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## The right of children to adoption in light of the European Convention on Human Rights

*'It's a good world if it's a good world to  
be a child in.'*  
(Balázs Véghegyi)

**ABSTRACT:** Each country applies its own national rules on the authorization and possible termination of adoption. Nevertheless, the practice of adoption is based on commonly agreed-upon principles and values, including the best interests of the child, which also affect the final fate of the child. The primary aim of adoption worldwide is to establish kinship between the adopter, his or her relatives, and the adopted child to ensure that the child is brought up in a family. Adoption remains the most appropriate legal instrument to replace birth families. International adoption is a secondary option that can occur when domestic adoption measures fail, with the exception of adoption by relatives and spouses. The protection of human rights is an important area in the wide range of activities of the Council of Europe, which was founded in 1949. The European Convention on Human Rights (ECHR), adopted in Rome in 1950, is an international norm that can be directly invoked and applied in the legal systems of states, including Hungary. The ECHR is a framework convention and therefore the substance of each right is expounded in the case law of the European Court of Human Rights (ECtHR). The case law of the ECHR is rich and authoritative in the field of fundamental rights protection and has ruled on several socially important issues, including adoption in the area of family law. The intention to adopt can be interpreted as the creation of a family because a family can be created through adoption, but the ECHR does not provide a substantive right to adoption.

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„The research on which the study was based was supported by the Ferenc Mádl Institute for Comparative Law. The language proofreading of the study was financed by the Hungarian Comparative Law Association, Miniszterelnökség and Bethlen Gábor Alap.”

**KEYWORDS:** adoption, child, child's best interest, family, marriage, discrimination, ultima ratio, case law.

### **1. Introduction and relevance of the topic**

There are no uniform rules on adoption within the Council of Europe; each country applies its own national rules on the authorization and possible termination of adoption. Nevertheless, the practice of adoption is based on commonly agreed-upon principles and values, including the best interests of the child, which also affect the final fate of the child. Based on international conventions, Hungarian legislation has also declared the right of the child to be raised by his or her parents and to be provided with special substitute protection in the form of family, family placement, domestic adoption, or, if this fails, international adoption, if the child cannot be left with his or her birth family. The primary aim of adoption worldwide is to establish kinship between the adopter, his or her relatives, and the adopted child to ensure that the child is brought up in a family, even if the child has no birth parents, or the parents are unable or unwilling to bring up the child properly.<sup>1</sup> The law protects the best interests of the child primarily by protecting the child's placement and upbringing in a family environment where this is lacking, by seeking to make up for it. Adoption remains the most appropriate legal instrument to replace birth families.

International adoption is a secondary option that can occur when domestic adoption measures fail, with the exception of adoption by relatives and spouses. The secondary nature of international adoption was confirmed by the Convention on the Rights of the Child adopted in 1989,<sup>2</sup> the Hague Convention on Adoption in 1992,<sup>3</sup> and the Civil Code adopted in 2013.<sup>4</sup> The basic national rules on adoption are contained in the Fourth Book of the Civil Code—the Book of Family Law (hereinafter referred to as: CC or the Book of Family Law).

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<sup>1</sup> Katonáné Pehr, 2018, p. 1.

<sup>2</sup> Act LXIV of 1991 Convention on the Rights of the Child, signed in New York on 20 November 1989; 1989 of New York (hereinafter referred to as: the Convention on the Rights of the Child).

<sup>3</sup> Act LXXX of 2005 on the Protection of Children in the Field of Intercountry Adoptions and the on Protection of Intercountry Adoptions and Cooperation in Respect of Such Adoptions, done at The Hague on 29 May 1992 (hereinafter referred to as: the Hague Convention on Intercountry Adoption).

<sup>4</sup> Act V of 2013 on the CC.

Mária Neményi and Judit Takács conducted a study between 2012 and 2014 at the regional child protection service in Budapest and found that the actors in adoption encounter discrimination at several levels. On the one hand, at the level of regulation, certain family forms are excluded from the beginning, while others are preferred. On the other hand, ‘public opinion tends to view socially constructed family forms, which are not based on blood ties, as abnormal or deviant and to contrast them with the “real” family, which is usually formed by heterosexual couples and their biological children.’<sup>5</sup>

The protection of human rights is an important area in the wide range of activities of the Council of Europe, which was founded in 1949. The European Convention on Human Rights (hereinafter referred to as: ECHR), adopted in Rome in 1950, is an international norm that can be directly invoked and applied in the legal systems of states, including Hungary.<sup>6</sup> The ECHR lays down non-derogable rights that states may not infringe, such as the right to life, and protects rights and freedoms that may be restricted by law only where this is strictly necessary in a democratic society, such as the right to liberty and security or the right to respect for private and family life.<sup>7</sup> All State parties to the ECHR have incorporated its provisions into their domestic law in some way. Although few articles specifically address children’s rights, many of the ECHR’s provisions apply to children.<sup>8</sup>

The ECHR is a framework convention and therefore the substance of each right is expounded in the case law of the European Court of Human Rights (ECtHR).<sup>9</sup> The ECtHR is a judicial body of the Council of Europe that hears applications from individuals and receives interstate applications. Currently, 47 countries have undertaken<sup>10</sup> efforts to guarantee fundamental rights and freedoms protected by the ECHR. The case law of the ECHR is

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<sup>5</sup> Neményi and Takács, 2015, pp. 69–70.

<sup>6</sup> In Hungary, the Convention – and several of its additional protocols – were promulgated by Act XXXI of 1993.

