family. The key term highlighted by the jurisprudence of the ECtHR for adoption and alternative care measures is time.<sup>110</sup> Namely, the passage of time should not be a guideline for determining the future relationship between the parent and the child. Still, it must be based on relevant considerations (paras. 208, 211 and 212). Therefore, the ECtHR particularly emphasises the importance of networking the interests of the child and the biological parents and consequently the necessity of involving the parents in the procedure, thereby protecting their procedural rights (para. 212).<sup>111</sup> By invoking the passage of time, and taking into account the complexity of adoption on the one hand, and the reunification of the biological family on the other, the ECtHR also points to the need for timely reports, i.e. expert reports (para. 222). Finally, the vulnerability of the child is particularly emphasised, more precisely, the importance of its detailed assessment (para. 224), which can be interpreted in

107 O'Halloran, 2021, p. 143.

108 Helland and Hollekim, 2023, p. 228; Bracken, 2023, p. 308. For the factual description of this case, see: Handbook on European law relating to the rights of the child, 2022, p. 123.

109 Melinder, Albrechsten van der Hagen and Sandberg, 2021, pp. 212 and 213.

110 Kilkelly states the same. See: Kilkelly, 2010, p. 257.

111 Melinder, Albrechsten van der Hagen and Sandberg, 2021, p. 214.

the context of the justification of taking further measures and limiting the right to respect for family life.<sup>112</sup> In this case, the ECtHR found a violation of the child's and the parents' right to respect for family life - the measure was legal and legitimate, but not necessary in a democratic society (paras. 225 and 226). Although the understanding of the best interest of the child in the jurisprudence of the ECtHR in adoption cases has evolved, the fundamental characteristic has remained unchanged, which is its careful assessment throughout each part of the adoption procedure, as well as the procedures that precede the adoption.

## ***5.2. The Best Interest of the Child in Cases of Adoption without Parental Consent***

In several cases, the ECtHR decided on adoption without parental consent in the context of the right to respect for family life. Although it is a right which is primarily related to the biological parents, it applies to a broader circle of persons, including the child. As regards consent to adoption, it prevents unjustified adoption, i.e. the termination of the child's ties with the biological family and the security of his or her placement in a new family.<sup>113</sup> It is related to the parents' right to take care of their child and the fact that parents cannot abandon their child.<sup>114</sup> Therefore, it is analysed, through selected cases, how the ECtHR interprets the best interest of the child in cases of adoption without parental consent.

In the case of *X. v. Croatia*,<sup>115</sup> the child was separated from the family due to the mother's mental illness and her addiction to opiates. The mother was completely deprived of legal capacity, and the child's grandmother did not show interest in taking care of him (paras. 42 and 43). Finally, the child was adopted without the mother's knowledge and consent (para. 20). Since there was no prospect that the mother's situation, and thus her ability to take care of the child, would change, it was in the best interest of the child to be placed under State care (para. 43). In addition, the ECtHR accepts the other measures taken as legal and legitimate, which refer to adoption, given that their aim was to protect the best interest of the child, but the necessity was lacking (para. 46). Notably, although the mother was completely deprived of legal capacity, she should have been allowed to express her opinion on the adoption of the child (para. 53), and as she was insufficiently involved in the procedure, it was not possible to assess her real relationship with the child (para. 54), and ultimately

112 On the case of *Strand Lobben and others v. Norway*, see also: Mørk et al., 2022, pp. 13-16; Vojvodić, 2020, p. 1551.

113 Fenton-Glynn, 2014, p. 51.

114 Hrabar and Korać Graovac, 2019, pp. 119, 120.

115 Application no. 11223/04, judgment of the ECtHR, 17 July 2008.

the justification of adoption.<sup>116</sup> Therefore, the ECtHR found a violation of the right to respect for the mother's family life in this case.

In the case of *Aune v. Norway*,<sup>117</sup> based on a hasty measure, the child was separated from the family due to exposure to violence, the mother's health problems, and the suspicion that she used opiates, and was finally adopted by a foster parent (paras. 5-13). The mother's deprivation of legal capacity and adoption without her consent had a legitimate goal, i.e. to protect the best interest of the child (para. 53). Although the ECtHR did not directly interpret the best interest of the child, by referring to earlier jurisprudence, it emphasised the permissibility of adoption only in exceptional circumstances and if the action was justified by an overriding requirement aimed at protecting the best interest of the child. However, before taking a complex measure such as adoption, the State must take appropriate measures to preserve family relations (para. 66). The proportionality and the legitimacy of the measure aimed at protecting the best interest of the child are also justified by a comprehensive approach, since the adoption was approved based on the appropriate amount of evidence (para. 79).<sup>118</sup> Therefore, in this case, there was no violation of the right to respect for family life (para. 80).

