



**Recognition of a foreign judicial decision – adoption of a child by same-sex partners**

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**Panel**

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**Legal basis:**

Private International Law and Procedure Act, Articles 94/1, 96, 100

European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 8/1, 14

Marriage and Family Relations Act, Articles 135, 145

Constitution of the Republic of Slovenia, Articles 14/1, 53, 54, 56

## **Decision**

**The request for the protection of legality is rejected.**

### **Headnote:**

As a rule, a foreign judicial decision has a direct effect only on the territory of the state the court of which issued it. In order for the decisions to have effect in other countries, it has to be recognized in special court proceedings of these countries.

The effects of recognizing foreign judicial decisions on the adoption of children by same-sex partners do not interfere with the international public order: they do not lower the level of family and child protection guaranteed by it, do not diminish it, and do not threaten it.

## **R e a s o n i n g**

1. The proposers are citizens of the Republic of Slovenia and of the United States of America. They registered a same-sex partnership in the federal state of New Jersey in the United States of America (but not also in the Republic of Slovenia). By the decision of the Superior Court of New Jersey no. 15211 of 30 March 2006 they became the adoptive parents of a girl, who was born on 5 January 2005 in the Phoenix Baptist Hospital in Phoenix, the State of Arizona, and was given the name A. A. At the same time it was decided, on the one hand, that all rights, duties, benefits and relations between the girl and her biological parents and other persons having such relations with her cease, including the right to inheritance in accordance with the rules of the State of New Jersey, and, on the other hand, that a relationship is established between

the girl and each of the adoptive parents as if she were a biological child of each of them, including the right to inheritance. The decision of the US court is final and has been executed, as the girl has been living with her adoptive parents since her birth, who exclusively and entirely take care of her.

2. The District Court in Ljubljana recognized the legal validity of the US court decision from the aforementioned paragraph by a final decision, against which the State Prosecutor General of the Republic of Slovenia has filed a request for the protection of legality.

3. In the request for the protection of legality it is claimed that the court of first instance erroneously applied substantive law, specifically the provision of Article 100 of the Private International Law and Procedure Act<sup>1</sup> (hereinafter: the PILPA) in relation to the provisions of Articles 8<sup>2</sup> and 12<sup>3</sup> of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>4</sup> (hereinafter: the ECPRFF), Articles 3,<sup>5</sup> 7,<sup>6</sup> 8,<sup>7</sup> 20<sup>8</sup> and 21<sup>9</sup> of the United Nations Convention on the Rights of the Child<sup>10</sup> (hereinafter: the CRC), Articles 2,<sup>11</sup> 3,<sup>12</sup> 4,<sup>13</sup> 7,<sup>14</sup> 135,<sup>15</sup> 142<sup>16</sup> and 145<sup>17</sup> of the Marriage and Family Relations Act<sup>18</sup> (hereinafter: the MFRA), the Registration of a Same-Sex Civil Partnership Act<sup>19</sup> (hereinafter: the RSSCPA), and Articles 53,<sup>20</sup> 54<sup>21</sup> and 56<sup>22</sup> of the Constitution of the Republic of Slovenia (hereinafter: the CRS). The State Prosecutor General assesses that the legal effects of the recognition of a foreign judicial decision on the adoption of a child by same-sex partners is contrary to the public order of the Republic of Slovenia. It emphasizes that the notion of the (international) public order is a legal standard which has to be in each individual case applied by the court while taking into consideration the criteria that have developed in legal theory and case law. The assessment of the compliance of recognizing a foreign judicial decision on the adoption of a child by same-sex partners with the public order of the Republic of Slovenia depends on general social circumstances in Slovenia and other member countries of the European Union which are comparable to it in social, cultural and economic