<sup>7</sup> See Emberi Jogok Európai Bírósága (2022) Az Európai Emberi Jogi Egyezmény – Élő jog. Available at: [https://echr.coe.int/Documents/Convention\\_Instrument\\_HUN.pdf](https://echr.coe.int/Documents/Convention_Instrument_HUN.pdf) (Accessed: 20 January 2023).

<sup>8</sup> Bereczki, 2021, p. 39.

<sup>9</sup> The judgments are available on the Court's website in the so-called HUDOC search system, mainly in English and partly in French.

<sup>10</sup> See Emberi Jogok Európai Bírósága (2022) Az Európai Emberi Jogi Egyezmény – Élő jog, pp. 22–23. Available at: [https://echr.coe.int/Documents/Convention\\_Instrument\\_HUN.pdf](https://echr.coe.int/Documents/Convention_Instrument_HUN.pdf) (Accessed: 20 January 2023).

rich and authoritative in the field of fundamental rights protection and has ruled on several socially important issues, including adoption in the area of family law.

The following sections will consider the international legal framework for adoption and then examine some pertinent adoption decisions in the ECHR case law and presents related provisions of Hungarian adoption rules.

## **2. Framework on international adoption**

International conventions have significantly facilitated the development of adoption rules. There have been many conventions on international adoption, but the question of its necessity and appropriateness has divided public opinion for decades and is still not unanimous. Many see it as a new opportunity for children to be brought up in a permanent family environment after unsuccessful domestic adoption, while others see it as a way of infringing on children's rights (e.g., loss of identity and disruption of the continuity of upbringing) by allowing international adoption.<sup>11</sup> However, recently, there has been a growing emphasis on "last resort," which is in line with one of the principles of international adoption, subsidiarity. The principles of international adoption also imply a greater emphasis on the effective functioning of national child protection systems.<sup>12</sup>

A seminar on international adoption was held in Leysin, Switzerland, in 1960, where the first principles of adoption were laid down, namely that the best interests of the child, not the parents, are paramount in adoptions and that international adoption is an *ultima ratio*. These principles served as the basis for subsequent national and international documents.

The Council of Europe called for a revision of the 1967 European Convention on the Adoption of Children, which resulted in the revised Convention on the Adoption of Children, signed in Strasbourg on November 27, 2008 (hereinafter referred to as the European Convention on Adoption), which Hungary signed on November 29, 2010, but has not been promulgated since then. However, the 1967 European Convention on Intercountry Adoption was also an important instrument of the Council of Europe in the field of adoption, as it harmonized the substantive law of the Member States and laid down the most basic standards on adoption.<sup>13</sup>

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<sup>11</sup> Kálmán, 2018, pp. 51–54.

<sup>12</sup> Marschalkó, 2013, p. 272.

<sup>13</sup> Katonáné Pehr, 2018, para. 49.

Article 21 of the Convention on the Rights of the Child lays down the basis for international adoption by stating that adoption abroad may be considered as other means of providing the child with the necessary care if the child cannot be adequately placed in his or her country of origin and the best interests of the child are paramount. The Hague Adoption Convention deals in the most detail with international adoption. It provides that adoption can only take place when it can be shown that all possible forms of care have been exhausted in the child's country of origin and that international adoption is in the best interests of the child. The adoption procedure between Hungary and the signatory State Parties is simplified as it will not require the authorization procedure of both States Parties will only be able to contact each other through the central authorities of the states.

In Hungary, international adoption was first regulated by Act No. 13 of 1979 on Private International Law and bilateral international conventions with several foreign countries. Subsequently, the Convention on the Rights of the Child, the Hague Convention on the Adoption of Children, and the current Act XXVIII of 2017 on Private International Law completed the rules in addition to the provisions of the Book Family Law.

The Book of Family Law defines international adoption in accordance with the Hague Adoption Convention, where it is not nationality or habitual residence that is relevant but the fact that the adoption results in a change in the child's habitual residence. Accordingly, an international adoption is one where the child is permanently transferred to another country as a result of the adoption, irrespective of the nationality of the adopter and whether the child's nationality changes.<sup>14</sup> Foreign adoption, except for adoption by a relative or spouse, may only be secret. Adoptions covered by the Hague Convention on Intercountry Adoption may occur only if the authorities of the receiving state have established, inter alia, that prospective adoptive parents meet the conditions for adoption and are fit and proper for adoption. The Hague Adoption Convention opens up the possibility of recognizing adoptions made in another Contracting State; it seeks to avoid the need to repeat the adoption process, which also means that adoption, made in accordance with the provisions of the Convention, must be recognized as such by the operation of law. Recognition may be refused only when it is manifestly contrary to the public policy of the country with regard to the best interests of the child.<sup>15</sup>

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<sup>14</sup> Art. 4:129(1) of the CC.

<sup>15</sup> Katonáné Pehr, 2018, para. 57.

However, the legal concept of adoption and the legal effect of whether adoption terminates the relationship between the adopted person and the birth parents, which fundamentally affects the parent-child relationship, differs from one country to another. In this respect, a distinction is made between incomplete adoptions, where the child's links with his or her original family are maintained, and full adoptions, where the adopted child takes on the status of the adoptive parents' biological child; that is, the adoption terminates the parental rights of the biological parents.

Problems of conflict of laws may arise because some states recognize either full or incomplete adoption, with some countries having both forms of adoption simultaneously, such as France and Italy. The minimum rule in Article 27 of the Hague Convention on Adoption is intended to unify this divergent practice by providing that, where the legal effect of an adoption authorized in the state of origin does not extend to the termination of the pre-existing parent-child relationship, it should be possible for the host state to convert it into an adoption with a legal effect that terminates the relationship between the adopted child and the birth parent.

