

THE IMPACT OF THE EUROPEAN COURT OF HUMAN RIGHTS ON THE ADOPTION PROCEDURE IN THE REPUBLIC OF CROATIA

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UDK 347.64::341.231.14(407.5)
<https://doi.org/10.30925/zpfsr.44.2.12>
Ur.: 31. listopada 2022.
Pr.: 18. svibnja 2023.
Pregledni rad

Summary

In numerous cases related to adoption, the European Court of Human Rights (hereinafter: ECtHR) emphasized the importance of a comprehensive approach to the adoption procedure as well as the best interest of the child, taking into account all the circumstances of the case. The denial of the right to consent to adoption leads to the violation of human rights, which is especially manifested to vulnerable social groups. The ECtHR also determined this type of violation of rights in the “Croatian cases” - X. v. Croatia and A.K. and L. v. Croatia, which dealt with the violation of the rights of persons with mental disabilities, more precisely, parents deprived of legal capacity and the right to parental care. The shortcomings determined by the ECtHR influenced the change of the adoption paradigm in the new Croatian family legislation from 2015. Therefore, the paper highlights the importance of a comprehensive approach to the adoption procedure by analyzing the Croatian family legislation and jurisprudence of the ECtHR related to “Croatian cases”. Likewise, newer cases decided by the ECtHR are analyzed, from which guidelines for further improvement of the adoption procedure and the protection of fundamental human rights are derived.

Keywords: *adoption; persons deprived of legal capacity; ECtHR; biological parents; consent to adoption.*

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This paper is product of work that has been fully supported by the J. J. Strossmayer University of Osijek, Faculty of Law Osijek, under the project no. IP-PRAVOS-2 “Legal Protection of Family and Vulnerable Groups of Society”.

1 INTRODUCTION

Adoption is undoubtedly one of the most difficult family law measures, but also the most controversial measure which denotes a break of (legal) ties between biological parents and the child.¹ Thus, in the procedural sense it is necessary to carry out the procedure in a way that respects the rights of all participants. Adoption is most often initiated in cases of dysfunctional families, in cases when the biological parents are unable to take (appropriate) care of the child, so a comprehensive approach is necessary.

The ECtHR jurisprudence shows that procedural violations in adoption (mostly) refer to the biological parents, namely those deprived of legal capacity and exposed to social risks. The consent of the aforementioned category of biological parents is indicated as particularly problematic aspect of the adoption procedure. The competent national authorities were mainly guided by the fact that the mental incapacity of the biological parents makes them incompetent to give consent, that it delays the procedure, and ultimately acts against the best interests of the child. However, this kind of treatment violates fundamental human rights stipulated by the Convention for the Protection of Human Rights and Fundamental Freedoms² (hereinafter: ECHR), firstly the right to family life³ and, in this context, the right to be heard.⁴ Regardless of the obstacles that exist in certain adoption procedures, it is important to emphasize that biological parents are still biologically connected to the child, which is why it is necessary to give them the right to be heard in the adoption procedure. Therefore, the existence of proportionality is essential, so it is the duty of the state to take all necessary measures to preserve family life, with adoption without consent being measure of last resort. However, the best interest of the child, in that case, is unquestionable.

The judgments of the ECtHR, with other international standards, constituted the guidelines for the reform of Croatian family legislation in 2015 in the area of adoption, especially for biological parents deprived of legal capacity and the right to parental care. It should be noted that the obligation to adapt legislation did not come only from ECtHR decisions but also from international documents, in particular, the

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- 1 In modern legal systems, adoption is defined in two ways, as a legal method: *i*) creating (artificial) family ties between the child and adoptive parents and *ii*) providing a safe home for the child. Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and Practice (Fourth Edition)* (Dordrecht: Springer, 2021), 4. See also: Kerry O'Halloran, *Adoption Law and Human Rights: International Perspectives* (New York: Routledge, 2018), 23.
 - 2 Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette - International Agreements, no. 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 13/17.
 - 3 "The right to family life" is stipulated in Art. 8, para. 1 of the ECHR - "Everyone has the right to respect for his private and family life (...)."
 - 4 "Right to be heard" is stipulated in Art. 6, para. 1 of the ECHR - "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)."

UN Convention on the Rights of Persons with Disabilities⁵ (hereinafter: CRPD), which emphasizes the importance of an inclusive approach.⁶ This paper aims to point out the importance of a comprehensive approach to the adoption procedure and highlight the example of Croatia, which reformed family legislation in the field of adoption, especially in the part of consent to adoption. After the introduction, the second chapter focuses on the theoretical analysis of the right to respect for family life, the best interests of the child and consent to adoption, as well as “previous questions” important for understanding this issue. The third chapter focuses on the analysis of Croatian cases decided by the ECtHR, while the fourth chapter seeks to answer the extent to which the ECtHR jurisprudence has influenced the new Croatian legislation, with special emphasis on the regulation of consent to adoption. Also, an attempt is made to answer the question whether the interests of the biological parents outweigh the interests of the child in the adoption procedure according to the new family legislation. In the fifth chapter, the ECtHR’s guidelines for the adoption procedure, which derive from previous jurisprudence, are emphasized. Finally, before the concluding remarks, the sixth chapter analyzes recent jurisprudence of the ECtHR related to consent to adoption, i.e. in which a violation of procedural rights was determined concerning certain vulnerable social groups.

2 “PREVIOUS QUESTIONS” RELATED WITH ADOPTION

Adoption is primarily aimed at protecting the rights and interests of the child so the purpose of adoption is to provide the child with a family.⁷ In legal sense adoption can be defined as a kind of method of “artificial” creating a family, or artificial family relationship between the child (adoptee) and persons who are not the child’s biological parents (adoptive parents). Practically, adoption enables a child to have a fresh start and a positive family environment,⁸ as well as (normal) further emotional development.⁹ Therefore, adoption enters the corpus of the right to respect for family life. Although the interests of three parties are expressed in the adoption procedure – the child, the biological parents and the adoptive parent – the focus of this procedure is on the child.¹⁰ This indicates to the fact that adoption is a comprehensive social service too, through which support is provided before, during, and after the procedure.¹¹ Considering the social significance of adoption and its complexity, it is

5 UN Convention on the Rights of Persons with Disabilities, Official Gazette - International Agreements, no. 6/07, 3/08, 5/08.

6 The Republic of Croatia has been a party to this Convention since 2007. “Treaty Collection,” United Nations, accessed September 21, 2022, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

7 O’Halloran, *Politics of Adoption*, 207.

8 O’Halloran, *Adoption Law and Human Rights*, 23.

9 Nigel Lowe, and Gillian Douglas, *Bromley’s Family Law (Tenth Edition)* (New York: Oxford University Press, 2007), 819.

10 Lowe and Douglas, *Bromley’s Family Law*, 79.

11 Kathy P. Zamostny et al., “The Practice of Adoption: History, Trends, and Social Context,” *The Counseling Psychologist* 20, no. 10 (2003): 652.

necessary to analyze the right to respect for family life, the best interest of the child and, consequently, consent to adoption as a particularly delicate aspect of adoption, which is also the central topic of this paper.

2.1 The Right to Respect for Family Life

The right to respect for family life covers a wide area of family relationships, where the existence of family life depends on each case, more precisely, the existence of close family relations.^{12,13} Speaking about the right to respect for family life, states have positive and negative obligations. The positive obligation generally refers to the duty of the state to respect family life, while the negative obligation refers to the protection of the individuals from (arbitrary) interference in family life. In other words, in the case of a negative obligation, even if there is interference in family life, it must be legal, legitimate, and necessary.¹⁴

The right to respect for family life is related to adoption in several aspects. Thus, relations between adoptive parents and adopted child constitute family relations (they also enjoy protection). Family life also includes the relationship between the adopter and the adopted child if the adoption procedure was legal and properly carried out, regardless of the actual relationship between the adopter and the adopted child.¹⁵ However, the ECtHR decided on numerous adoption cases, which related to respect for family life, such as the marital status of the adopter and adoption by persons of homosexual orientation, but cases of adoption without parental consent were particularly represented.¹⁶ It is certainly emphasized that adoption represents the most severe form of state interference in family life, which can only be justified if such treatment was in the child's best interest.¹⁷ When it comes to adoption procedures, it should be pointed out that anyone who has rights according to Art. 8 of the ECHR has the right to be involved in the adoption procedure,¹⁸ which would consequently also refer to biological parents deprived of legal capacity and the right to parental care.

When the ECtHR decides on cases related to adoption, it is mainly focused on procedural issues related to the right to respect for family life, with an emphasis on the comprehensiveness of the procedure, which also includes actions that precede

12 "Guide on Article 8 of the European Convention on Human Rights," European Court of Human Rights, accessed October 10, 2022, https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

13 The interpretation of the concept of "family life" was contributed by the jurisprudence of the ECtHR. For example, in the ECtHR case *Marckx v. Belgium*, no. 6833/74 of July 13, 1979 it was pointed out that the right to cohabitation is an important determinant of family life, while in *Paradiso and Campanelli v. Italy*, no. 25358/12 of January 24, 2017 it is emphasized that the existence of family life in practice depends on the existence of close ties.