terms, and which signed and ratified the ECPRFF. The member states of the Council of Europe have so far not yet developed uniform criteria regarding the position and legal consequences of same-sex partnerships, in particular in the field of adoption. It is left to individual member state to regulate family and partnership relations on their territories in accordance with their internal legislation and international documents. The Council of Europe Convention on the Adoption of Children of 2008, which Slovenia did not sign, provides the opportunity that the member states decide on their own whether they shall allow adoption by same-sex couples living in permanent relationships. Although some efforts have been made in the direction away from the moral and legal principles of the conventions, which Slovenia by ratification integrated into its legal order, the Convention did not become established in the national legal order: in accordance with Article 135 of the MFRA, nobody can be adopted by several persons unless the adopting persons are married (or a non-marital partner – Article 12 of the same Act). The RSSCPA, which regulates the conditions and the registration procedure for same-sex partnerships and its legal consequences, does not envisage any consequences in the area of family law. There is also no other regulation valid in Slovenia which would equate a registered same-sex partnership with a marriage or an extramarital partnership. The aim of the marriage or an extra-marital partnership (within the meaning of the provisions of the MFRA) is in starting a family. The parental right belongs to parents of both sexes and this mission cannot be realized in a same-sex partnership as a natural course of events. A family can come into being also by an adoption, however, it is crucial that between the adopted person and the adopting person a relationship is legally established as it had existed previously between the adopted person and his or her biological parents; the entry of same-sex partners in the position of natural parents is not acceptable. Even in the case of registration, the position of the same-sex partnership cannot be equated with the position that the legal order (including the provisions of Article 54 and the third paragraph of Article of the CRS) gives to marriage or an extra-marital partnership, also taking into consideration special protection which it provides to children and minors without parents or without adequate family care, a child

cannot be adopted by same-sex partners although they are living in a registered partnership. The recognition of the foreign court decision at issue would be contrary to the established morals, furthermore, the recognized decision could not be executed before a domestic court.

4. The proposers were served the request for the protection of legality in accordance with the provision of the second paragraph of Article 391 of the Civil Procedure Act<sup>23</sup> (hereinafter: the CPA) in relation to the provision of the first paragraph of Article 375 of the same Act, and responded to it by proposing its rejection. The proposers in the explanation oppose the position emphasized in the request for the protection of legality, which claims that the effects of the recognition of the decision under discussion on adoption would be contrary to the domestic public order and that they would threaten the moral principles, the basic legal principles or economic and political interest of the Republic of Slovenia.

5. The request for the protection of legality is not substantiated.

6. A request for the protection of legality is an extraordinary judicial review of the State Prosecutor General against a final court decision against which the court cannot allow a revision (the first and the second paragraph of Article 385 of the CPA). The scope in which a final decision is challenged is limited: pursuant the provision of the first paragraph of Article 391 of the CPA, in deciding on a request for the protection of legality the court limits itself to testing the violations that are explicitly alleged by the State Prosecutor General.

7. In the case at issue the court of first instance issued a final decision against which the request for the protection of legality has been filed, however, the court did not decide on the adoption of the child by two same-sex partners but rather on the recognition of a foreign final court decision on adoption which

was already executed in the country of issue. Consequently, that part of it which gives the argumentation for the position outlined in the request for the protection of legality claiming that the valid legal order in the Republic of Slovenia does not allow a child to be adopted by two persons, unless these two persons are spouses, i.e. not partners in a registered (and even less non-registered) same-sex partnership, is irrelevant for the decision on this extraordinary judicial review. The foreign court based its decision on its substantive law; the test as to whether the court applied it correctly is not a part of the procedure to recognize a foreign judicial decision – the court in the country of recognition should not take over the function of instance court with the exception that it may in accordance with the generally accepted principle of a strictly limited test assess the meritory regularity of the foreign decision and the procedure in which it was issued only from the point of view of compliance with the international public order of the Republic of Slovenia<sup>24</sup> (to be discussed in more detail below).

8. As a rule, a foreign judicial decision has a direct effect only on the territory of the country the court of which issued it. In order for a judicial decision to have effect also in other countries, these countries have to recognize it by special court procedures. In Slovenia the procedure and conditions for the recognition of foreign judicial decisions is regulated by the PILPA. Pursuant to the first paragraph of Article 94 of the aforementioned Act, if recognized by a court of the Republic of Slovenia, a foreign judicial decision has the same status as a decision of a court of the Republic of Slovenia, and has the same legal effect in the Republic of Slovenia as a domestic judicial decision. The actual and legal situations which represent procedural or substantial negative assumptions for the recognition of foreign judicial decisions are regulated by the PILPA in Article 96 to 101.<sup>25</sup> The court of first instance assessed that in the case at issue none of these obstacles is present, whereas the request for the protection of legality claims that the reservation from Article 100 of the PILPA exists. It stipulates that a foreign judicial decision is not recognized if the effects of its recognition were contrary to the public order of the Republic of

Slovenia. This is the so-called reservation regarding public order which may apply in the case of the application of foreign law before a domestic court, and in the case of recognition of foreign judicial and arbitration decisions. Due to this reservation, a domestic court uses national law instead of foreign law or rejects a foreign judicial or arbitration decision.