### **3. The European Court of Human Rights on family law in general**

The European Court of Human Rights is the court established to monitor compliance with the European Convention on Human Rights. Based in Strasbourg, the ECtHR was the most important human rights forum in Europe. The Convention protects, among other things, the right to respect for private and family life,<sup>16</sup> the right to marry and found a family,<sup>17</sup> and the prohibition of discrimination.<sup>18</sup> The previous practices of the ECHR also laid down a number of principles that have contributed to the development of children's rights,<sup>19</sup> as the best interests of children have become a

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<sup>16</sup> Art. 8 of the ECHR.

<sup>17</sup> Art. 12 of the ECHR.

<sup>18</sup> Art. 14 of the ECHR.

<sup>19</sup> These have been discussed in the UN Committee on the Rights of the Child's Comprehensive Commentary No. 14, which states that the "best interests" of the child are threefold. First, the child's substantive right to have his or her best interests assessed as a primary consideration. Second, a fundamental principle of interpretation, i.e., where a legal provision is open to more than one interpretation, the interpretation of the law which will most effectively serve the best interests of the child should be taken as the basis. Third, it is also a procedural rule, as in the decision-making process involving a child, the potential

consideration. Most children's rights cases are related to Article 8 of the ECHR; however, other articles may also play a role in protecting children's rights.

Changes in the family structure are constantly taking place in society, resulting in a more diverse structure at certain times and a more homogeneous structure at others. Since the mid-20th century, social changes have led to diverse family structures as well as increased mobility between family forms.<sup>20</sup> Apprehensively changing life situations call for a new approach, as new, previously unaccepted, alternative family forms have taken their place alongside marriage as the traditional family form. There is a widespread view that the pluralization of family forms leads to the destabilization and subsequent disintegration of the family institution. This approach is often based on the "confusion" between marriage and family.<sup>21</sup> 'Marriage, however, has lost its monopoly as a legitimation of the couple and the family, while at the same time, the role of parenthood and with it the family is growing in importance in Europe.'<sup>22</sup>

Practices in different countries are divided on what kinds of couples can adopt jointly. Adoption by a same-sex spouse is generally recognized, but adoption by unmarried same-sex or same-sex partners differs. We can ask: what types of relationships can be considered a "family;" who can form a family and what type of family the state wants to promote and create through adoption?<sup>23</sup>

Article L of the Fundamental Law, as amended several times, states that 'Hungary protects the institution of marriage as a community of life

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negative and positive effects of the decision on the child concerned must be assessed and explained in detail in the reasons for the decision of the court or authority.

<sup>20</sup> The main social trends affecting family structure in recent decades are well known: fertility levels have fallen below replacement levels; the timing of childbearing has been postponed; childbearing often occurs outside marriage; the timing of marriage is being postponed and relationships have become more fragile. Rácz, 2020, pp. 16–22.

<sup>21</sup> Harcsa, 2014, pp. 2–12.

<sup>22</sup> Vaskovics, 2002, pp. 360–361.

<sup>23</sup> Czech, Lithuanian, Romanian, Slovakian law excludes same-sex couples from adopting, and Polish law explicitly prohibits joint adoption. English, Belgian, Danish, Finnish, French, Dutch, Norwegian, Spanish, Swedish and Danish law also allows for same-sex adoption by same-sex partners other than married couples. In addition to the above countries, e.g. Estonian, German, Italian, Slovenian legislation also allows for adoption by one same-sex partner of the other's biological child. In Romania, a joint adoption is possible if the same-sex partner has been co-parenting the half-orphan child of the cohabiting partner for 5 years. Pehr, 2018, para. 30.

between one man and one woman, based on voluntary consent, and the family as the basis for the survival of the nation.’ Family relationships are based on marriage and parent-child relationships with the mother being a woman, and the father, a man as Hungary supports childbearing. However, the above-mentioned interpretation of Article L of the Fundamental Law does not fully cover all family relations. The “principle of protection of the family” enshrined in the Book of Family Law expresses that family law protects the family as a community, i.e., it recognises the relationship between individual family members. This protection extends both to relationships established by law (marriage, adoption by descent, guardianship, etc.) and to other forms of cohabitation (e.g., step-parent-child or foster-parent-child relationships). The protection of the family as a community is closely linked to the principle of harmony between family and individual interests. The ECHR also states that the interests and rights of children in family relationships, including adoption, afforded enhanced protection.

Article 8 of the ECHR, the right to respect private and family life, declares a broad but elusive human right in the legal relationships of paternity, custody, contact, and adoption. As far as family law relationships are concerned, in line with modern life relationships, the Convention covers not only life relationships formally recognized by the state but also parental custody and contact issues relating to children from relationships other than cohabitation, from partnerships to adoption matters. The ECHR examines the concept of family on a case-by-case basis, taking into account, for example, the degree of consanguinity, the fact of actual cohabitation, the existence of financial or other dependencies, etc., in addition to marriage.<sup>24</sup>

It should also be stressed that the ECHR does not replace national authorities, because its task is to protect human rights and monitor their implementation by examining the conformity of the effects of national legal interpretations with the Convention. The ECtHR’s practice impacts the development of national family law, not least in terms of ensuring that changes in family law move in the same direction. In several cases, the ECHR uses comparative legal analysis to examine whether European solutions have reached a common understanding of the issue in question—that is, whether there is a common denominator. The discretion of national authorities is wide when there is no consensus among Member States on a given issue.

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<sup>24</sup> Winkler, 2003, p. 27.