14 Iris Gović Penić, *Izabrana praksa Europskog suda za ljudska prava i građanski postupci pred hrvatskim sudovima* (Zagreb: Organizator d.o.o., 2022), 757.

15 ECtHR, "Guide on Article 8."

16 ECtHR, "Guide on Article 8."

17 Branka Rešetar, *Komentar Obiteljskog zakona (Knjiga I.)* (Zagreb: Organizator d.o.o., 2022), 34, 37.

18 Shazia Choudhry, and Jonathan Herring, *European Human Rights and Family Law* (Oxford and Portland, Oregon: Hart, 2010), 323.

adoption.^{19, 20} Comprehensiveness could be interpreted as a restrictive factor of the “margin of appreciation” that most often leads to a violation of the right to respect for family life, especially in adoption procedures. This protects the right to respect for family life and, in a practical sense, enables adoption to be the measure of last resort.

2.2 *The Best Interest of the Child*

The best interest of the child is a fundamental principle by which the competent authorities must be guided in every action related to the child. Thus the 1989 UN Convention on the Rights of the Child²¹ (hereinafter: CRC) stipulates that all proceedings concerning children undertaken by public or private social welfare institutions, courts, public administration bodies, or legislatures, must take into account the best interests of the child.²² Likewise, the state parties of the CRC are required to provide legislative and administrative measures to ensure the protection and care of the child essential to his or her well-being, respecting the rights and duties of parents, guardians, or other persons legally responsible for the child.²³ This principle is interpreted as *i*) substantive right, considering that states have to implement this standard into national legislation, *ii*) a fundamental interpretative principle, and *iii*) a procedural rule.²⁴ Emphasizing the principle of the best interests of the child in the context of adoption, the state has to establish appropriate legislation to regulate the adoption procedure.^{25, 26} The CRC provisions related to adoption²⁷ clearly stipulate that adoption must be in the best interests of the child, i.e. that competent authorities must take into account child’s well-being, which means a broader term relating to the physical, social, emotional and moral well-being.^{28, 29} Figuratively, the competent

19 Rešetar, *Komentar Obiteljskog zakona*, 697.

20 The comprehensiveness of proceedings, in the context of social work, would refer to the duty of notification of parents about their “parental disadvantages” and advise how to (preventively) correct the shortcomings. Choudhry and Herring, *European Human Rights and Family Law*, 312.

21 Convention on the Rights of the Child, Official Gazette of the SFRY - International Agreements, no. 15/90, Official Gazette - International Agreements, no. 12/93, 20/97, 4/98, 13/98.

22 Art. 3, para 1 of the CRC.

23 Art. 3, para. 2 of the CRC.

24 Roberta Ruggiero, “Article 3: The Best Interest of the Child,” in *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes*, eds. Ziba Vaghri, Jean Zermatten, Gerison Lansdown, and Roberta Ruggiero (Cham: Springer, 2022), 26, 27; Nikolett Takács, “The Threefold Concept of the Best Interests of the Child in the Immigration Case Law of the ECtHR,” *Hungarian Journal of Legal Studies* 62, no. 1 (2021): 96, 100.

25 Gerison Lansdown, “Article 21 - Adoption,” in *Monitoring State Compliance with the UN Convention on the Rights of the Child: An Analysis of Attributes*, eds. Ziba Vaghri, Jean Zermatten, Gerison Lansdown, and Roberta Ruggiero (Cham: Springer, 2022), 176.

26 About the adoption relationship and Art. 8 of the ECHR see: Ursula Kilkelly, *The Child and the European Convention on Human Rights* (New York: Routledge, 2016), 297, 298.

27 Art. 20 and 21 of the CRC.

28 Samanta M. Davey, *A Failure of Proportion: Non-Consensual Adoption in England and Wales* (Oxford, New York: Hart, 2020), 12.

29 About the welfare of the child in adoption procedures, see: O’Halloran, *Politics of Adoption*,

authorities are required to put themselves in the child's position.

The best interests of the child is closely related to the right to respect for family life stipulated by Art. 8 of the ECHR. As they are interconnected, it is possible to violate both articles, one of them or neither.³⁰ Although the best interest of the child is interpreted in such a way that when making a decision, it is necessary to examine its positive and negative effects on all family members and to finally choose the solution that causes the least harm to all adults, without any harm to the child,³¹ in adoption procedures, the best interest of the child is interpreted differently. Namely, in adoption procedures, the best interest of the child is the exclusive and mandatory criterion, which means that the decision is made by assessing its effect only in relation to the child. Adoption, in the best interest of the child, implies, among other things, the right of the child to help his or her family and the right (of the child) to participate in the procedure.³²

Therefore, what represents the best interest of the child depends on each case, and in order to determine this, a comprehensive approach is necessary. The best interest of the child is an unparalleled principle, and although following contemporary standards of human rights protection in the adoption procedure, an effort is made to achieve a balance between the interests of the child and the biological parents, the best interest of the child always prevails.

2.3 Consent to Adoption

The issue of consent to adoption was especially relevant in the jurisprudence of English courts, which have interpreted the term "best interests of the child" in such a way that the rights of biological parents in the adoption procedure can be neglected. Thus, their consent to adoption would be unnecessary³³ which was a consequence of a very narrow interpretation of the best interests of the child.³⁴ Consent to adoption is related to the parents' right to participate in the adoption procedure, i.e. the protection of their interests.³⁵ CRC, as the most important international document related to the protection of children's rights, stipulates that state parties which recognize or allow adoption, shall ensure that the best interest of the child shall be the paramount consideration and determine that the interested parties in adoption procedure have given their consent to the adoption after counselling.³⁶

95, 96.

30 Jonathan Collinson, "Making the Best Interests of the Child a Substantive Human Right at the Centre of National Level Expulsion Decision," *Netherlands Quarterly of Human Rights* 38, no. 3 (2020): 179.

31 Rešetar, *Komentar Obiteljskog zakona*, 16, 17.

32 Rešetar, *Komentar Obiteljskog zakona*, 701.

33 Sonia Harris-Short, "Making and Breaking Family Life: Adoption, the State, and Human Rights," *Journal of Law and Society* 35, no. 1 (2008): 35, 36.

34 Karen Broadhurst, and Claire Mason, "Birth Parents and the Collateral Consequences of Court-ordered Child Removal: Towards a Comprehensive Framework," *International Journal of Law, Policy and The Family* 31, no. 1 (2017): 44.

35 Kilkelly, *The Child and the European Convention on Human Rights*, 310, 311.

36 Art. 21 of the CRC.

The ECtHR has decided on the issue of consent to the adoption in several cases³⁷ and found that denying this possibility to biological parents violates the right to respect for family life. By preventing biological parents of their right to consent or at least give an opinion on adoption, their other rights are violated such as the right to respect for family life or the right to a fair trial (hearing).³⁸ Speaking of consent to adoption from the aspect of international documents, it is guaranteed by the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption³⁹ which emphasizes the obligation to inform persons about the consequences of consent to adoption, based on the termination of legal ties with the child, free consent, prohibition of any compensation for consent, the obligation to give the mother's consent after the birth of the child and the child's consent, depending on his or her age and the possibility of understanding consent to adoption.^{40, 41} Consent to adoption is also regulated by the 2008 European Convention on the Adoption of Children (revised version)^{42, 43} (hereinafter: ECA). ECA stipulates that adoption cannot be established if the parents or other persons, the child, the

37 Some of the cases in which the ECtHR decided on adoption without consent are: ECtHR, *Aune v. Norway*, no. 52502/07 of October 28, 2010; ECtHR, *R.P. and others v. United Kingdom*, no. 38245/08 of October 9, 2012; ECtHR, *Keegan v. Ireland*, no. 16969/90 of May 26, 1994; ECtHR, *P., C. and S. v. United Kingdom*, no. 56547/00 of July 16, 2002; ECtHR, *R.M.S. v. Spain*, no. 28775/12 of June 18, 2013; ECtHR, *Zhou v. Italy*, no. 33773/11 of January 21, 2014; ECtHR, *S.H. v. Italy*, no. 52557/14 of October 15, 2015; ECtHR, *Haddad v. Spain*, no. 16527/17 of June 18, 2019. More about that: Dijana Jakovac-Lozić, "Posvojenje u praksi Europskog suda za ljudska prava," in *Europsko obiteljsko pravo*, eds. Aleksandra Korać Graovac, and Irena Majstorović (Zagreb: Narodne novine, 2013.), 77-92; Claire Fenton-Glynn, *Children and the European Court of Human Rights* (Oxford: Oxford University Press, 2021), 357-360; Davey, *Failure of Proportion*, 133.