9. The PILPA does not define public order.<sup>26</sup> Legal doctrine and case law define it in general terms as the boundary of foreign law application,<sup>27</sup> or as an institute protecting domestic legal order against foreign law, which is contrary to the basic legal principles of the domestic law.<sup>28</sup> The basic legal principles of domestic law, i.e. those on which the domestic legal order is founded and indirectly form the framework of public order, consist of: (i) legal norms: constitutional principles, basic principles arising from laws, basic principles of the legal order of the Council of Europe, European Communities and international agreements adopted to guarantee the minimum standard of legal protection, all with the restriction which prevents the institute of the recognition of a foreign judicial decision to fail: not every cogent (forced) regulation is a part of public order,<sup>29</sup> only those are, the violation of which would threaten the legal and moral integrity of the domestic legal system; (ii) international customary law; (iii) basic moral principles, and (iv) vital economic, political ... interests of the state.<sup>30</sup>

Just as the economic, social, cultural, demographic ... situation changes, values that individual states safeguard as basic ones, also change and develop (which can happen also under the influence or on the basis of law). Public order is relative: it adjusts to these changes by either expanding or narrowing itself. Its scope and contents depend on the manner in which an individual state values its interest.<sup>31</sup> The moment which is relevant for the assessment of a possible contradiction between foreign law and domestic public order is the moment when the decision about the recognition is made; public order that is valid when the foreign judicial decision is recognized has to be taken into account.<sup>32</sup>

10. The position of the request for the protection of legality claims that the reservation regarding public order in relation to the recognition of the concrete foreign judicial decision arises from the contradiction between the effects of the foreign judicial decision in the Republic of Slovenia and those two sources of public order that are represented by basic legal norms and basic moral norms in the state.

11. The decision whether the extraordinary judicial review under discussion is (un)founded depends on the assessment whether the effects of the recognition of a foreign judicial decision on the adoption of a child by (two) same-sex partners would be contrary to the domestic public order. The Supreme Court has already taken the position that the so-called international public order<sup>33</sup> should be taken into account when assessing whether the effect of the recognition of the foreign judicial decision would be contrary to the public order of the Republic of Slovenia. International public order is not a notion of international but of national law (it is national public order in the sense of international private law):<sup>34</sup> in principle each state decides on its own which values are basic values for it. Since Slovenia has become a member of the European Community and the Council of Europe, the public order the source of which is the law of these institutions (the Community and the Convention public order constituting the so-called European public order)<sup>35</sup> is also a part of the Slovenian international public order. Within the national public order the elements arising from the European legal sources<sup>36</sup> also have to be protected, which means (i) that the courts have to reject the recognition of a foreign judicial decision, even if it is not contrary to the public order of their state but it is contrary to the common values, and (ii) that the courts can no longer reject the recognition of a foreign court judgement, if it is contrary to their public order, however from the “European perspective” this rejection would not be justified or proportional.<sup>37</sup>



12. The role of public order is different in a situation when a relationship is to be established in the domestic state, in comparison to a situation when a relationship has already been established in another state and the acquired rights are only to be recognized in the domestic state.<sup>38</sup> In the case of recognizing a foreign judicial decision, the reservation regarding the public order is “alleviated” (some are of the opinion that it is alleviated to the extent that it is almost excluded). Legal theory and case law, namely, often allow for the recognition of a foreign judicial decision, despite it having been adopted on the basis of legal rules which could not have been applied in the country of recognition due to their discrepancy with the public order, and its “result” in the country of recognition could have never been achieved. The legal premise on which they base their position is that in the case of recognizing a foreign judicial decision, only a confirmation or the protection of rights acquired elsewhere is in question, rather than their establishment. They further base their position on the fact that a certain relationship does not have a link with the country of origin which would be strong to the extent that it would be appropriate to protect the public order of this country.<sup>39</sup> In other words: the reservation regarding public order should be used only as a last resort (very carefully, restrictively and in a restrained manner),<sup>40</sup> when the lack of its application would result in consequence unbearable for the domestic legal order.