However, the ECHR cannot annul national rules or decisions, nor can it oblige a state to do or refrain from doing something. However, the ECtHR case law provides guidance to ensure that similar disputes in particular areas of law are resolved at the national level and do not need to be referred to. The individual decisions and the principles and reasons for them guide national, and therefore domestic, decisions, and subsequent decisions of the ECHR if they can be applied to the new case.<sup>25</sup>

The Convention on the Rights of the Child was implemented primarily through the relevant provisions of the ECHR and its practices. It should be noted that although ECHR jurisprudence is influenced by the Convention on the Rights of the Child, its adoption is not automatic or systemic, but is often a reference point, particularly to the best interests of the child, which are paramount, that is, in the long term.<sup>26</sup>

#### **4. Some cases from the adoption practice of the Strasbourg Human Rights Court**

In the Convention, the family as a fundamental human rights institution is reflected in Article 8 “the right to respect for private and family life” and Article 12 “the right to marry,” and the ECHR case law refers to these articles together, however, if there is no infringement of Article 8, then Article 12 is excluded. The relationship between the two articles is therefore characterized by a *lex generalis* and a *lex specialis*, with Article 12 having diminished practical importance. In several of its decisions on adoption, the ECtHR examines Article 14 of the Convention (prohibition of discrimination) in conjunction with Article 8, which discusses individual cases. According to the practice of the ECtHR, discrimination can be said to exist if it is not applied for a legitimate reason and purpose and if it goes beyond what is necessary to achieve the aim pursued, that is, if it is disproportionate.

The first and second paragraphs of Article 8 are distinguishable. While the first paragraph declares, in general, the right to respect private and family life, the second paragraph states that this right may be restricted by the State in justified cases.

Restriction may be based solely on the law when the interests of national security, public safety, or economic well-being in a democratic society so

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<sup>25</sup> Dudás, 2018, pp. 21–24.

<sup>26</sup> Szentgáli–Tóth, 2018, p. 8.

require, for the prevention of disorder or crime, or for the protection of public health, morals, or the rights and freedoms of individuals.<sup>27</sup> However, the ECHR does not define the concept of a democratic society, which is a matter for the ECtHR to interpret. However, according to the practice of the ECtHR, two conditions must be fulfilled. First, the intervention must be in the public interest and must comply with the requirement of proportionality.<sup>28</sup>

As explained earlier, the concept of family life can only be achieved through an understanding of the ECtHR case law. The manner in which family relationships are defined and understood varies widely from one legal system to another. However, the ECtHR consistently recognizes as a family relationship the family ties that actually exist and examines them individually in light of the circumstances of each case.<sup>29</sup> European family forms are also pluralizing as traditional and new family forms coexist in societies.

The correct interpretation of Article 8 is that the State not only has a passive obligation of non-intervention but also an active obligation on the Member State concerned, which is to respect family life.<sup>30</sup> This article is one of the most flexible provisions of the ECHR as the content of the rights it protects evolves dynamically. According to Dudás, there are four protected areas: privacy, family life, home, and private correspondence, and concepts that have autonomous meaning in ECtHR practices.<sup>31</sup>

The intention to adopt can be interpreted as the creation of a family because a family can be created through adoption, but the ECHR does not provide a substantive right to adoption. However, the interpretation of privacy under Article 8 is sufficiently broad to include the right to establish and maintain relationships with another person. These interpretations of the ECtHR are also discussed in individual cases.

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<sup>27</sup> Raffai, 2016, pp. 84–85.

<sup>28</sup> Grád and Weller, 2011, p. 449,

<sup>29</sup> In *X and Others v Austria*, the ECtHR held that same-sex partners living together *de facto* on a long-term basis constitute “family life” within the meaning of Article 8 of the European Convention, in the same way that cohabitation between same-sex partners in the same situation would constitute family life. *Case of X and Others v. Austria* App. No. 19010/07, 19 February 2013.

<sup>30</sup> Grád and Lakatos, 2012, pp. 32–33.

<sup>31</sup> Dudás, 2021, pp. 225–226.

#### **4.1. Case of *Kearns against France*<sup>32</sup>**

##### 4.1.1. Situation

The mother declared that she wished to place her child in state care, requested confidential treatment of her case, and consented to the adoption of the child under the French Civil Code. Months later, the applicant filed an action seeking annulment of the decision to adopt her child and place the child with her. The court rejected the application. The applicant claimed that the authorities had violated her right to respect her private and family life under Article 8 and referred her to the ECHR.

##### 4.1.2. ECtHR decision and assessment of the case

The ECtHR held that the provision of the French Guardianship and Family Code which allows a two-month period for the withdrawal of parental consent to the adoption of a child - a “renunciation” - does not constitute a disproportionate interference with the rights of the child and the parents and therefore does not violate Article 8 ECHR. Indeed, this period seeks to strike an appropriate balance among the interests of the child, birth parents, and adoptive parents, where the best interests of the child are paramount. The ECHR also held that it does not follow positive State obligations under Article 8 that a professional interpreter must be provided for the declaration of the adoption of the child if hospital staff who speak the mother’s mother tongue are present and provide adequate information and language translation.

It was in the child’s best interests to develop a stable emotional relationship with the newly adopted family as quickly as possible. The ECHR also found that there was no common denominator in the practice of Member States and that, although the discretion of the State parties was wide, the period for withdrawal of the declaration varied from ten days to three months in practice in some countries. a two-month period was considered sufficient to allow the mother to make a responsible decision on the fate of her child.

The French authorities provided the mother with sufficient and detailed information as well as language assistance not required by law, written information on the legal consequences of the parental declaration,

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<sup>32</sup> *Affair E Kearns v. France* App. No. 35991/04, 10 January 2018.

and the possibility of withdrawing it, including the deadline. The decision to refuse to return the adopted child was, by law, aimed at protecting the rights and freedoms of the child, and therefore had a legitimate purpose.