38 Sylvain Vité, and Hervé Boéchat, "Article 21: Adoption," in *A Commentary on the United Nations Convention on the Rights of the Child*, eds. André Alen, Johan Vande Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans, and Mieke Verheyde (Leiden: Martinus Nijhoff Publishers, 2008), 39.

39 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Official Gazette - International Agreements, no. 5/13.

40 Vité and Boéchat, "Article 21: Adoption," 41.

41 The child's consent to adoption is related to the fact that children are a vulnerable social group, and also, their vision of a certain issue is different from adults. It is also about the procedural rights of the child. By doing so, children are allowed to be active participants in procedures related to their rights and position. Hanita Kosher, Asher Ben-Arieh, and Yael Hendelsman, *Children's Rights and Social Work* (Cham: Springer, 2016), 42, 43; Noam Peleg, "International Children's Rights Law: General Principles," in *International Human Rights of Children*, eds. Ursula Kilkelly, and Ton Liefwaard (Singapore: Springer, 2019), 148.

42 European Convention on the Adoption of Children (Revised), Council of Europe Treaty Series - no. 202, Strasbourg, November 27, 2008.

43 The European Convention on the Adoption was adopted in 1967, but due to social changes, it was necessary to revise it. It is also important to point out that the Republic of Croatia is not a party to this Convention. "Chart of Signatures and Ratifications of Treaty 202," Council of Europe, accessed September 20, 2022, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treaty=202>.

spouse, or the registered partner have not given their consent to the adoption.⁴⁴ The obligation to inform persons who consent to the adoption of the legal consequences of the adoption is also emphasized, while parents deprived of the right to parental care or if there are other reasons stated in national legislation do not have to give consent to adoption.⁴⁵ Referring to the previously highlighted obligation of states to regulate the issue of consent to adoption, there is also an obligation to regulate certain restrictions.⁴⁶ In general, denying parents the right to consent to adoption violates the state's positive obligation to protect family life and reintegrate the family. Adoption without parental consent is the measure taken only in exceptional circumstances.⁴⁷ In other words, adoption without parental consent is possible only if the state has provided adequate prior support to the parents for involvement in the adoption procedure.⁴⁸ Contemporary Croatian Family Act 2015⁴⁹ (hereinafter: FA 2015) regulates the substantive and procedural assumptions for adoption emphasizing the welfare of the child.⁵⁰ Considering that Croatia is a member of the Council of Europe - the umbrella organization for the protection of human rights and freedoms in Europe - adoption should be viewed from a broader aspect of the right to respect for family life with emphasis on nature and purpose rather than the form of relationship.⁵¹ With its judgments, the ECtHR highlights the importance of the ECHR as the "living" instrument,⁵² and due to the expanded formulation, there is enough space to define family relationships in all circumstances.^{53, 54} Speaking about the right to family life in the context of adoption, it is important to point out

44 Art. 5, para. 1 of the ECA.

45 Art. 5, paras. 2 and 4 of the ECA.

46 "Explanatory Report to the European Convention on the Adoption of Children (Revised)," Council of Europe Treaty Series, accessed October 12, 2022, available: <https://rm.coe.int/16800d3833>.

47 "Adoption without Consent (update 2016)," European Parliament - Directorate-General for Internal Policies, accessed October 15, 2022, [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556940/IPOL_STU\(2016\)556940_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556940/IPOL_STU(2016)556940_EN.pdf); Kilkelly, *The Child and the European Convention on Human Rights* 302.

48 O'Halloran, *Adoption Law and Human Rights*, 102.

49 Croatian Family Act, Official Gazette, no. 103/15, 98/19, 47/20.

50 Leon Žganec-Brajša, "Anticipirane naredbe i roditeljska skrb," *Hrvatska pravna revija* 18, no. 4 (2018): 70, 73.

51 Andrea Büchler, "The Right to Respect for Private and Family Life: The Case Law of the European Court of Human Rights on Parenthood and Family Forms," in *Family Forms and Parenthood: Theory and Practice of Article 8 ECHR in Europe*, eds. Andrea Büchler, and Helen Keller (Cambridge, Antwerp, Portland: Intersentia, 2016), 30, 31.

52 Daniel Thym, "Respect for Private and Family Life Under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?," *International and Comparative Law Quarterly* 57, no. 1 (2008), 92; Maša Marochini Zrinski, "Pravo očeva na poštovanje obiteljskog života: presude Europskog suda za ljudska prava protiv Republike Hrvatske," *Zbornik radova Pravnog fakulteta u Nišu* 56, no. 77 (2017): 19.

53 Uroš Novaković, "Pravo na poštovanje porodičnog života u praksi Evropskog suda za ljudska prava," *Strani pravni život* no. 3 (2007): 177.

54 There is no "right to adoption", but only the obligation of the state to provide a safe (family) home for the child. O'Halloran, *Adoption Law and Human Rights*, 323.

that it includes the right to family reunification, i.e. the child's right to a family and the prohibition of illegal separation.⁵⁵ Regarding the lack of consent to adoption, the jurisprudence of the ECtHR indicates the complexity of such treatment, considering that it is related mainly to parents deprived of legal capacity, the right to parental care or other vulnerable groups of parents. The ECtHR decided on two adoption cases against Croatia concerning procedural aspects of adoption. The central issue in these cases was the position of parents deprived of legal capacity and the right to parental care, more precisely, the denial of the possibility of their participation in the adoption procedure and giving consent to the adoption, which *de facto* terminates the right of parents to parental care.⁵⁶

Therefore, the issue of consent to adoption is presented below, which was decided by the ECtHR in the "Croatian cases" by analyzing the factual situation, shortcomings in the formerly family legislation and the changes that occurred in the new family legislation.

3 CASES AGAINST CROATIA BEFORE THE ECtHR CONCERNING ADOPTION

The cases against Croatia before the ECtHR regarding adoption and persons deprived of legal capacity point to the complexity of this issue. It is clear that in this case it is necessary to protect the double interests - the child and the person deprived of legal capacity. Following international legal obligations, primarily the CRPD, as well as the jurisprudence of the ECtHR, it is important to respect the fundamental human rights of persons deprived of legal capacity. In the context of adoption, deprivation of the right to parental care has a dual effect - on the one hand a parent deprived of the right to parental care is not required to consent to the adoption of a child, while on the other hand he cannot be an adoptive parent.⁵⁷ Considering that the new Croatian family legislation is in force since 2015, it is necessary to compare the measure of deprivation of the right to parental care with the former family legislation. Namely, the 2003 Family Act⁵⁸ (hereinafter: FA 2003) and FA 2015 as a general presumption for deprivation of the right to parental care allege abuse or gross violation of parental responsibility, duties, and rights.⁵⁹ In addition to listing other, special presumptions, FA 2015 also stipulates special presumptions for deprivation of the right to parental

55 Jasna Omejec, "Značaj i doseg prava na poštovanje obiteljskog života u praksi Europskog suda za ljudska prava," in *Presude o roditeljskoj skrbi Europskog suda za ljudska prava protiv Republike Hrvatske*, ed. Dubravka Hrabar (Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2021), 18, 19.

56 Dijana Jakovac Lozić, "Posvojenje," in *Obiteljsko pravo*, ed. Dubravka Hrabar (Zagreb: Narodne novine, 2021), 313.

57 Dubravka Hrabar, "Obiteljskopравни odnosi roditelja i djece," in *Obiteljsko pravo*, ed. Dubravka Hrabar (Zagreb: Narodne novine, 2021), 256.

58 Family Act, Official Gazette, no. 116/03, 17/04, 136/04, 107/07, 57/11, 61/11, 25/13, 75/14, 5/15, 103/15.

59 Art. 114 of the FA 2003; Art. 170 of the FA 2015.

care.⁶⁰

The ECtHR jurisprudence has significantly influenced changes in Croatian family legislation regarding the regulation of adoption. The basis for these changes derives from two cases - *X. v. Croatia*⁶¹ and *A.K. and L. v. Croatia*.⁶² The common features of these cases are that the ECtHR found a violation of the Convention right - the right to respect for family life under Art. 8 of the ECHR, in procedural aspect. The applicants before the ECtHR as biological parents were not recognized as parties to the proceedings, but ECtHR did not analyze the justification of the adoption. Although these were violations of fundamental human rights, the Croatian legislature did not promptly act on the necessary changes to the legislation. Namely, the decision in cases *X. v. Croatia* and *A.K. and L. v. Croatia* was made in 2008 and 2013, respectively. It was not until 2015 that the (new) Family Act came into force, which corrected the shortcomings in the adoption procedure pointed out by the ECtHR decisions. Following the decision in the case of *X. v. Croatia*, there was no prompt reaction from the legislature, but the ministry competent for social policy issued in 2009 a mandatory instruction according to which social welfare centers were required to include parents deprived of legal capacity in adoption procedure.⁶³ According to the mandatory instruction, social welfare centers in the adoption procedure in which biological parents deprived of legal capacity were involved should state their consent/opinion in the minutes, which would then be part of the case file.⁶⁴ The competent authorities have to ensure that all participants in the adoption procedure meet the adoption criteria, determine that consent is given, ensure the child's welfare and establish compliance with legal regulations and procedures.⁶⁵ In other words, it was an inappropriate application of the provisions of the FA 2003, which left the possibility of hearing the child's close relatives (therefore, including the parents).⁶⁶ It is clear that the mandatory instruction was not effective as expected, so a second judgment was handed down against Croatia before the ECtHR, which influenced the legislator to make serious legal adjustments in the area of adoption as one of the most difficult interventions in family life.