13. As it was emphasized, the proposers, who are citizens of the USA and the Republic of Slovenia, adopted a child who is also the citizen of the USA and has been living since birth with adoptive parents in the USA by a decision of the US court, which is final. There are a number of different positions in the theory on whether a recognized foreign judicial decision has the same effect in the country of recognition as in the country of origin, or else, it has the same effect as a domestic judicial decision of the same type.<sup>41</sup> The basic legal effect of the recognition of a decision on adoption in Slovenia would be, as has been established by the court of first instance, which used the second of the aforementioned criteria, and this has not been challenged by the request for the

protection of legality, that (also) in Slovenia (as they already did in the USA): (i) the adoptive parents would enter in the legal position of the child's parents, in (ii) the child would enter in the legal position that she would have had if she was a biological offspring of both adoptive parents (which on both sides comprises obligations, as well as rights which are differently distributed in different life periods and in different situations). All other effects are directly or indirectly derived from this: the child would obtain the right to the citizenship of the Republic of Slovenia (the citizens of which are both adoptive parents) and the rights arising from it (for example to unlimited residence, health care and social security), the right to inheritance after the adoptive parents (and their relatives) and similar.

14. The request for the protection of legality refers to the provisions of the ECPHRFF, CRC, CRS, MFRA and RSSCPA given in paragraph 3 when justifying the position that the provision of Article 135 of the MFRA is the domestic law on adoptions to the application of which refer these two Conventions that do not regulate this issue, and that this provision is cogent and a constitutive element of the public order: because the disputed adoption was carried out in contradiction to this provision, the effects of the decision are contrary to the public order of the Republic of Slovenia.

15. The major source of family law in Slovenia is the MFRA. In Article 135 it stipulates that nobody can be adopted by more than one person, unless the adoptive parents are a married couple. In accordance with this, each partner in a same-sex partnership may adopt the biological child of his or her partner under general conditions, however, same-sex partners cannot together adopt a child who is not the biological descendant of any of them. The RSSCPA does not regulate family law relationships, including adoption. The provision of Article 135 of the MFRA, which prevents registered and non-registered same-sex partners from adopting together a child in Slovenia, is undoubtedly cogent, however it is not intertwined into the international public order (because it is

neither technically nor substantially a basic provision of the law) as contrary to the correct judgement of the court of first instance erroneously claims the request for the protection of legality. It remains a question whether it is in accordance with the CRS and whether it does not violate the general prohibition of discrimination (first paragraph of Article 14)<sup>42</sup> in guaranteeing the human rights and fundamental freedoms regarding personal circumstances of an individual (adoptive parents with same-sex sexual orientation). However, this question would be relevant if the Slovenian court would have to decide on the adoption of a child by (two) same-sex partners on the basis of the Slovenian national law. In this concrete case, when the Slovenian court decides “only” on the recognition of a foreign judicial decision, only the decision as to whether this foreign judicial decision is contrary to the (“alleviated”) international public order is of decisive significance.

16. As the basic document protecting human rights and fundamental freedoms in the member state of the Council of Europe and the European Community, the ECPHRFF is undoubtedly a part of the public order of the Republic of Slovenia, which is a member of these European associations.<sup>43</sup> In the European society its rules are considered to be fundamental and therefore have to be respected by member states. The European Court for Human Rights (hereinafter: the ECHR) on several occasions ordered that member states have to consider the European public order, based on the ECPHRFF, as a part of their national (domestic) public order; they have to respect it also in the case of recognizing and executing foreign judicial decisions (i.e. as international public order), because a state that recognizes a judicial decision which violates the rights of the Convention, is indirectly responsible for such a violation.<sup>44</sup> This imperative has been overlooked by the request for the protection of legality, when it refers to the violation of the provision of Articles 53 (Marriage and the Family), 54 (Rights and Duties of Parents), and 56 (Rights of Children) of the CRS, which it uses, the same as the provisions of Articles 2, 3, 4, 7, 142 and 145 of the MFRA, and the provisions of the RSSCPA, in order to argue the position that an adoption which is contrary to the provision of Article 135 of the

MFRA is at the same time contrary to the international public order.