#### 4.1.3. The Hungarian legislation

The revocability of parental consent for adoption has always been a sensitive issue in adoption regulations. According to the Book of Family Law a parent's consent to the open or secret adoption<sup>33</sup> of a child may be withdrawn uniformly within six weeks of the child's birth to allow the child to be raised by the parent or another relative. Parents must be informed of the possibility of withdrawal.

Based on this declaration, the guardianship authority shall immediately obtain information about the circumstances of the child's upbringing and the validity of the parent's or other relatives' undertakings to raise the child. Parental custody shall otherwise cease when the child reaches six weeks of age, but if the declaration relates to a child over six weeks of age, parental custody shall cease with the declaration. The termination of parental custody is always established by a decision of the guardianship authority.<sup>34</sup>

## 4.2. *Case of E. B. against France*<sup>35</sup>

### 4.2.1. Fact

The applicant's kindergarten teacher was in a long-term relationship with a same-sex psychologist partner and wanted to adopt the child. The authorities rejected her request, despite the fact that sole adoption was possible under French law. In the application submitted to the ECtHR, the applicant referred to a violation of Articles 8 and 14.

### 4.2.2. ECJ decision and evaluation of the case

The ECtHR ruled that the decision conflicted with Article 8, which states the protection of family life, and Article 14, which prohibits discrimination

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<sup>33</sup> Katonáné Pehr, 2018, para. 46.

<sup>34</sup> Arts. 4:125–126. of the CC.

<sup>35</sup> *E.B. v. France* App. No. 43546/02, 22 January 2008.

since the authorization of adoption was denied based on the applicant's sexual orientation. The ECtHR has confirmed that with regard to the rights covered by Article 8 of the ECHR, discrimination based on sexual orientation can only be justified on the basis of particularly convincing and compelling arguments, and the reference to the lack of a role model of the opposite sex is neither sufficiently convincing nor compelling enough that this on the basis of which the authorization of adoption can be refused.<sup>36</sup>

Since French law allows single persons to adopt children, it also opens up the possibility of adopting single homosexuals as applicants. The state may not act in a discriminatory manner during the application. Article 8 of the ECHR does not guarantee the right to find a family or adopt it but includes the right to establish and maintain relationships with other persons. The provisions of French law do not contain a requirement that adoption must be undertaken by persons of the opposite sex; therefore, adoption cannot depend on the sexual orientation of a single parent.<sup>37</sup>

#### 4.2.3. The Hungarian regulation

According to the Civil Code and the Book of Family Law, a child can be adopted primarily by spouses – in the case of adoption by relatives and the parent's spouse—and under certain conditions by a single person—that is, only a married woman and man can be adoptive parents. An adoptive person can be a person who has reached the age of 25 years, has the capacity to act, is older than the child by at least 16 years and at most 45 years, and whose personality and circumstances are determined as suitable. In the case of submitting an application for the adoption of a child over 3 years of age, the adoption can be granted for the benefit of the child, even if the age difference between the adoptive parent and child is no more than 50 years. Age differences must be disregarded in cases of relative or conjugal adoption. 'The Book of Family Law attaches particular importance to marital status at the time of adoption.'<sup>38</sup>

However, in exceptional cases, it is possible for someone to adopt the child alone. However, to establish the suitability of the person intending to adopt, the consent of the minister responsible for family policy is also required. When giving consent, the Minister considers the interests of the

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<sup>36</sup> O'flaherty and Fisher, 2008, p. 8.

<sup>37</sup> Polgár, 2008, pp. 90–91.

<sup>38</sup> Katonáné Pehr and Filó, 2022, p. 201.

child, considering Article XVI of the Constitution of Hungary to the provisions of paragraph (1) of the Article (see Point 3).

In the case of adoption by a single person, raising a child is the sole responsibility of the parents, and for the sake of the child, an imaginary mother or an optional imaginary father must be registered for adoption. According to The Book of Family Law, you cannot adopt a person who is subject to a final court judgment terminating parental supervision, who is subject to a final court judgment prohibiting him from public affairs, or whose child has been removed from the family and taken into foster care.<sup>39</sup>

### ***4.3. Fretté's case against France***<sup>40</sup>

#### 4.3.1. Facts

The applicant submitted several applications for the adoption of a child, which were rejected by the authorities. Following this appeal, the court annulled the authorities' rejection decision on the basis that the applicant would be suitable for raising a child, based on preliminary examinations. The authority that made the original decision appealed to the Council of State, which invalidated the court's decision and cited the applicant's lifestyle. The applicant contested this decision because, in his opinion, the decision arbitrarily interfered with his private and family life protected by Article 8 of the ECHR, as it was based solely on an a priori unfavorable value judgment regarding his sexual orientation.

#### 4.3.2. ECJ decision and evaluation of the case

Primarily referring to the states' freedom of judgment, the ECtHR considered the explanation given by the French state to be objective and reasonable and, based on this, ruled that the refusal of the adoption application was not based on discrimination. According to the decision of the ECtHR, the French authorities did not violate Article 14 of the ECHR in conjunction with Article 8 by refusing consent to the adoption request of the single homosexual applicant because the reason for the refusal was not sexual orientation but the health and rights of the children the state intended to protect.

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<sup>39</sup> Art. 4:121 of the CC.

<sup>40</sup> *Fretté v. France* App. No. 36515/97, 26 February 2002.