60 Art. 171 of the FA 2015.

61 ECtHR, *X. v. Croatia*, no. 11223/04 of July 17, 2008.

62 ECtHR, *A.K. and L. v. Croatia*, no. 37956/11 of January 8, 2013.

63 Morana Briški, "Sudjelovanje roditelja lišenih roditeljske skrbi u postupku posvojenja - pozitivne obveze države iz članka 8. Konvencije za zaštitu ljudskih prava i temeljnih sloboda," accessed October 9, 2022, <https://www.iusinfo.hr/aktualno/u-sredistu/34083>.

64 Kristijan Grđan, "Skrbnništvo za odrasle osobe iz perspektive prava osoba s duševnim smetnjama u Hrvatskoj," in *Poslovna sposobnost i skrbništvo - raskorak između Konvencije o pravima osoba s invaliditetom i prakse*, ed. Branka Meić (Zagreb: Pravobraniteljica za osobe s invaliditetom, 2012), 44.

65 Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law, Policy & Practice (First Edition)* (Dordrecht: Springer, 2006), 76.

66 Art. 139 of the FA 2003.

3.1 Factual Description of the Cases

In the case of *X. v. Croatia*, proceedings were instituted to deprive of legal capacity the applicant who was suffering from schizophrenia, and her mother was appointed as temporary representative. In the meantime, the proceedings for deprivation of legal capacity were terminated and the applicant gave birth to a daughter. However, as the applicant's condition significantly deteriorated after the birth of the child, the proceedings for deprivation of legal capacity were reopened, while the applicant's mother was appointed as foster parent for the child. The expert examination established that the applicant, due to mental disease, is not capable of taking care of her rights, interests and needs and that she endangers the rights of others. The child was subsequently placed under guardianship and such treatment was explained by the fact that the child was without parental care, considering that the father had died and the mother had been completely deprived of legal capacity. Finally, the child was adopted. It is important to point out that the applicant, the mother of a child who was completely deprived of legal capacity was not informed - neither about decision relating to the placement of the child nor to adoption. Furthermore, the applicant had only been informed by telephone that the adoption procedure was ongoing, and that procedure had been initiated without her knowledge, consent or opinion. The applicant applied for restoring her legal capacity, since she had been deprived of her parental rights *ex lege*, but her claim was not granted.^{67, 68}

In the case of *A.K. and L. v. Croatia*, the court, by the request of the social welfare center, deprived the first applicant (mother) of the right to parental care to the second applicant - her son. This decision is supported by inappropriate living conditions in which the child lives with the mother who suffered of milder form of mental retardation. Her son was then placed in a foster family, without consent. In the proposal for restoring parental care to the first applicant, the lawyer stated that living conditions had significantly improved, which indicated that conditions had been created for adequate childcare. However, in a conversation with the child's guardian, the first applicant found that the adoption procedure had been initiated, and the child was eventually adopted. Therefore, the applicant was not informed about previously stated proceedings, with the explanation that she was not a party to the proceedings. Likewise, the first applicant was also prevented from finding out any further information with the explanation that the principle of secrecy of the proceedings applied to the adoption.⁶⁹

67 *X. v. Croatia*, paras. 5-20; Grđan, "Skrbništvo za odrasle osobe," 51.

68 See also: Vesna Batistić Kos, *Pozitivne obveze prema Europskoj konvenciji za zaštitu ljudskih prava i temeljnih sloboda* (Zagreb: Narodne novine, 2012), 253-260.

69 *A.K. and L. v. Croatia*, paras. 4-16; Nataša Lucić, "Adoption of a Child Without Consent of its Parent With an Intellectual Disability - Case of *A.K. and L. v. Croatia*," in *New Development in EU Labour, Equality and Human Rights Law*, ed. Mario Vinković (Osijek: J. J. Strossmayer University of Osijek, Faculty of Law, 2015), 361-363.

3.2 Family Law Legislation and Identified Shortcomings by the ECtHR

The analysis of the factual situation of these two cases reveals the problems of former Croatian family legislation on two levels - on the one hand, to persons deprived of legal capacity and the right to parental care, and on the other hand on the procedural provisions of the adoption procedure. The rights and interests of children are also directly emphasized in this sense. According to the FA 2003, an adult who was unable to take care of his or her rights and duties or endangered the interests of others due to mental disabilities or other causes could be deprived of legal capacity completely or partially by the court decision.⁷⁰ The problem arose with the possibility of complete deprivation of legal capacity because in that case, the person would lose every right including the right to exercise parental care. In general, total deprivation of legal capacity has led to inequality among persons deprived of legal capacity in many areas of life.⁷¹ It was explicitly determined when parental consent was not required - when parents were *i*) deprived of the right to parental care, *ii*) completely deprived of legal capacity, and *iii*) in the case of minor parents who were incapable of understanding the meaning of adoption.⁷² It should be noted that the issue of complete deprivation of legal capacity has proved problematic to the exercise of the right to parental care. Thus, if the parent was completely deprived of legal capacity, he or she could not perform any content of parental care - in that case, there was a cessation of parental care *ex lege*, although the FA 2003 provided that parental care could be taken away or limited only by the decision of the competent body,⁷³ i.e. deprivation of right to parental care occurred in case of abuse or gross neglect of parental rights and duties.⁷⁴ As the ECtHR pointed out, by restricting a biological parent deprived of the legal capacity to express his or her consent or opinion for adoption, the relationship with the child is terminated.⁷⁵ In the context of the issues raised in the factual description of the case, the ECtHR examined the violation of the right to respect for family life under Art. 8 of the ECHR which protects individuals from unjustified state interference in family relations. Therefore, a "test of necessity" was conducted to examine the legality, legitimacy, and necessity of the adoption.⁷⁶

3.2.1 Case of *X. v. Croatia*

In the case of *X. v. Croatia*, the ECtHR pointed out that adoption was one of the measures affecting family life, stressing that it is legal and legitimate, since it aims to protect the best interest of the child which is why it focused on the validity

70 Art. 159 of the FA 2003.

71 Božena Horvat Alajbegović, "Usklađivanje uloge centra za socijalnu skrb u postupku lišenja poslovne sposobnosti s Konvencijom UN-a o pravima osoba s invaliditetom," in *Lišenje poslovne sposobnosti: smjernice za suce, vještake i socijalne radnike*, ed. Slađana Štrkalj Ivezić (Zagreb: Udruga Svitanje, 2012), 49.

72 Art. 130 of the FA 2003.

73 Art. 91, para. 3 of the FA 2003.

74 Art. 114, para. 1 of the FA 2003.

75 *X. v. Croatia*, para. 39.

76 ECtHR, "Guide on Article 8."

of the procedural actions taken.⁷⁷ However, the problematic part of this procedure was the necessity of its implementation in a democratic society defined as “acting in proportion to the legitimate goal to be achieved”.⁷⁸ Therefore, the ECtHR emphasizes that in the adoption procedure, due to complexity, it is necessary that the competent authorities conducting this procedure are aware of all the circumstances, the views of the parties and enable the use of available legal remedies.⁷⁹ However, the ECtHR also points out that a delicate matter such as adoption means that the competent authorities carry out the procedure with a certain degree of discretion. Therefore, parents have the right to be heard and to receive all relevant information about the procedure, as well as any restrictions that may be imposed.⁸⁰ The procedural actions that led to the violation of the right to respect for family life were as follows. The ECtHR points out that the competent authorities for carrying out the adoption procedure did not assess the relationship between the applicant (biological mother) and the child,⁸¹ which makes it clear that biological parents also need to be involved in the procedure, notwithstanding that family law legislation does not determine them as the parties to the proceedings.⁸² As a contentious procedural aspect of the adoption procedure, the ECtHR also cited the automatism of deprivation of parental care related with deprivation of legal capacity.⁸³ In general, the ECtHR highlighted the applicant’s lack of involvement as a fundamental problem considering that the adoption decision had determined the future relationship between the child and the biological parent, which had violated the right to respect for family life.⁸⁴ In other words, the state allowed the applicant, the mother of a child deprived of legal capacity, to be excluded from the adoption procedure of her biological child.⁸⁵ Among other things, the insufficient involvement of the applicant in the adoption procedure is evident by the fact that the applicant was only notified of the adoption by telephone.⁸⁶ In its decision in the case of *X. v. Croatia*, the ECtHR pointed to the fact that the right to respect for family life under Art. 8 of the ECHR consists of material and procedural elements. Namely, the applicant also referred to the violation of Art. 6 (right to a fair trial) due to the impossibility of participating in the proceedings and Art. 13 (right to an

77 *X. v. Croatia*, paras. 45, 46, 50.