In the first paragraph of Article 8 the ECPHRFF stipulates that everyone has the right to respect for his private and family life, his home and his correspondence. In Article 14 it further stipulates that the enjoyment of the rights and freedoms set forth in the Convention is secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. As a circumstance on the basis of which discrimination is prohibited the Convention assumes also sexual orientation, although it is not explicitly listed among the statuses listed in Article 14 (however, the Council of Europe is making every effort to include it), because it arises from several provisions of the ECPHRFF, which are an important instrument explaining the provisions of the Convention.<sup>45</sup> The European Parliament adopted several resolutions, which as distinct from the ECPHRFF, are not legally binding and are only a recommendation, in which it called the member states to legally regulate the status of persons with same-sex sexual orientation and to abolish discrimination on the basis of sexual orientation, among which it counts also the prevention of marriage to same-sex partners, the rejection of adoption and the right to education, by adopting legislation that will allow marriage to people with same-sex sexual orientation, abolish restrictions regarding parental rights and guarantee the right to adoption.<sup>46</sup> Slovenia has not (yet) followed these recommendations. National legislation allowing the joint adoption of a child to same-sex partners has in Europe so far been adopted by Belgium, Denmark, Norway, the Netherlands, Spain, Sweden, United Kingdom and Iceland.<sup>47</sup>

17. Without any doubt constitutional principles also constitute the international public order. Constitutional provisions are in hierarchy above the ECPHRFF (Article 8 of the CRS).<sup>48</sup> The priority of generally valid principles of international law and international agreements is valid only in relation to laws and other regulations of national law, and not in relation to the CRS; in other

words, only the national law regulations that are not at the constitutional level have to be harmonized with the principles of international law and international agreements.<sup>49</sup> The request for the protection of legality does not claim that the provisions of the ECPHRFF are contrary to the basic provisions of the CRS which could be important for the decision in the case under discussion (which could be relevant, as they are both a source of international public order). Regardless of that, it has to be emphasized that the CRS provides the particular and equal protection of family and children with the general provision of Article 53, 54 and 56, which are an element of international public order; the state protection of a family as a community of parents and children is in particular regarding the protection of the child's benefits within the framework of a family.<sup>50</sup> The effects of recognizing foreign judicial decisions as the disputed one do not interfere with the international public order, the source of which are aforementioned constitutional provisions: they do not lower the level of family and child protection guaranteed by it, do not diminish it, and do not in any way threaten it. The concretization of this protection (including the forms of families that receive it, and the conditions of adoption as a special protection of minor children) is left to the law, specifically to the MFRA (according to the court of first instance, none of its provisions is a part of international public order, which, however, is not significant according to the Supreme Court: even if all the provisions of the MFRA to which refers the request for the protection of legality were a part of the relevant international public order, it would not be possible to neglect within it the priorities of the ECPHRFF over the national law). The RSSCPA does not regulate the relationships as is the disputed one, and consequently its provisions cannot be a constitutive element for the concrete case of the relevant international public order.

18. The common denominator of the CRC is the commitment of the states signatories to the Convention that the benefits of the child will be their primary consideration in all activities related to children. The principle of a child's greatest benefit is a part of the relevant public order. Consequently, it could be possible to reject the recognition, if the assessment would be based on the

criteria outlined in paragraph 12 of the reasoning, which state that the recognition of those effects of the foreign judicial decision on adoption which will occur in the Republic of Slovenia would objectively not be to the benefit of the adopted child<sup>51</sup> (here again it is necessary to emphasize the necessity to make a distinction between the benefit of the child and the effects of recognizing a foreign judicial decision on adoption, which is relevant in the procedure of recognition, and the benefit from the adoption, which was relevant in the procedure of adoption before the foreign court but it cannot be the subject of assessment in the procedure of recognition before the Slovenian court). However, the conclusion of the court of first instance was just the contrary: the effects of the recognition that will occur in Slovenia (which are in brief outlined in paragraph 13 of the reasoning) will be without any doubt to the benefit of the girl. The Supreme Court understands that this assessment is not challenged by the request for the protection of legality, which limits the scope of the test of the substantive legal regularity of the final decision by the court of the first instance with reasons put forward by the State Prosecutor General (first paragraph of Article 391 of the Civil Procedure Act). If the interpretation is the opposite (assuming that the extraordinary judicial review under discussion is stating that the effects of recognizing the disputed decisions are contrary to the benefits of the adopted child), the assessment is made difficult by the lack of concreteness of the statement (as is understood): because in the procedure on the request for the protection of legality the court does not consider the adequate application of substantive law *ex officio*, it should be explained which effects of the recognition of the foreign judicial decision are contrary to the benefits of the child.