According to the ECtHR, there is no common denominator in the practice of the state, and there is no consensus in the field of enabling or prohibiting adoption by single adults or single homosexual persons. Therefore, the discretion of state parties must be widened and the priority interests of children must be protected to achieve a balance. Therefore, the French authorities' decision to deny adopter eligibility does not violate the principle of proportionality.

According to the ECtHR, national authorities make legitimate and reasonable decisions when the right to adoption is limited by the interests of the adoptable child, even though the applicant's intentions are legitimate. Adoption means that 'we provide a family for the child, not a child for the family, and whoever is selected by the state as an adopter must provide the most appropriate home for the child in all respects.'<sup>41</sup> In these states, there is a debate about the interests and mental vulnerability of the child in adoption cases. In the present case, the applicant's "lifestyle" does not provide sufficient assurance that he would be able to provide adequate family, educational and psychological conditions for receiving a child.

The judgment was accompanied by concurring and separate opinions.

According to concurring opinions, it would have been easier for the ECtHR to reject the application of the intending adopter based on the inapplicability of Article 14 of the ECHR than to declare it applicable but intact because Article 8 does not provide an independent right to adoption or family formation. According to separate opinions, the ECtHR must exercise supervision in the field of rights provided by Article 14 of the ECHR because the reason for the French refusal was absolute, and therefore it was not possible to examine real interests.

#### 4.3.3. The Hungarian regulation

According to the Book of Family Law, a child can be adopted primarily by spouses – in the case of adoption by relatives and the parent's spouse—and under certain conditions by a single person—that is, only a married woman and man can be adoptive parents. "The Book of Family Law attaches particular importance to marital status at the time of adoption."<sup>42</sup>

However, in exceptional cases, it is possible for someone to adopt the child alone. However, to establish the suitability of the person intending to adopt,

<sup>41</sup> *Fretté v. France* App. No. 36515/97, 26 February 2002, para. 42.

<sup>42</sup> Katonáné Pehr and Filó, 2022, p. 201.

the consent of the minister responsible for family policy is also required. When giving consent, the Minister considers the interests of the child, considering Article XVI of the Constitution of Hungary to the provisions of paragraph (1) of the Article.

In the case of adoption by a single person, raising a child is the sole responsibility of the parents, and for the sake of the child, an imaginary mother or an optional imaginary father must be registered for adoption.

#### ***4.4. Emonet's case against Switzerland<sup>43</sup>***

##### **4.4.1. Facts**

A stepfather decided to adopt his orphaned and sick foster daughter so that they would become a legal family. The Cantonal Court in Geneva approved the adoption, but the registry office informed the mother that, as a result of the adoption, parental custody of her daughter was terminated because they were not married. The applicants went to court, and in the appeal procedure, the Federal Court found, based on the Swiss Civil Code, that the joint adoption of cohabiting couples was excluded, and that members of cohabiting couples could adopt each other's children.

In a petition submitted to the ECHR, applicants referred to a violation of their right to respect family life.

##### **4.4.2. ECJ decision and evaluation of the case**

According to the ECtHR, respecting the right to family life requires the consideration of real ties beyond biological relationships. However, Swiss laws did not allow the adoption of the child of a live-in partner; therefore, the ECtHR found a violation of Article 8 of the ECHR. The ECtHR emphasized that, for the purposes of Article 8 of the ECHR, the concept of "family" cannot be limited to relationships based on marriage, it includes the so-called de facto "family ties" when partners live together without marriage.

According to the ECtHR's interpretation, Article 8 not only protects the individual from arbitrary intervention by the State but also imposes a positive obligation on authorities in certain cases. Although the right to adopt is not part of the ECHR, this does not mean that the State has any

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<sup>43</sup> *Emonet and Others v. Switzerland* App. No. 39051/03, 13 December 2007.



obligation to establish or maintain family relationships. According to the principles derived from the ECtHR case law, where a family bond with a child can be established, the State must act in such a way as to enable the development of this bond and create the possibility of the child's integration into the family with appropriate legal safeguards. The ECHR also emphasized that it is not the task of national authorities to decide on the affected parties in what form they wish to live their lives together.<sup>44</sup>

#### 4.4.3. Hungarian regulation

Hungarian law does not prohibit adoption by single people, but it specifically prefers adoption by married couples; European countries are united in this regard, since it is in the interest of every minor child to grow up in a complete family. However, in Hungary, adoption by two persons, as a special case of adoption, is only allowed if they are spouses and not cohabitants; therefore, Article 4:123 paragraph 2 of CC also stipulates that only the spouse of the adopter may adopt the adopted child during the existence of the adoption. Therefore, a child adopted jointly or separately by both spouses, or one spouse adopting the child of the other spouse, is considered a common child. The Book of Family Law of the Civil Code does not allow joint adoption of cohabitants or registered cohabitants.

It is definitely in the best interests of the child if he has a legal relationship with both parents.<sup>45</sup> It should be possible to adopt a partner's child in a narrower range in the case of partners of the opposite sex on the basis that a long-term partnership refers to the seriousness and durability of the relationship,<sup>46</sup> which results in a situation similar to that of a family based on marriage from the child's point of view.

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<sup>44</sup> Polgár, 2008, pp. 89–90.

<sup>45</sup> Katonáné Pehr, 2018, para. 28.

<sup>46</sup> In Hungary, the registered partnership name made the terminology of partnerships somewhat opaque, which was further complicated by the possibility of registering de facto partnerships before a notary public.