In the case of *A.K. and L. v. Croatia*,<sup>119</sup> the child was separated from the family and placed in foster care because of the mother's mental problems and the inadequate living conditions in which she lived, made it impossible to care for the child properly. Since the mother was deprived of the right to parental care, the child was adopted, and she was not allowed to submit a request to restore the right to parental care (paras. 4-16). The ECtHR concluded that all the measures, including adoption, had a legitimate goal, i.e. the protection of the best interest of the child (para. 61). In relation to the necessity of adoption as the last applicable measure, the following conclusions stand out. Although the competent national authorities have a wide margin of appreciation, cases related to adoption require greater caution, considering that its effect is irreversible, that is, the legal ties between the child and the parents are permanently severed.<sup>120</sup> Also, the importance of involving parents in the procedure, whose interests and attitudes need to be considered, is emphasised. As the ECtHR states, the impossibility of the mother's participation in the adoption procedure made it impossible to consider preserving the family relationship with the child (paras. 62, 63, 75 and 79). Despite the legal and legitimate treatment in accordance with the best

116 See also: Guštin, 2023, pp. 541, 542-544; Guštin, 2022, pp. 406 and 407; Čulo Margaletić, 2021, pp. 159-174; Šeparović, 2014, pp. 187-189.

117 Application no. 52502/07, judgment of the ECtHR, 28 October 2010.

118 See also: Majstorović, 2022, pp. 135-139.

119 Application no. 37956/11, judgment of the ECtHR, 8 January 2013.

120 This results from determining the best interest of the child in the adoption cases as a paramount consideration.

interest of the child, due to the lack of necessity, the ECtHR found a violation of the mother's right to respect for family life (para. 80).<sup>121</sup>

Unlike the so-called 'Croatian cases' in which the ECtHR found a violation of the right to respect for family life, in the case of *S.S. v. Slovenia*,<sup>122</sup> there was no violation of the right to respect for family life. Notably, due to mental health problems and inadequate care of the child, the mother was deprived of the right to parental care (which is why consent to adoption was not required), the child was entrusted to a foster family and finally was adopted (paras. 18, 38, 50 and 51).<sup>123</sup> The measures taken were legal and legitimate, and in this case, necessary. The right to respect for family life implies establishing a balance between the child's interests and the interests of the biological parents, whereby particular importance is attached to the best interest of the child. This interest may override the interests of the parents (para. 83). As pointed out earlier, the competent authorities must take appropriate measures to preserve the family ties between the child and the biological parents. In this case, the competent authorities implemented appropriate measures with a comprehensive approach (paras. 100-102). An expert opinion determined that further contact would harm the child since there was no emotional connection with the parent, and thus, there was no possibility of re-establishing the family relationship (para. 97). By balancing conflicting interests, the child's best interest is focused at a permanent and secure form of care that outweighs other interests (para. 99).<sup>124</sup>

In the case of *Omorefe v. Spain*,<sup>125</sup> due to financial problems and the impossibility of providing adequate care for the child, the mother independently entrusted the child to care. The child was placed in a foster family and finally adopted without the mother's consent (paras. 4, 9 and 10). The ECtHR points out that, to protect the right to respect for family life, it is necessary to balance interests between the child, parents, as well as public order and peace, whereby the best interest of the child always takes precedence. More precisely, the best interest of the child may override the interests of the parents, depending on the circumstances, and it must be a primary consideration (paras. 37 and 46). Therefore, it is the duty of the State to provide appropriate mechanisms to ensure compliance with the positive obligations arising from the right to respect for family life, taking into account the best interest of the child (para. 42). Since it was a mother who was unable to take care of the child due to her vulnerability, it is the duty of the competent social welfare authorities to provide appropriate assistance (para. 59). In accordance with the best interest of the

121 See also: Guštin, 2023, pp. 541, 544 and 545; Guštin, 2022, pp. 407 and 408; Korać Graovac, 2021, pp. 63-84; Šeparović, 2014, pp. 189-192.