19. The fact that the current internal legal system regarding adoption does not allow two persons who are not spouses but partners in same-sex partnership to adopt a child together, is not sufficient for the conclusion that the effects of recognizing such a foreign judicial decision are contrary to morals. Morals are a set of values accepted in a certain environment, which are part of the individual and collective consciousness of a society and which define what is good and

bad for a human: individual action cannot be assessed as immoral, if a wider consensus does not exist about it in a society.<sup>52</sup> The request for the protection of legality does not allege that a wider consensus exists in a society about the unacceptable effects of recognizing a foreign judicial decision on the adoption of a child by a homosexual pair (it is difficult to imagine one, in view of the recommendations made by the European Parliament, as explained in paragraph 16).

20. The request for the protection of legality unjustifiably alleges also that it would be impossible to execute the recognized decision of a foreign court, claiming that in accordance to Article 145 of the MFRA only the parents of the adopted child can be entered in the registry of births, and it is in the nature of things that two fathers or two mothers cannot be entered in the registry. The entry of the birth of a child of same-sex parents undoubtedly calls for the adequate adjustment of the valid concept of the registry of birth, in which it is necessary to write in the section on parents the data about father and mother, i.e. the parents of different sex. However, the entry of child's birth into the registry of births on the basis of a foreign judicial decision on adoption, which is recognized in Slovenia, does not mean the execution of this decision. Namely, this is not a condemnatory decision, which is in principle the executory title, but rather a constitutive decision, and the effects of constitutive decisions come into being only when they become final, or, in the case of the recognition of a foreign court decision, when the decision on the recognition becomes final.

It is evident from the case file that the proposers filed a request with the Civil registration Department of the Sector of Administrative Internal Affairs of the Ljubljana Administrative Unit for the entry of the birth of A. A. into the registry and that the administrative body did neither dismiss nor reject the request, but only suspended the procedure with the decision no. ... of 18 September 2009 until the decision on the adoption is recognized before the Slovenian court.

21. The aforementioned justifies the assessment that those effects of recognizing the disputed foreign judicial decision which arise from the circumstance that the adoptive parents are two persons who are not spouses but partners in a same-sex partnership (which is registered abroad but not also in Slovenia), are not in contradiction with the (“alleviated”) international public order and (“from the European perspective”<sup>53</sup>) cannot be the basis for the rejection of the recognition. The request for the protection of legality is therefore not justified and has been rejected by the Supreme Court (Article 385 of the CPA).

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<sup>1</sup> Official Gazette of the RS, no. 56/99 and no. 45/2008.

<sup>2</sup> The text of the provision is cited in paragraph 15 of the reasoning.

<sup>3</sup> The text of the provision is cited in paragraph 15 of the reasoning.

<sup>4</sup> Official Gazette of the RS, MP, no. 7/94.

<sup>5</sup> (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

<sup>6</sup> (1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as



possible, the right to know and be cared for by his own parents. (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

<sup>7</sup> (1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. (2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

<sup>8</sup> (1) A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. (2) States Parties shall in accordance with their national laws ensure alternative care for such a child. (3) Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and the child's ethnic, religious, cultural and linguistic background.

<sup>9</sup> State Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- a) ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling, as may be necessary;
- b) recognize that inter-country adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of

origin;

c) ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

d) take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

e) promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements, or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

<sup>10</sup> Official Gazette of the SFRY, MP, no. 15/90, and Official Gazette of the RS, no. 35/1992, MP, no. 9/92.

<sup>11</sup> A family is a living community of parents and children which, because of the benefit of children, enjoys special social protection.

<sup>12</sup> (1) Marriage is a legally regulated living community of a man and a woman.

(2) The aim of marriage is in starting a family.