78 Ana Radina, “Izdvajanje djeteta iz obitelji u praksi Europskog suda za ljudska prava,” *Godišnjak Akademije pravnih znanosti Hrvatske* 8, no. poseban broj (2017): 96.

79 *X. v. Croatia*, para. 48.

80 *X. v. Croatia*, paras. 47, 48.

81 *X. v. Croatia*, para. 51.

82 When proceedings related to children are carried out, social workers are required to inform parents about perceived shortcomings and help them overcome these problems. At the same time, the duty to inform the parents is especially emphasized if children are separated from the family. Choudhry and Herring, *European Human Rights and Family Law*, 312.

83 *X. v. Croatia*, para. 52.

84 Deciding on adoption makes the biological parents “legal strangers” to the child. Cynthia R. Mabry, and Lisa Kelly, *Adoption Law: Theory, Policy, and Practice (Second Edition)* (Buffalo, New York: William S. Hein & Co., Inc., 2010), 503.

85 Ivana Milas Klarić, “Reforma skrbničkog zakonodavstva i europski pravni okvir,” *Godišnjak Akademije pravnih znanosti Hrvatske* 5, no. 1 (2014): 105.

86 *X. v. Croatia*, paras. 53, 54.

effective remedy) and the ECtHR pointed out that this did not raise new issues, but that violations of these rights overlapped with the right to respect for family life.^{87, 88}

3.2.2 Case of *A.K. and L. v. Croatia*

In the case of *A.K. and L. v. Croatia*, the ECtHR emphasized that a fundamental feature of family life is the enjoyment of children and parents in each other's company and that the placement of a child in public care does not end the (natural) family relationship.⁸⁹ In addition, it should be noted that the ECtHR referred several times to the case of *X. v. Croatia*, which it had previously ruled on (especially in the part of the procedural rights of biological parents in the adoption procedure). Conducting a "test of necessity", the ECtHR found that the adoption in this case was lawful and legitimate, emphasizing the importance of a certain degree of discretion of the competent bodies.⁹⁰ However, a key issue addressed by the ECtHR concerned the proper application of Art. 8 of the ECHR. It, therefore, emphasizes that the situation needs to be seen as a whole in which the links between the biological parent and the child have gradually been severed, thereby violating the right to respect for family life.⁹¹ In this decision, the ECtHR did not address the (in)compliance of participation of parents deprived of legal capacity in the adoption procedure with the right to respect for family life but examined the sufficiency of other, alternative mechanisms to protect the right to family life.⁹² Since the present case concerned an applicant suffering from a mild form of mental retardation, it was necessary to provide her with assistance so that she could make decisions, as well as participate in the proceedings.⁹³ The ECtHR considered that the applicant had been insufficiently involved in the adoption procedure,⁹⁴ which also resulted from the fact that she had not been informed about the adoption procedure or heard.⁹⁵ In principle, the ECtHR pointed out that separating a child from the family solely on the basis of the mental illness of the parents is considered as impermissible practice. Considering that the issue of poor financial situation was highlighted in the case as aggravating circumstance, this should also not be a reason for separating the child from the family. Moreover, the state has to provide material assistance to the family to preserve the right to family life, so there should be only an exceptional reason for separation.⁹⁶ The ECtHR pointed out that it

87 *X. v. Croatia*, paras. 56, 59.

88 In this sense, it should be pointed out that the adoption procedure is guaranteed a greater degree of independence when it is entrusted to the jurisdiction of judicial bodies to administrative bodies. More information in: O'Halloran, *Adoption Law and Human Rights*, 310.

89 *A.K. and L. v. Croatia*, para. 51.

90 *A.K. and L. v. Croatia*, para. 62.

91 *A.K. and L. v. Croatia*, para. 67.

92 *A.K. and L. v. Croatia*, para. 70.

93 *A.K. and L. v. Croatia*, paras. 74, 75; Fenton-Glynn, *Children and the European Court of Human Rights*, 333.

94 *A.K. and L. v. Croatia*, para. 79.

95 *A.K. and L. v. Croatia*, para. 77.

96 Davey, *Failure of Proportion*, 65; Fenton-Glynn, *Children and the European Court of Human Rights*, 316; see also: ECtHR, *Wallová and Walla v. the Czech Republic*, no. 23848/04 of

is necessary to take into account the emotional ties between the child and the parents, while poor financial situation is a factor in which national authorities act otherwise than by separating the child from the family, ultimately by adoption.⁹⁷ Due to the fact that the applicant was not notified of the initiation of the adoption procedure, the applicant was denied the possibility to restore her right to parental care, which the ECtHR interpreted as her exclusion from the adoption procedure.⁹⁸ As the applicant was formally deprived of the right to parental care, the violation of the right to respect for family life is also based on the fact that she did not have the opportunity to claim the restoration of the right to parental care before adoption proceedings.⁹⁹

These two judgments, rendered five years apart, indicate that the ECtHR already in the judgment in *X. v. Croatia* left sufficient time to adapt family legislation. On the other hand, it is also clear that it took the ECtHR five years to reaffirm the seriousness of the adoption problem with another judgment.¹⁰⁰ There is no doubt that the entire adoption procedure should be primarily directed towards the child, but the fact that biological parents, regardless of health or social difficulties, have guaranteed rights under international law should not be overlooked either (prescribed by the ECA, ECHR and other international documents). In other words, adoption is a complex procedure that affects the fundamental human rights of all participants and therefore requires a comprehensive approach taking into account all the circumstances of the case.

4 CHANGES IN CROATIAN LEGISLATION

The ECtHR judgments in cases of *X. v. Croatia* and *A.K. and L. v. Croatia* pointed to serious shortcomings in Croatian family legislation and consequently influenced its amendments.

4.1 Deprivation of Legal Capacity and Parental Care

Compared to the FA 2003, which provided for the possibility of complete or partial deprivation of legal capacity,¹⁰¹ the FA 2015 provides only for the possibility of partial deprivation of legal capacity.¹⁰² Namely, if a person would be completely

October 26, 2006, paras. 73-74; ECtHR, *Saviny v. Ukraine*, no. 39948/06 of December 18, 2008, para. 57; ECtHR, *R.M.S. v. Spain*, no. 28775/12 of June 18, 2013, paras. 85-86; ECtHR, *Soares de Melo v. Portugal*, no. 72850/14 of February 16, 2016, para. 106.

97 Branka Rešetar, and Neven Grigić, "Smjernice za izdvajanje djece iz obitelji u praksi Europskog suda za ljudska prava (II. dio)," *Pravo i porezi* 28, no. 5 (2019): 106, 107.

98 Radina, "Izdvajanje djeteta iz obitelji u praksi Europskog suda za ljudska prava," 110, 111.

99 *A.K. and L. v. Croatia*, para. 78.

100 The judgment in the case of *X. v. Croatia* and *A.K. and L. v. Croatia* was passed in 2008 and 2013, respectively.

101 Art. 159 of the FA 2003.

102 According to available statistical data from 2016 to 2020, the ratio of the number of persons (partially) deprived of legal capacity and the number of persons whose legal capacity was restored is as follows: 2016: 8 398 - 68; 2017: 8 774 - 91; 2018: 10 056 - 135; 2019: 9 799 - 191; 2020: 11 437 - 203. On average, 9,693 people are deprived of legal capacity in Croatia

deprived of legal capacity, due to the threat to their rights and/or interests and those of other persons, they would not be able to perform parental care. In general, the deprivation of legal capacity of a person who is a parent, should also result in assessing the impact of health difficulties on the exercising of parental care.¹⁰³ According to international documents that are part of the Croatian legal system, there is an obligation to take measures to include persons with disabilities (and those deprived of legal capacity) in society and move away from the usual approach to their protection.¹⁰⁴ For parents deprived of legal capacity and parental care, the FA 2015 provides the possibility of professional assistance and support, the institute of parental care is reformed,¹⁰⁵ as well as the participation of parents deprived of legal capacity in the adoption procedure.¹⁰⁶ The FA 2015 also points out the impaired mental abilities of parents as a special presumption for deprivation of the right to parental care. Therefore, a parent may be deprived of the right to parental care if the mental capacities are so limited that *i*) he or she is unable to realize the contents of parental care where *ii*) the welfare of the child is endangered.¹⁰⁷ In this way, the legislator explicitly separated the procedure of deprivation of legal capacity and the procedure of deprivation of the right to parental care, at the same time preventing a person deprived of legal capacity due to mental difficulties from being automatically deprived of the right to parental care which was contentious in practice. It should also be noted that the measure of deprivation of the right to parental care is reversible, which means that its return can be requested if the conditions for it are met, i.e. the reasons why the parent is deprived of the right to parental care cease.¹⁰⁸ Thus, a proposal for the restoration of the right to parental care can be submitted by a child, a parent deprived of the right to parental care, or a social welfare center.¹⁰⁹ It also follows that, if it strives to preserve the family as a fundamental social unit, the state should proactively remove the obstacles that led to the deprivation of the right to

per year, while on average 138 people regain legal capacity. “Strategije, planovi, programi, izvješća,” Ministry of Labour, Pension System, Family and Social Policy, accessed September 22, 2022, <https://mrosp.gov.hr/strategije-planovi-programi-izvjesca-statistika/4165>.