122 Application no. 40938/16, judgment of the ECtHR, 30 October 2018.

123 Handbook on European law relating to the rights of the child, 2022, p. 125.

124 See also: Šimović, 2022, pp. 77-101; Guštin, 2022, p. 408.

125 Application no. 69339/16, judgment of the ECtHR, 23 June 2020.

child, any separation of the child from the family should result in its reunification, as a positive obligation in the context of the right to respect for family life (para. 38). Also, as regards the regulation of future relations between parents and children, the passage of time should not be the only criterion for their arrangement, but it must be based on relevant facts (para. 39). Therefore, the procedure in this case, including the adoption, was legal and legitimate, but not necessary, which is why the ECtHR found a violation of the mother's right to respect for family life (para. 44).

In the case of *V.Y.R. and A.V.R. v. Bulgaria*,<sup>126</sup> the child was also adopted without the mother's consent due to her addiction to opiates, since the earlier intervention of the competent State authorities did not result in positive changes and the possibility of the child's return to the family (paras. 1, 4 and 14). In this case, the ECtHR once again emphasises the importance of preserving family ties and the possibility of terminating them as an exception when the biological family proves to be unsuitable for the child. The ineligibility of the family generally results in the child's previous placement in a certain form of alternative care, which must be temporary and enable family reunification. The ECtHR also points to the child's interest in growing up in a healthy family environment, which means that the parent's right to respect for family life cannot result in taking measures that would harm the child's health and development (para. 77). Despite this, the ECtHR emphasises the importance of providing opportunity to the parents to participate in the decision-making process affecting the child (para. 78), which, in addition to adoption, would also refer to the separation of the child from the family and other actions related to the child.<sup>127</sup> Although it was an adoption without the consent of the parent, it represented an action in accordance with the best interest of the child since the adoption was established in child's early age (para. 97). Previously, the competent national authorities tried to implement reunification, but the mother was not interested in it. Instead, she advocated the child's stay in the foster family for an indefinite period (paras. 84, 92, 96 and 98), which is against the best interest of the child.<sup>128</sup> Therefore, in this case, the procedure was legal, legitimate and necessary, so the ECtHR did not find a violation of the right to respect for family life (para. 101).

In cases of adoption without parental consent, the ECtHR particularly emphasises the importance of a comprehensive approach. At the same time, applying the necessity test undoubtedly contributes to a more complete understanding of the best interest of the child and balancing the rights between the child and the biological parents.

<sup>126</sup> Application no. 48321/20, judgment of the ECtHR, 13 December 2022.

<sup>127</sup> Vité and Boéchat, 2008, p. 24.

<sup>128</sup> Several reasons speak to the disadvantages of long-term foster care. Thus, for example, it creates insecurity to children, there are frequent changes of foster families, foster parents are not as dedicated to children as adoptive parents, children potentially have behavioral problems, etc. See: Bainham, 2023, p. 216; Selwyn, 2023, p. 229; O'Halloran, 2018, p. 23; O'Halloran, 2018, p. 229.

### 5.3. The Best Interest of the Child in Cases of Intercountry Adoption

Intercountry adoptions represent a particularly complex form of adoption, which, along with the termination of all legal ties between the child and the biological family, is also characterised by different citizenships between the adoptee and the adoptive parents.<sup>129</sup> In addition to respecting the principle of the best interest of the child, the existence of subsidiarity is also a prerequisite for the establishment of intercountry adoption.<sup>130</sup> As regards intercountry adoption, it is also related to the recognition of a foreign decision on adoption so that it produces legal effects in another legal system.<sup>131</sup> The ECtHR also decided on several cases related to intercountry adoption, by interpreting the best interest of the child. Therefore, the selected cases are analysed below.