<sup>13</sup> (1) Parents shall have the right and obligation to ensure through direct care, by their work and social activities, the successful physical and mental development of their children. (2) In order to provide healthy growth, well-adjusted personal development and the capacity for independent life and work, parents shall have the right and obligation to care for the subsistence, personal development, rights and benefits of their minor children. These rights and obligations constitute parental rights. (3) Parental rights belong together to father and mother.

<sup>14</sup> Adoption, as a special form of care for minor children, shall create the same relations between the adopter and the adopted child as between parents and children.

<sup>15</sup> Nobody may be adopted by more than one person unless the adopters are a married couple.

<sup>16</sup> Adoption shall create the same relations between an adopted child and his or her descendants as between relatives, unless the law determines otherwise.

<sup>17</sup> In the case of adoption the adopters shall be entered in the birth registry as adopted child's parents.

<sup>18</sup> Official Gazette of the SRS, no. 15/76, as revised and amended.

<sup>19</sup> Official Gazette of the RS, no. 65/2005.

<sup>20</sup> (1) Marriage is based on the equality of the spouses. Marriage shall be solemnised before an empowered state authority. (2) Marriage and the legal relations within it and the family, as well as those within an extramarital union, shall be regulated by law. (3) The state shall protect the family, motherhood, fatherhood, children and young people and shall create the necessary conditions for such protection.

<sup>21</sup> (1) Parents have the right and duty to maintain, educate and raise their children. This right and duty may be revoked or restricted only for such reasons as are provided by law in order to protect the child's interests. (2) Children born out of wedlock have the same rights as children born within it.

<sup>22</sup> (1) Children shall enjoy special protection and care. Children shall enjoy human rights and fundamental freedoms consistent with their age and maturity. (2) Children shall be guaranteed special protection from economic, social, physical, mental or other exploitation and abuse. Such protection shall be regulated by law. (3) Children and minors who are not cared for by their parents, who have no parents or who are without proper family care shall enjoy special protection of the state. Their position shall be regulated by law.

<sup>23</sup> Official Gazette of the RS, no. 73/2007, and no. 45/2008.

<sup>24</sup> *Mutatis mutandis* the same as the decision by the Supreme Court of the Republic of Slovenia Cpg 3/2003.

<sup>25</sup> These are: if a person against whom a foreign judicial decision is rendered does not have the opportunity to participate in the proceedings (Article 96), exclusive jurisdiction over the matter in question by a court or other body of the Republic of Slovenia (Article 97), the existence of a final decision rendered by a Slovenian court or another body or litispence (Article 99), effect contrary to the public order of the Republic of Slovenia (Article 100) and lack of

reciprocity (Article 101).

<sup>26</sup> The previously valid Act on the Regulation of Law Collision with Regulation of Other Countries in Individual Relationships (Official Gazette of the SFRY, no. 43/82) used a descriptive formulation of the public order, when it stipulated in Article 91 that a foreign judicial decision is not recognized, if it is contrary to the foundations of the social system defined by the Constitution of the Socialist Federative Republic of Yugoslavia.

<sup>27</sup> *Marko Ilešič, Ada Polajnar Pavčnik, Dragica Wedam Lukić, Mednarodno zasebno pravo, komentar zakona, 2<sup>nd</sup> amended edition, Časopisni zavod Uradni list SRS, Ljubljana 1992, p. 25.*

<sup>28</sup> *Krešimir Sajko, Međunarodno privatno pravo, 4<sup>th</sup> amended and revised edition, Narodne novine, Zagreb 2005, p. 252.*

<sup>29</sup> *Stojan Cigoj, Mednarodno zasebno pravo, Volume 1, Splošni nauki, ČZP Uradni list SRS, Ljubljana 1977, p. 74.*

<sup>30</sup> See *Stojan Cigoj, ibid.*, pp. 73 - 76; *Krešimir Sajko, the above cited work*, pp. 253 and 254; *Jerca Kramberger, Javni red pri priznanju in izvršitvi tujih sodnih odločb (s poudarkom na procesnih vprašanjih), Zbornik znanstvenih razprav, LXV. letnik, Pravna fakulteta v Ljubljani, Ljubljana 2005, pp. 255 - 257.* Compare also with the decision by this court Cp 16/2006.