103 Anica Čulo Margaletić, “Presuda u predmetu X. protiv Hrvatske,” in *Presude o roditeljskoj skrbi Europskog suda za ljudska prava protiv Republike Hrvatske*, ed. Dubravka Hrabar (Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2021), 168.

104 Branka Rešetar, “Utjecaj prakse Europskog suda za ljudska prava na reformu obiteljskopravne zaštite osoba s invaliditetom u Republici Hrvatskoj,” in *Suvremeno obiteljsko pravo i postupak*, eds. Branka Rešetar, Slađana Aras Kramar, Nataša Lucić, Ines Medić, Dinka Šago, Ivana Tucak, and Petra Mioč (Osijek: Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, 2017), 211.

105 Thus, parental care is suspended when the parent is deprived of legal capacity in the part in which they are unable to exercise parental care. A parent deprived of legal capacity may, together with a guardian or another parent, take care of the child on a daily basis - parent cannot represent the child in the part in which they are deprived of legal capacity, but the parent’s opinion is taken into account. Art. 114, paras. 1, 2 and 3 of the FA 2015.

106 Rešetar, “Utjecaj prakse Europskog suda za ljudska prava,” 213.

107 Art. 171 of the FA 2015; Lucić, “Adoption of a Child,” 377.

108 Mateja Čop and Iva Svalina, “Obiteljskopравни aspekt izdvajanja djeteta iz obitelji,” *Pravnik* 48, no. 1 (2015): 139, 146.

109 Art. 176 of the FA 2015.

parental care and enable the reintegration of the family. Exercising the right to respect for family life from Art. 8 of the ECHR is also strengthened in procedural terms by the obligation to hear a person deprived of legal capacity when it comes to exercising parental care.^{110, 111}

While the FA 2003, in defining adoption, pointed out that adoptive parents are thus allowed parenthood,¹¹² the FA 2015 emphasizes the creation of a lasting parent-child relationship,¹¹³ which is confirmation that the adoption is solely in the interest of the child.

4.2 Consent to Adoption

The most important changes in the new Croatian family legislation relate to consent to adoption, which is required from the child's parents, guardian, the child, and the spouse or extramarital partner.¹¹⁴ It can be said that consent to adoption is the central point of the procedure since it is a presumption for establishing adoption.¹¹⁵ In general, parental consent is required for adoption, except in cases where FA 2015 stipulates that consent is not required, with the right of parents to revoke consent within 30 days of signing the minutes of consent.¹¹⁶ It is also the right of parents to refuse to give consent for adoption, in which case the social welfare center warns the parents that their consent may be replaced by a court decision three months after the day they were warned of this possibility. In addition to the warning about the replacement of consent, the social welfare center also informs the parents about the possibility of imposing a measure of intensive professional assistance and supervision¹¹⁷ for three months.¹¹⁸ In the case when a parent is deprived of legal

110 The (new) Croatian legislation also affected the issue of deprivation of the right to parental care. In the period from 2016 to 2020, data on the number of decisions on the right to parental care and decisions on the return of the right to parental care are as follows: 2016: 147 - 1; 2017: 148 - 4; 2018: 173 - 6; 2019: 237 - 3; 2020: 228 - 6; 2021: 218 - 2. On average, 192 decisions on deprivation of the right to parental care and 4 decisions on restoring the right to parental care are made in Croatia annually. Ministry of Labour, Pension System, Family and Social Policy, "Strategije, planovi, programi, izvješća, statistike."

111 Slađana Aras Kramar, "Položaj osoba s invaliditetom u sudskim postupcima: lišenje poslovne sposobnosti te djelotvoran pristup pravosuđu," in *Suvremeno obiteljsko pravo i postupak*, eds. Branka Rešetar, Slađana Aras Kramar, Nataša Lucić, Ines Medić, Dinka Šago, Ivana Tucak, and Petra Mioč (Osijek: Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, 2017), 251.

112 Art. 123, para. 1 of the FA 2003.

113 Art. 180, para. 1 of the FA 2015.

114 Dubravka Hrabar, *Obiteljsko pravo u sustavu socijalne skrbi* (Zagreb: Narodne novine, 2019), 205.

115 Jakovac Lozić, "Posvojenje," 307.

116 Art. 188, para. 1 and 6 of the FA 2015.

117 Pursuant to Art. 145 of the FA 2015, this measure is imposed on parents when the child's development is seriously threatened, and the parents are: *i*) able and ready to change their behavior in a short period of time with the purpose of preventing the separation of the child from the family and *ii*) obey the instructions and enable supervision of the child. It is crucial for this measure that the life and health of the child in the family are not endangered.

118 Art. 189, paras. 1 and 2 of the FA 2015.

capacity, there are two preconditions for giving their consent: *i*) they must understand the meaning of consent (and thus adoption), and *ii*) the social welfare center has to inform them of the consequences of giving consent.^{119, 120} In case when a parent deprived of legal capacity does not understand the consequences of giving consent to adoption, and to avoid the establishment of adoption without consent, consent to adoption is substituted by the court. According to the FA 2015, parental consent to adoption is not required only if the parent *i*) has died, disappeared, or is unknown, and *ii*) when the parent is deprived of the right to parental care.¹²¹ Thus, adoption without the consent (of parents) is only an exception and it is necessary to find an alternative. It is therefore pointed out that the most appropriate alternative to adoption without consent would, in fact, be early state intervention to reduce the likelihood of negative implications for the child.¹²² The procedure for replacement consent for the adoption of a child is initiated by the social welfare center, a non-contentious procedure is conducted and parents, other persons related to the child, as well as the child, have the right to express their opinion.¹²³ These are situations when a parent violates or abuses parental responsibility, rights, and duties by showing disinterest in the child and in such cases there is a possibility that care will no longer be entrusted to them or they are so incapable that they cannot exercise any content of parental care.¹²⁴ This procedure envisages the full implementation of the right to respect for family life considering that court informs the parents deprived of legal capacity in an appropriate manner of the consequences of adoption, both legal and factual.¹²⁵ Although the child and the most appropriate potential adoptive parent are explicitly determined as parties in the adoption procedure,¹²⁶ the standard of “parental involvement” has been introduced into Croatian legislation, which implies the possibility of considering the views of biological parents by the competent authorities.¹²⁷ The parent who gave consent to the adoption of the child (to unknown adoptive parent) loses the status of the party within 30 days from the day of signing the minutes of consent to adoption.¹²⁸ On the other hand, a parent whose consent is replaced by a court’s decision or whose

119 Art. 188, para. 2 of the FA 2015.

120 Analyzing statistical data for the period from 2016 to 2020, the number of parents deprived of legal capacity who gave their consent for adoption, meeting the necessary assumptions, is as follows: 2016: 10 parents; 2017: 7 parents; 2018: 8 parents; 2019: 5 parents; 2020: 3 parents; 2021: 3 parents. On the other hand, in the same period, the following number of court rulings were passed, replacing consent for adoption: 2016: 10; 2017: 20; 2018: 8; 2019: 8; 2020: 18; 2021: 17. In Croatia, on average, 6 parents deprived of legal capacity give consent for adoption per year, while on average 14 decisions are passed per year replacing the parents’ consent to adoption. Ministry of Labour, Pension System, Family and Social Policy, “Strategije, planovi, programi, izvješća, statistike.”