#### **4.5. The case of *I.S. against Germany*<sup>47</sup>**

##### 4.5.1. Facts

After birth, the applicant consented to the adoption of her children in a notarized document and agreed orally with the foster parents to a semi-open adoption because she wanted to remain in contact with her children. After the adoption was approved, she filed a lawsuit to revoke the decision and observe his child.<sup>48</sup> The German court rejected her claims because she prioritized the rights of the children. Subsequently, the mother from Vésérint filed a complaint with the European Court of Human Rights, claiming that her right to respect for family life had been violated because even though they had agreed on semi-open adoption, she was still not allowed to see the children.

##### 4.5.2. ECJ decision and evaluation of the case

The ECtHR found that the determination of remaining or newly formed rights between the mother, the adoptive parents, and her biological children, even if they are outside the scope of “family life,” is an important part of the identity of the biological mother, thus according to Article 8 of the ECHR affected his “private life.” The ECtHR also found that the applicant’s mother’s parental rights over her biological children were terminated with the “declaration of resignation,” which she made in full awareness of the legal and factual consequences. In view of this, the decision of the German authorities was proportionate, giving more weight to the private and family interests of adoptive families. It also found that Article 8 of the ECHR does not provide biological parents with “sight” of children after adoption. The German Court correctly placed children’s rights in the foreground, giving them the opportunity to develop. The contested German decisions did not violate the Convention when the mother’s right to contact and obtain information was denied. The ECtHR emphasized that although German law allows “open” and “semi-open” forms of adoption, they require the written consent of the adoptive parents they depend.

The two dissenting opinions of the judges related to the judgment also concluded that legal regulations and the participants of the adoption process

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<sup>47</sup> *I.S. v. Germany* App. No. 31021/08, 5 June 2014.

<sup>48</sup> Contact according to the rules of the Hungarian legal system.

must always be provided with thorough and comprehensive information because this is a positive state obligation contained in Article 8 of the ECHR. If such a disagreement arises, the State must not fulfill its obligations.<sup>49</sup> Protecting families is the primary goal.

#### 4.5.3. Hungarian regulation

In relation to adoption, both in practice and science, there are increasing discussions about the relationship between the biological parent and the adoptive parent; that is, the openness of adoption (this is not the same as the concept of open adoption), which is closely related to the legal effects of adoption and the right of the child to know his or her origin. According to the, The Book of Family Law of the Code Civil with adoption ceases the rights and obligations of the biological parent and relatives arising from the blood relationship with the adopted child. However, there are situations where the child is not completely removed from the blood family; therefore, the legislator is mindful of the legitimate interests of the wider circle of relatives (for example, grandparents), which makes adoption open.<sup>50</sup> Therefore, according to the rules of The Book of Family Law, within the framework of the legal effects of adoption, the maintenance of contact with parents or relatives is allowed within a very narrow circle after conjugal or relative adoption.

Pursuant to the Book of Family Law, adoption does not affect the right to contact relatives if one of the spouses adopts the child of the other spouse, and if the marriage from which the child originates ends in the death of the spouse, the right of contact of the relatives of the deceased spouse is not affected by the adoption.

When both parents are deceased, the child is adopted by the relative of one parent, and the right of contact of the relatives of the other parent is not affected by adoption.

In addition, in the case of open adoption, the guardianship authority may, in exceptionally justified cases, authorize the biological parent who

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<sup>49</sup> Indeed, Art. 8 of the ECHR provides procedural guarantees in addition to the obligation to effectively protect fundamental rights and human rights. In the ECtHR's practice, this primarily means the enforcement of the right of the affected parties to be properly informed and to express their opinion. Szeibert, 2014, pp. 31–36.

<sup>50</sup> Katonáné Pehr and Herger Csabáné, 2021, p. 193.

consented to the adoption of his child by the other parent's spouse to maintain contact.<sup>51</sup>

#### ***4.6. Söderback's case against Sweden***<sup>52</sup>

##### 4.6.1. Facts

Söderback met the applicant's child only a few times, so the relationship between them essentially ceased. Despite this, he did not give consent for the adoption of his child and asked the court to allow him to see the child. The mother's husband initiated the adoption of the child, whom he had raised since she was eight months old, and whom the child considered her father. The Swedish court ruled that adoption was in the best interests of the child and that there were no obstacles. The applicant claimed that the court's decisions violated her right to respect her family life as guaranteed by Article 8 of the ECHR.

##### 4.6.2. ECtHR decision and assessment of the case

The ECtHR unanimously ruled that Article 8 of the ECHR (right to respect for private and family life) was not violated by allowing the adoption of a child whose mother's husband had raised since the age of eight months, without the consent of the natural father, that is, the biological father.

The ECtHR found that the decision to authorize adoption interfered with the applicant's right to respect private life guaranteed by Article 8(1). Such interference is a breach of the Convention unless it is provided by law for the legitimate aims listed in Article 8(2) and can be regarded as necessary. The ECHR found that the Swedish District Court granted adoption based on the provisions of the Family Code and that it was in the best interests of the child.<sup>53</sup> Therefore, there is no doubt that the measure was provided by law and served a legitimate purpose. The ECHR went on to examine whether it could be considered "necessary in a democratic society."

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<sup>51</sup> Art. 4:133 of the CC.

<sup>52</sup> *Söderbäck v. Sweden* App. No. 113/1997/897/1109, 28 October 1998.

<sup>53</sup> According to Art. 3, custody of the child from birth is shared between the parents if they are married and between the mother if the parents are not married. If a spouse wishes to adopt a child under the age of 18 of the other spouses, the consent of the other parent is not required if the latter has not been involved in the upbringing of the child. After the adoption, the right of access of the biological father is also terminated.