<sup>31</sup> *Marko Ilešič, Ada Polajnar Pavčnik, Dragica Wedam Lukić, the above cited work*, p. 25.

<sup>32</sup> *Krešimir Sajko, the above cited work*, p. 263.

<sup>33</sup> As stated in decisions Cpg 3/2003 and Cpg 4/2004.

<sup>34</sup> *Miroslava Geč Korošec, Mednarodno zasebno pravo, volume 1, Uradni list RS, Ljubljana 2001, p. 142; Stojan Cigoj, Mednarodno zasebno pravo, volume 1, Univerza v Ljubljani, Ljubljana 1977, p. 74; Tomaž Keresteš, Pridržek javnega reda pri priznavanju tujih arbitražnih odločb po Newyorški konvenciji, Podjetje in delo, no. 8/1999, p. 1631 and the following.*

<sup>35</sup> *Jerca Kramberger Škerl, Evropeizacija javnega reda v mednarodnem*

*zasebnem pravu, Pravni letopis, Inštitut za primerjalno pravo pri Pravni fakulteti v Ljubljani, Ljubljani 2009*, p. 359, which explains that some authors use the »European public order« for public order, which is based on the ECHR, and »common public order« for public order, based on the law of the European Community.

<sup>36</sup> *Ibid*, p. 360.

<sup>37</sup> *Ibid*, p. 373.

<sup>38</sup> *Marko Ilešič, Ada Polajnar Pavčnik, Dragica Wedam Lukić, the above cited work*, p. 25.

<sup>39</sup> *Jerca Kramberger, the above cited work*, p. 257 and p. 258.

<sup>40</sup> *Špela Mežnar, Priznavanje in izvršitev odločb družinskega prava v EU, Podjetje in delo, no. 6/2005*, p. 1513 and the following.

<sup>41</sup> *Špela Mežnar, ibid.*

<sup>42</sup> In the Republic of Slovenia everyone is guaranteed equal human rights and fundamental freedoms irrespective of national origin, race, sex, language, religion, political or other conviction, material standing, birth, education, social status, disability or any other personal circumstance.

<sup>43</sup> It is a part of the Slovenian legislation since the ratification in 1994. As the European Court of Human Rights wrote in the case *Loizidou vs. Turkey* (1995), the ECHR is »a constitutional instrument of the European public order«.

<sup>44</sup> *Jerca Kramberger Škerl, the above cited work*, p. 362.

<sup>45</sup> For example the decision in the case *Keegan vs. Ireland* of 25 June 1994, the decisions in the case *Salgueiro da Silva Mouta vs. Portugal* of 21 December 1999, the decision in the case *E. B. vs. France* of 22 January 2008.

<sup>46</sup> Resolution on equal rights for homosexuals and lesbians (1994), Resolution A3-0028 (1994), Resolution A5-0281 (2003).

<sup>47</sup> In addition to them also Uruguay and some regions and federal states in Australia, Canada and the United States of America.

<sup>48</sup> Laws and other regulations have to be compliant with the generally valid

principles of international law and with international agreements which are binding for Slovenia. Ratified and published international agreements apply directly.

<sup>49</sup> *Andrej Graselli and Lovro Šturm (ed.) and co-authors, Komentar Ustave RS, Fakulteta za pravne, družbene in evropske študije, Ljubljana 2002, p. 140 and p. 142.*

<sup>50</sup> *Igor Kaučič and Franc Grad, Ustavna ureditev Slovenije, fourth, revised and amended edition, GV Založba, Ljubljana 2007, p. 137.*

<sup>51</sup> In the case Cpg 3/2003 the Supreme Court held the position that in a very limited scope the assessment of the compliance with the international public order of the Republic of Slovenia allows also the assessment of the merits of a foreign judicial decision: what is assessed is not its compliance with all compulsory provisions of the national law but only with those imperative norms and moral rules the violation of which would threaten the legal and moral integrity of the Slovenian legal system.

<sup>52</sup> Compare *Marijan Pavčnik, Teorija prava, Cankarjeva založba, Ljubljana 1999, p. 24* and the decision of the Supreme Court of the Republic of Slovenia II Ips 546/2005.

<sup>53</sup> See paragraph 10 of the reasoning.