121 Art. 188 of the FA 2015.

122 Davey, *Failure of Proportion*, 142, 146.

123 Art. 493, paras. 1, 2 and 4 of the FA 2015.

124 Art. 190 of the FA 2015.

125 Art. 493, para. 5 of the FA 2015.

126 Art. 209, para. 1 of the FA 2015.

127 Fenton Glynn, *Children and the European Court of Human Rights*, 332.

128 Art. 209, para. 2 of the FA 2015.

consent is not needed, is not a party in the proceedings.¹²⁹ Interests of the child are also protected by appointing a special guardian,¹³⁰ because the interests of the child and the biological parents are in conflict. In accordance with the above, in addition to the obligation to act according to the ECtHR judgments, it is clear that the legislator focused on protecting the procedural rights of all parties, emphasizing the best interest of the child, which is also a reflection of international standards.¹³¹

In accordance with the legislative reform and the aforementioned guidelines for the adoption procedure, it seems that the rights of the biological parents are mainly protected in the adoption procedure rather than the rights of the child, but the reality is different. Starting from the best interest of the child - this is an interpretative principle according to which there are several possible interpretations of a legal provision, but the one that is in the best interest of the child is always chosen.¹³² The FA 2015 particularly emphasizes the protection of vulnerable social groups. When referring to consent to adoption, this right is also provided for minor parents, which protects the interests of two children - the minor parent and the child being adopted.¹³³ The protection of the child's interests in the adoption procedure is also based on the procedure for substituting consent to adoption which makes the adoption procedure more efficient,¹³⁴ preventing the biological parents from jeopardizing the child's right to family life with their actions. Due to consent to adoption, the parent loses the right to parental care,¹³⁵ but as a party they have the rights to a certain stage of the procedure.

Consent to adoption confirms the importance of a comprehensive approach in the adoption procedure and achieving a balance of all participants. As an argument against this part of the procedure, the impact on the length of the entire procedure could be highlighted, but ECtHR jurisprudence has shown that the reasonable duration of the adoption procedure depends on numerous issues related to the best interests of the child,¹³⁶ and which would undoubtedly include consent to adoption, which results in the loss of the right to parental care. Therefore, the position of the child in the adoption procedure is not threatened in any way because adoption is a procedure that ensures the child's right to a family. However, the legislature also regulated the situation when a parent, a person deprived of legal capacity, could not give consent to adoption. In that case, there remains the possibility of expressing an opinion on the adoption, which is not binding and is taken into account if it is in

129 Art. 209, paras. 4 and 5 of the FA 2015.

130 Art. 493, para. 6 of the FA 2015.

131 Alan Uzelac, "Novo uređenje obiteljskih sudskih postupaka - glavni pravci reforme obiteljskih parničnih postupaka u trećem Obiteljskom zakonu," in *Novo uređenje obiteljskih sudskih postupaka*, ed. Jakša Barbić (Zagreb: Hrvatska akademija znanosti i umjetnosti, 2014), 29.

132 Rešetar, *Komentar Obiteljskog zakona*, 16.

133 Rešetar, *Komentar Obiteljskog zakona*, 701, 725.

134 See: Slađana Aras Kramar, *Komentar Obiteljskog zakona (Knjiga II.)* (Zagreb: Organizator d.o.o., 2022), 583, 584.

135 Art. 195, para. 1 of the FA 2015.

136 Kilkelly, *The Child and the European Convention on Human Rights*, 313.

the best interests of the child.¹³⁷ This solution is suitable in cases when various life circumstances have made it impossible for parents to exercise parental care for their child, while the shortcoming is manifested in the fact that the procedure is delayed and there is no mechanism for stopping the procedure when the parent initiates the procedure of restoring parental care.¹³⁸

5 THE ECTHR GUIDELINES FOR ADOPTION PROCEDURE

The ECtHR judgments in cases against Croatia concerning adoption, as well as in its jurisprudence in general, also pointed to procedural guidelines for the reform of the adoption procedure. Speaking of substantive presumptions, they are manifested in the “test of necessity”, but as procedural guidelines for the implementation of the procedure the following is highlighted:

- complete and reasoned determination of all relevant facts,
- prohibition of unilateral implementation of the procedure,
- involvement of children in the adoption procedure and
- comprehensive and in-depth case analysis.¹³⁹

In other words, taking into account the elements of the “test of necessity” as well as the procedural guidelines for the implementation of the adoption procedure, the ECtHR indicates that this procedure requires an interdisciplinary approach. Thereby, equal opportunities to participate in the procedure should be provided to biological parents regardless of their health problems and with the best interests of the child in mind. It is also clear that the ECtHR emphasizes consent to adoption as a central point of the proceedings, *de facto*, a point that marks the legal transition of parental care from biological parents to adoptive parents. By denying the right to participate to biological parents deprived of legal capacity or the right to parental care, by denying their consent or opinion, adoption becomes incomplete, considering that it does not provide a complete background of the reasons that led to the need for adoption at all. In fact, such treatment would be contrary to the comprehensiveness of adoption procedures highlighted by the ECtHR jurisprudence. The regulation of consent to adoption and the expression of opinions by biological parents deprived of legal capacity, as well as the right to parental care was necessary because the denial of this right consequently led to the violation of human rights. In that way, the legislator consistently implements the standards established by the CRPD and emphasizes the dignity of persons with disabilities as its guiding principle.¹⁴⁰ This inclusive approach prevented further violation of procedural rights protecting the rights and interests of

137 Art. 210 of the FA 2015; Slađana Aras Kramar, “Što donosi novi Obiteljski zakon,” *Pravo i porezi* 24, no. 11 (2015): 27.

138 Aleksandra Korać Graovac, “Presuda u predmetu A.K. i L. protiv Hrvatske,” in *Presude o roditeljskoj skrbi Europskog suda za ljudska prava protiv Republike Hrvatske*, ed. Dubravka Hrabar (Zagreb: Pravni fakultet Sveučilišta u Zagrebu, 2021), 84.

139 Rešetar and Grigić, “Smjernice za izdvajanje djece iz obitelji,” 108, 109.

140 Irena Majstorović, and Ivan Šimović, “The Scope of the Deprivation of Legal Capacity as a Precondition for the Protection of Rights and Dignity of Persons with Disabilities,” *Ljetopis socijalnog rada* 25, no. 1 (2018): 69.

all participants in the procedure. However, it is necessary to emphasize once again that the best interest of the child has absolute priority.

6 NEW JURISPRUDENCE - OLD PROBLEMS?

Although consent to adoption is highlighted as the central problem in this paper, it is also related to the position of parents deprived of legal capacity and the right to parental care in the adoption procedure. The cases before the ECtHR against Croatia indicated the complexity of the adoption, especially to the “weaker” parties in the procedure, not only regarding consent to adoption but also in relation to other aspects. The new ECtHR jurisprudence also points to shortcomings in the decisions of national authorities, especially concerning biological parents deprived of legal capacity, i.e. those who have certain mental difficulties, the right to parental care, as well as other social problems that make them a vulnerable social group.

In the case of *Pedersen and Others v. Norway*,¹⁴¹ it was about parents who had mental health problems resulting in the inability to provide adequate care for the child. As a result, they were deprived of the right to parental care and the child was subsequently placed into foster care and eventually adopted.¹⁴² As the ECtHR has repeatedly stated that its role is not to examine the reasons for adoption, in this decision it pointed out as problematic the fact that the child’s original placement (separation from the family) was linked to the mental health problems of the biological parents. All this consequently affected the strict regime of contact between the child and the biological parents, which abolished the possibility of family reunification as the ultimate goal of the right to respect for family life. The ECtHR pointed out that the competent national authorities, instead of trying to reunite the family, had made it possible to adopt a child as the severe measure (interference in family life). In addition, as a problematic part of the proceedings, it was pointed out that the adoption decision did not assess the custodial skills of the biological parents but the child’s attachment to foster parents. Referring to the aforementioned facts, as well as the restriction of contact, the biological parents were denied the opportunity to develop any relationship with the child which violated the right to respect for family life.¹⁴³

In the case of *Omorefe v. Spain*,¹⁴⁴ a Nigerian woman with a Spanish address requested temporary accommodation for her child in a reception center as she did not have sufficient means of sustenance, had an unregulated position in Spain, was unemployed, and affected by a marital crisis. According to Spanish law, this treatment was interpreted as a form of child abandonment, with the possibility of reintegrating the child into a biological family, with the obligation to provide conditions for the child’s normal development, ensure socio-economic conditions, and employment of parents. The regime of visiting the child was very strict, the child was placed in the care of foster parents, and was eventually adopted without the necessary consent of the

141 ECtHR, *Pedersen and others v. Norway*, no. 39710/15 of March 10, 2020.

142 *Pedersen and others v. Norway*, paras. 4, 8.

143 *Pedersen and others v. Norway*, paras. 66-72.