Having regard to the adoption as an objective, it cannot be said that the adverse effects of the adoption on the applicant's relationship with the child were disproportionate. Swedish court proceedings struck a fair balance between the competing interests involved. The court's decision served a legitimate aim, and the restriction did not go beyond what was necessary.

The ECtHR also found that the Swedish court had only confirmed the *de facto* family relationship between the child and the adoptive father, which had existed for more than five years, given that the father had neither exercised custody of the child nor otherwise participated in his upbringing.

#### 4.6.3. Hungarian legislation

According to the Book of Family Law, adoption requires the consent of the person intending to adopt, the child's legal representative, the child's parents, and the adoptive spouse. In accordance with the protection of human rights, a parent may be deprived of this right only if his or her parental authority has been terminated by a court or if other circumstances, as defined by law, arise which may lead to the waiver of parental consent.<sup>54</sup>

According to the Book of Family Law, parental consent is not required for adoption: subject to a final court judgment terminating parental custody or whose foster child has been declared adoptable by the guardianship authorities.

Who is not incapacitated as a minor? Those whose identity is unknown or whose whereabouts are unknown and efforts to trace him or her have been unsuccessful, and those who, to be brought up by another person, leaves his or her child in a place designated for that purpose by a health establishment without revealing his or her identity and does not present himself or herself within six weeks of collecting the child.<sup>55</sup>

### ***4.7. Bogonosovy's case against Russia***<sup>56</sup>

#### 4.7.1. Facts

After the mother's death, the child of a divorced Russian couple was raised by the grandfather, the applicant, who was appointed as the guardian. The

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<sup>54</sup> Katonáné Pehr, 2018, para. 19.

<sup>55</sup> Art. 4:127(1) of the CC.

<sup>56</sup> *Bogonosovy v. Russia* App. No. 38201/16, 5 March 2019.

child's relatives were also involved in the child's upbringing and later applied for adoption. The applicant's grandparents requested a review of the adoption decision because the deprivation of their right to contact was contrary to the best interests of the child. The court of first instance (which dismissed the application and the court of appeal (which upheld it) held that the adoption order did not provide for the grandfathers and grandchildren to maintain a family relationship and that the grandfathers could not claim the right to contact under the Family Law Act.

The applicant then brought an action to the Court of Justice, alleging a breach of Article 8 of the ECHR, which guaranteed the protection of private and family life.

#### 4.7.2. ECtHR decision and assessment of the case

The ECtHR held that refusal to consider a grandparent's application for post-adoption contact constituted a violation of Article 8 ECHR. The ECtHR has held that a grandparent-grandchild relationship based on previous cohabitation falls within the scope of protection of family life under Article 8 and must therefore be protected by the States Parties.

The ECHR explained that under the Russian Family Code, adoption terminates the family relationship with the former ascendants unless the court expressly orders the maintenance of the family relationship in the best interests of the child at the request of the ascendant. No such requests were made by the grandfathers. However, the Russian courts could have made an order to maintain the family relationship in the best interests of the child, i.e., supplemented the decision, but they did not do so, but "made" the applicant believe that he could assert his right of access in other proceedings. It also found that the Russian Supreme Court had failed to examine the merits of the grandfathers' appeal against the annulment of the adoption and that, by refusing to examine the merits of the case, the court had failed to respect the applicant's family life, which, according to the unanimous decision, led to a violation of Article 8 of the ECHR. The ECtHR awarded the applicant EUR 5,000 as non-pecuniary compensation.

#### 4.7.3. Hungarian legislation

According to the, The Book of Family Law of the Code Civil with adoption ceases the rights and obligations of the biological parent and relatives

arising from the blood relationship with the adopted child. However, there are situations where the child is not completely removed from the blood family; therefore, the legislator is mindful of the legitimate interests of the wider circle of relatives (for example, grandparents), which makes adoption open. Therefore, according to the rules of The Book of Family Law, within the framework of the legal effects of adoption, the maintenance of contact with parents or relatives is allowed within a very narrow circle after conjugal or relative adoption.

Pursuant to the Book of Family Law, adoption does not affect the right to contact relatives if one of the spouses adopts the child of the other spouse, and if the marriage from which the child originates ends in the death of the spouse, the right of contact of the relatives of the deceased spouse is not affected by the adoption.

When both parents are deceased, the child is adopted by the relative of one parent, and the right of contact of the relatives of the other parent is not affected by adoption.

In addition, in the case of open adoption, the guardianship authority may, in exceptionally justified cases, authorize the biological parent who consented to the adoption of his child by the other parent's spouse to maintain contact.

## 5. Summary thoughts

The ECtHR and its case law is part of the European legal order, and case law shapes the interpretation of the ECHR. The modernist practice of the ECHR has led to an increasing number of precedent-setting decisions and thus to an evolving body of law that also affects children's rights. The ECHR aims to establish a more uniform European benchmark; however, within this, state parties are developing their jurisprudence according to their national rules and historical roots. However, it should not be overlooked that adoption is not only a legal issue; other non-legal factors also play an important role, in particular, the interests and personalities of the child who wishes to adopt and the child who is to be adopted, the future family relationship that can be established between them, and the motivation for adoption.<sup>57</sup>

The importance of the ECHR jurisprudence is that changes in family law move in the same direction. It is also important that Hungarian legal

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<sup>57</sup> Láposy and Tasi, 2018, p. 16.

practitioners interpret the law in conformity with the ECtHR case law on family law, including adoption.

### Acknowledgement

„The research on which the study was based was supported by the Ferenc Mádl Institute for Comparative Law. The language proofreading of the study was financed by the Hungarian Comparative Law Association, Miniszterelnökség and Bethlen Gábor Alap.”





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