In the case of *Pini and Others v. Romania*,<sup>132</sup> Italian citizens adopted two girls who were Romanian citizens, and were denied the possibility of taking them to Italy due to the girls' opposition (paras. 99 and 157). Intercountry adoption was in accordance with the best interest of the child, considering that the children were abandoned and met the conditions for adoption (para. 144). The adoptive parents who were Italian citizens, were denied the opportunity to take their adopted children to Italy, which is why the ECtHR referred to the best interest of the child in the context of reunification.<sup>133</sup> It is emphasised that the positive obligation of the State is to establish a relationship with the parents, but that this obligation is not absolute, especially when children and parents do not know each other. Any action, in that case, must be based on the best interest of the child (paras. 150 and 151), which, even in this case, may override the interests of adoptive parents' in creating a family relationship, since the purpose of adoption is to provide the child with a family, and not the family with the child (paras. 154, 155 and 156). The best interest of the child must also be interpreted from the procedural aspect. Notably, the children rejected the possibility of going to Italy, and according to their age, it was justified for the children to express their opinion about the environment in which they want to grow and be brought up, therefore, that

129 See about it: Jakovac-Lozić, 2006, pp. 10 and 11.

130 Guštin and Rešetar, 2023, p. 903; see also: note 53.

131 See about it: Guštin and Rešetar, 2023, pp. 809-903; Hoško, 2019, pp. 336-338.

132 Application no. 78028/01 and 78030/01, judgment of the ECtHR, 22 June 2004.

133 Trotter cites this case in the context of the existence of family life that is denied by the actions of the competent state authorities. The ECtHR recognised the existence of family life in this case since the adoptive parents used letters as the only form of communication with the adopted children. Trotter, 2018, pp. 455, 456.

their opinion is respected.<sup>134</sup> The consequence of opposite treatment, i.e. allowing children to go to another country against their will, would hardly lead to integration into the adoptive family (paras. 157 and 158), which would undoubtedly be against the best interest of the child. Therefore, the measures taken were legal, legitimate and necessary, and the ECtHR did not find a violation of the right to respect for family life (paras. 188 and 189).<sup>135</sup>

In the case of *Harroudj v. France*,<sup>136</sup> the competent French authorities refused to recognise the *kafala* established in Algeria as a form of full adoption in France, stating that the *kafala* still provides the parent with the possibility of exercising parental care (paras. 10 and 11). As a rule, in this case, it was about the recognition of an institution similar to adoption created in another legal system. Notably, *kafala* is characteristic for Islamic countries that prohibit adoption. It is a form of long-term care that does not enable the full legal integration of the child into the family.<sup>137</sup> In this case, the ECtHR also states that the ECHR must be interpreted in accordance with international instruments, which also refers to the interpretation of Art. 8 in accordance with the CRC (para. 42). This would also refer to the obligation to apply the best interest of the child. Since adoption was prohibited in Algeria, and the *kafala* enabled the exercise of parental care, the ECtHR did not find a violation of the right to respect for family life (paras. 51 and 52). Moreover, the refusal to recognise *kafala* as a form of full adoption is an example of balancing the public interest and the interest of the bearer of the right to *kafala* (para. 51). This respects cultural pluralism and the integration of a child of foreign origin in another country, and although it is not explicitly stated, this undoubtedly represents acting in accordance with the best interest of the child.<sup>138</sup>

The case of *Wagner and J.M.W.L. v. Luxembourg*<sup>139</sup> is also related to intercountry adoption and refers to recognising an enforceable decision on adoption. Notably, a Luxembourg citizen who lived as a single person adopted a child in Peru, after which she requested recognition of the adoption as a full adoption in Luxembourg (paras. 6-9). However, the Luxembourg legislation did not foresee the possibility of full adoption for single people (para. 123), which is why the recognition of the adoption was denied.<sup>140</sup> It should be noted that in this case, there was a *de facto* family relationship, and thus family life (para. 117). In the context of adoption, the ECtHR once again emphasised

134 According to research conducted by Helland, Križ and Skivenes, in certain European legal systems (Austria, England, Estonia, Finland, Germany, Norway and Spain), 85% of children consider that their opinion is not respected in the adoption procedure. Stein Helland, Križ and Skivenes, 2023, p. 216; O'Halloran, 2018, pp. 203, 204.