144 ECtHR, *Omorefe v. Spain*, no. 69339/16 of June 23, 2020.

mother with the explanation of the competent court that it is in the best interests of the child (the child had lived with foster parents almost since birth and the applicant did not have the necessary parenting skills).¹⁴⁵ The ECtHR emphasized in particular that the possibility of reintegration into the biological family existed considering that the necessary conditions had to be met, as well as the possibility of maintaining contact with the child.¹⁴⁶ However, in this case, the biological mother was not deprived of the right to parental care, and the adoption was ultimately made without her consent, which would be possible only in exceptional situations. It should also be noted that the competent national authorities did not explain the reasons for placing the child in a foster family, which also indicated the ultimate intention - adoption. Particularly problematic was the fact that the applicant had voluntarily requested (temporary) accommodation for her child and had not been provided with any assistance. In this sense, the state acted in wrong direction by failing to take appropriate measures to reunite the family, which resulted in the violation of the right to family life.¹⁴⁷

In the case of *A. I. v. Italy*,¹⁴⁸ it was about the violation of the right to respect for family life as a result of the ban on contact between the applicant and her daughter. Namely, the applicant, a Nigerian citizen, came to Italy as a victim of trafficking, for which reason, as established by the expert report, she suffered from post-traumatic stress disorder. One of her two children was diagnosed with HIV, for which she was deprived of parental care for that child, and shortly afterward, she was deprived of parental care for the other child, she was forbidden to make contact with the child, the children were placed in different families and were declared eligible for adoption.¹⁴⁹ The ECtHR found that the children were not exposed to violence and that (procedural) rights of the mother were violated during the proceedings. Assessing the justification of the measure, the ECtHR repeatedly referred to the judgment in the case of the *Strand Lobben and Others v. Norway*,¹⁵⁰ emphasizing the need to strike a fair balance between the interests of the child and the parents, as well as the need for stronger supervision over restrictions.¹⁵¹ In this case, the ECtHR determined guidelines for the competent national authorities which, to make a final decision on adoption, should examine *i*) whether they have facilitated family reunification, *ii*) whether they have struck a fair balance between the biological parent and the child and *iii*) whether they provided sufficient reasons to justify the final and complete termination of the relationship between the biological parent and the child.¹⁵² As key aspects of the proceedings that led to the violation of the right to family life, the ECtHR pointed out insufficient assessment of the vulnerability of the mother as an applicant, placement of children in different families, and failure to use appropriate

145 *Omorefe v. Spain*, paras. 3-24.

146 *Omorefe v. Spain*, paras. 47, 48.

147 *Omorefe v. Spain*, paras. 47, 48, 50, 58-60.

148 ECtHR, *A.I. v. Italy*, no. 70896/17 of April 1, 2021.

149 *A. I. v. Italy*, paras. 1-42.

150 ECtHR, *Strand Lobben and others v. Norway*, no. 37283/13 of September 10, 2019.

151 *A. I. v. Italy*, paras. 87, 89.

152 *A. I. v. Italy*, para. 92.

safeguards.¹⁵³

The ECtHR jurisprudence in recent adoption cases points to previously identified problems. Thus, competent national authorities conducting the adoption procedure continue to carry out this procedure lightly. The fact that states are required to prove in the proceedings before the ECtHR that there was no less severe measure than adoption available in order to preserve the family life of the child (and parents), as well as that the best interest of the child is protected in that way, it confirms the complexity of adoption.¹⁵⁴ However, the ECtHR puts special emphasis on vulnerable social groups, emphasizing that persons deprived of legal capacity or deprived of the right to parental care should be treated with special caution, and in recent practice, special attention is paid to third-country nationals. It is also clear that, in some cases, competent national authorities do not exercise discretion in the conduct of adoption in favor of all participants, but use discretion to shorten the duration of the proceedings. Also, it is especially emphasized that in any case it is necessary to determine all the circumstances that would lead to deprivation of parental care, or when deciding on adoption, it is necessary to take into account all relevant circumstances and take measures necessary for family reunification. Although the ECtHR has previously indicated a positive obligation under Art. 8 of the ECHR, according to which the state has to protect the right to family life by appropriate measures, the competent national authorities continue to direct their positive obligation to preserve the family in a negative direction, exclusively by determining adoption as the ultimate measure of child protection.

7 CONCLUSION

With its decisions, the ECtHR has influenced the adoption in Croatia, emphasizing the importance of equal representation of all participants in that procedure, without calling into question the best interest of the child. However, due to numerous specifics, adoption needs to be approached comprehensively, guided by the fact that this procedure irreversibly terminates a family relationship and that a new family is created “artificially”. Thus, the complexity of this procedure is obvious, considering the need to take into account the views of all participants for the final decision on adoption to have long-term effects, primarily for the child who is thus guaranteed the right to family life. The high level of formalization of the adoption procedure has led to the degradation of certain groups of parents, primarily those deprived of legal capacity and the right to parental care. Due to the complexity of the adoption procedure, the ECtHR requires exceptional precision in its implementation and an explanation of any action taken, which must be legal, legitimate, and necessary. Although it pointed out the shortcomings, the ECtHR did not explicitly determine how the regulation of the adoption procedure should be approached, but it is left to the legislator to independently regulate that procedure following the given guidelines. Therefore, the legislator, following contemporary human rights standards,

¹⁵³ A. I. v. Italy, paras. 99-104.

¹⁵⁴ Rešetar, *Komentar Obiteljskog zakona*, 698, 734.

has enabled the inclusion of persons deprived of legal capacity in the adoption procedure by giving consent or opinion regarding the adoption.

It should be noted that current legislation seeks to protect the fundamental human rights of persons deprived of legal capacity, but the best interests of the child continues to be a fundamental principle of family legislation, including the adoption procedure. This is also confirmed by the fact that the child, along with the most appropriate potential adoptive parent, is well defined as a party to the proceedings, which is why it has a procedural (and every other) advantage over his or her biological parents. The interest of the biological parents in the adoption procedure should be interpreted from an emotional aspect, given that the existing family relationship is irredeemably terminated. Since consent to adoption has been given the feature of an important segment of the adoption procedure, it can theoretically be assumed that this could further prolong the adoption procedure. To prevent such undesirable situations, the legislator provided for the possibility of replacing the consent by the court in the case that there would be no possibility of giving that consent by the biological parent for objective reasons or in case of misusing that possibility. Therefore, the primary intention of the legislator is to allow the exercise of fundamental rights to all participants in the adoption procedure, including direct participants (child and biological parents), but the best interest of the child always prevails. With their decisions, the ECtHR also improved the position of biological parents in adoption procedure, especially biological parents deprived of legal capacity and the right to parental care, giving them at least the possibility of “indirect” participation in that procedure. Legal capacity enables each individual to take legal action, so the legislator only provided for the possibility of partial deprivation. The fact that the previously mentioned category of parents can participate in the adoption procedure (as well as in the procedures of deprivation of legal capacity or the right to parental care), enables the use of all procedural tools with which they could protect their rights and interests, without jeopardizing the fundamental principle of protecting the best interests of the child.

The ECtHR judgments have changed the paradigm of adoption in Croatia, but newer jurisprudence points to old problems. In the cases against Croatia concerning adoption, the ECtHR dealt with the procedural aspects of adoption, primarily the right to participate in proceedings and the right to effective remedy, which is related to the right to respect for family life. While in the “Croatian cases” consent to adoption was denied to biological parents deprived of legal capacity and the right to parental care, recent ECtHR jurisprudence indicates that the same problem is repeated in relation to migrants, also as a vulnerable social group. It is clear, therefore, that contemporary social movements and challenges affect the adoption procedure by emphasizing the importance of its inclusive approach and guaranteeing fundamental human rights. This also confirms that adoption goes beyond mere formality and is only one in a series of (administrative) procedures, and indicates that it is an extremely complex procedure whose improper implementation could mean a violation of many human rights.

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Sažetak

UTJECAJ EUROPSKOG SUDA ZA LJUDSKA PRAVA NA POSTUPAK POSVOJENJA U REPUBLICI HRVATSKOJ

U brojnim predmetima povezanim s posvojenjem, Europski sud za ljudska prava (u daljnjem tekstu: ESLJP) istaknuo je važnost sveobuhvatnoga pristupa postupku posvojenja te najboljeg interesa djeteta, uzimajući u obzir sve okolnosti slučaja. Uskraćivanje prava na pristanak na posvojenje dovodi do kršenja ljudskih prava, što se posebno očituje u odnosu na ranjive društvene skupine. Takav oblik povrede prava ESLJP je utvrdio i u „hrvatskim predmetima” - X. protiv Hrvatske te A.K. i L. protiv Hrvatske. U njima se bavio povredom prava osoba s duševnim smetnjama, točnije roditelja lišenih poslovne sposobnosti i prava na roditeljsku skrb. Nedostatci koje je utvrdio utjecali su na promjenu paradigme posvojenja u novom hrvatskom obiteljskom zakonodavstvu iz 2015. godine. Stoga se u radu ističe važnost cjelovitoga pristupa postupku posvojenja analizirajući hrvatsko obiteljsko zakonodavstvo i judikaturu ESLJP-a vezanu za „hrvatske predmete”. Također se analiziraju i noviji predmeti iz kojih proizlaze smjernice za daljnje unaprjeđenje postupka posvojenja i zaštite temeljnih ljudskih prava.

Ključne riječi: *posvojenje; osobe lišene poslovne sposobnosti; Europski sud za ljudska prava; biološki roditelji; pristanak na posvojenje.*

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