135 On this case, see also: O'Halloran, 2021, pp. 206 and 207.

136 Application no. 43631/09, judgment of the ECtHR, 4 October 2012.

137 O'Halloran, 2021, p. 6, 159; Vité and Boéchat, 2008, p. 21.

138 On this case, see also: Koumoutzis, 2021, pp. 939-965.

139 Application no. 76240/01, judgment of the ECtHR, 28 June 2007.

140 See also: Župan, 2012, p. 660.

the importance of interpreting the right to respect for family life in accordance with the CRC and that the relationship between the adoptee and adoptive parent is the same nature as the relationship between parents and children (paras. 120 and 121). Despite the reference to the conflict of law rules which referred to the application of Luxembourg legislation, the non-recognition of the adoption as a full adoption faced the adoptive parent with numerous obstacles and prevented the child from fully integrating into the family (para. 132). This departs from the best interest of the child, and it also follows that priority is given to conflict rules instead of social reality (para. 133). Moreover, the circumstances under which the child was adopted require recognition of the adoption as a full adoption, established by the decision of a foreign court (para. 134).<sup>141</sup> Despite the legal and legitimate actions of the competent national authorities, it was not necessary, which is why there was a violation of the right to respect for family life, and in connection with that, discriminatory treatment also (paras. 136 and 160).<sup>142</sup>

Intercountry adoptions show the complexity of interpreting the best interest of the child and its connection with other rights regulated by the CRC. Time is also a decisive factor in these cases, so at each stage of the procedure, it is necessary to be guided anew by considering the best interest of the child.

## 6. Conclusion

The best interest of the child is a mechanism that enables the achievement of the most appropriate solution for the child, which is why the absence of a single definition allows its adaptation in different circumstances. In this sense, it is necessary to understand the purpose of the best interest of the child. It is the protection of the child's welfare, which depends on various factors that the competent national authorities must take into account when deciding on the adoption. The best interest of the child in the adoption procedure means that appropriate measures were previously taken to balance the biological parent's rights and the child's best interest, the failure of which ultimately results only in what is best for the child.

Although the right to respect for family life does not explicitly include adoption and the best interest of the child, the ECtHR's interpretations significantly contribute to their understanding. Therefore, it should be pointed out that the ECtHR interprets the best interest of the child in adoption cases comprehensively and dynamically,

141 Since the child was abandoned, Šeparović points out that the recognition of this foreign decision on adoption also protects the child's right to special protection and assistance from the state stipulated by the CRC. Šeparović, 2014, p. 184.

142 See also: Hoško, 2019, pp. 337 and 338.; Shannon et al., 2013, p. 37.

in accordance with the circumstances of each case. The dynamism of the right to respect for family life means that the best interest of the child is an integral part of it. More precisely, the right to respect for family life complements the meaning of the best interest of the child by affirming the child's right to live in a safe family environment.

The ECtHR interprets the best interest of the child as a paramount consideration in adoption procedures. Nevertheless, respecting the positive obligations of the State in the context of the right to respect for family life, the importance of balancing the interests of the child and the biological parents is emphasised, with a significant limitation. Notably, the interests of the parents are respected as long as the child's interests are not jeopardised. The procedure that precedes adoption, i.e. the attempt to reunify the biological family, is mandatory but not an endless procedure. This means that it must be based on proportionality as long as such treatment acts in the direction of protecting the best interest of the child. The same applies to the possibility of biological parents to participate in the adoption procedure, which the best interest of the child may override.

The ECtHR does not call into question the best interest of the child but rather the necessity of the measures taken: adoption or other measures that precede it. This means there is no single answer according to which criteria the competent national authorities act to protect the family and determine adoption as a last applicable and necessary measure. Whether the adoption is in the best interest of the child depends on the circumstances of the case in which it is necessary to take a series of inter-related previous actions, each of which must be necessary and in the best interest of the child.

Competent national authorities must take care of the timely undertaking of measures aimed at the reunification of the biological family and the regular questioning of the imposed measures. Only after the passage of time, in which the measures taken to preserve the biological family did not result in positive changes, adoption can be justified, that is, to meet the criterion of necessity. It is also important to point out that questioning the child's opinion in the adoption procedure determines the outcome of that procedure – the child's right to be heard is an integral part of the principle of the best interest of the child. This, in accordance with the best interest of the child, ensures the child's life in a safe and stable family environment.

With the previous interpretation, the ECtHR gave a significant contribution to the understanding of the best interest of the child by confirming that it is a *condicio sine qua non* to all actions in the adoption procedure. Therefore, the ECtHR does not need to refer directly to Art. 3 of the CRC, considering that the context of the case and the teleological interpretation reflect the best interest of the child.

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