

LEGAL STATUS OF SAME-SEX PARTNERS IN ADOPTION PROCEDURE: RECENT DEVELOPMENTS IN SLOVENIAN LAW

Abstract: In June 2022, the Constitutional Court of the Republic of Slovenia delivered two landmark decisions with major implications for the non-discrimination of same-sex partners. The existing regulation that defined marriage as a union of two persons of different sex and prevented same-sex partners from jointly adopting a child was found to be inconsistent with the Slovenian Constitution, and the legislator was ordered to remedy the established unconstitutionality within six months. In the meantime, marriage is now considered to constitute a life union of two persons regardless of their sex, and same-sex partners living in a formal civil union may jointly adopt a child under the same conditions as spouses. The paper discusses these decisions with a focus on the rights of same-sex couples in the adoption procedure. It presents the legal background, analyses the reasoning, and explains the expected consequences.

Keywords: joint adoption, same-sex civil union, the right to equal treatment, the best interest of a child, review of constitutionality.

1. Introduction

In the Republic of Slovenia (hereinafter: RS), legal regulation of same-sex unions has been gradually but steadily developing in the direction of equal treatment, eventually reaching a point where same-sex partners in formal and non-formal civil unions were recognised the same rights as married or cohabiting partners of different sex, respectively, with some notable exceptions that have long been subject to controversy. The remaining differences were mainly a result of a parallel system established by the Civil Union Act (*Zakon o partnerski zvezi*, hereinafter: ZPZ),¹ which explicitly banned same-sex partners from jointly adopting a child (no such prohibition applied for the so-called unilateral adoption, see below), and the Infertility Treatment and Procedures of Medically-Assisted Reproduction Act (*Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo*, hereinafter: ZZNPOB),² which likewise explicitly banned same-sex partners from accessing medically-assisted reproduction procedures. On 16 June 2022, the Constitutional Court of the RS delivered two decisions concerning the (un)equal treatment of same-sex partners in proceedings to review the constitutionality of the existing regulation, with decisive consequences for the first of these issues, the joint adoption. As this was arguably the most impactful recent step in the prevention of

¹ Official Gazette of the RS, No. 33/16 and 94/22 – odl. US.

² Official Gazette of the RS, No. 70/00 and 15/17 – DZ.

discrimination in the RS, the paper will focus on the analysis of these decisions by presenting the status and rights of same-sex partners under legal regulation prior to the delivery of decisions, the content of decisions and arguments presented by all sides participating in respective proceedings, reasoning and arguments provided by the Constitutional Court to justify their decision, as well as the expected outcome of subsequent legislative procedure and the impact of analysed decisions.

2. Regulation of Same-Sex Adoption in Slovenia

The first legal act regulating same-sex unions in the RS was the Same-Sex Civil Partnership Registration Act (*Zakon o registraciji istospolne partnerske skupnosti*, hereinafter: ZRIPS),³ which was adopted on 22 June 2005 and applied since 23 July 2006. ZRIPS regulated the so-called registered same-sex civil partnerships (i.e. a union of two women or two men who registered their union before the competent authority, Article 2 of ZRIPS) and legal consequences arising from such unions but failed to address non-registered same-sex partnerships. Partners in registered same-sex civil partnerships were granted certain rights and obligations (e.g. maintenance, joint property, housing, succession, information about partner's health, visiting rights in hospitals) but not to the same extent as married spouses, and they were not allowed to adopt. ZRIPS did not state this explicitly, but as the issue of adoption was also not expressly regulated within this act, general family-law legislation applied. Under the Marriage and Family Relations Act (*Zakon o zakonski zvezi in družinskih razmerjih*, hereinafter: ZZZDR),⁴ which was valid at the time, only married spouses were allowed to adopt a child together, or one spouse was allowed to unilaterally adopt a child of the other spouse (Articles 135 and 138 of ZZZDR). Neither cohabiting partners of different sex nor same-sex partners in a union of any kind were allowed to adopt a child.

In 2011, the National Assembly of the RS adopted a new Family Code, which was a result of several years of preparations, discussions and coordination between various shareholders, with the aim of reforming and modernising Slovenian family law and bringing it in line with international trends and developments (e.g. introducing the principle of the best interest of a child, redefining family as a community of a child and parent(s) or other adult(s) taking care of the child, establishing a new system of measures to protect the best interest of the child). It also introduced the new regulation of same-sex union and same-sex cohabitation and allowed for one partner in a same-sex union or same-sex cohabitation to unilaterally adopt the child of the other partner. On the other hand, it still prohibited same-sex partners from jointly adopting a child.⁵ Nevertheless, this was enough for a large-scale outrage, especially

3 Official Gazette of the RS, No. 65/05, 55/09 – odl. US, 18/16 – odl. US, 33/16 – ZPZ and 68/16 – ZPND-A.

4 Official Gazette of the RS, No. 69/04 – official consolidated text, 101/07 – odl. US, 90/11 – odl. US, 84/12 – odl. US, 82/15 – odl. US, 15/17 – DZ and 30/18 – ZSVI.

5 For more on the most important changes accompanying the reform, see the documents and explanations by the Ministry of Labour, Family and Social Affairs, available at <<http://web.archive>.

by the more conservative parties, which opposed several changes, although the focus of contention was definitely on provisions regulating the rights of same-sex partners, especially those related to adoption. On 25 March 2012, a referendum was held, where 45.45% of participating voters voted for the adoption of the new Family Code, while 54.55% voted against (with only 30.31 % of eligible voters actually voting at the referendum altogether).⁶ As a result, the law was repealed.

In 2015, an act amending ZZZDR was adopted by the National Assembly of the RS as the second attempt to define marriage as a legally regulated life union of two persons (instead of a husband and a wife). The amendment would allow same-sex partners to enter into marriage under the same conditions as different-sex partners and grant them equal rights and obligations arising from the such union, including those concerning adoption. Following another major backlash, led by (mostly) the same opposing parties, which rested heavily on the argument that same-sex adoption would be detrimental to the best interest of a child, another referendum was held on 20 December 2015 on whether the amending act should be adopted or not. The referendum was once again successful, and the amending act was repealed, with 36.49% of participating voters voting for and 63.51% voting against the adoption of the amending act (with only 36.38 % of eligible voters voting at the referendum altogether).⁷

With ZRIPS not keeping up with contemporary legal and social developments, it was replaced on 24 February 2017 by ZPZ,⁸ which regulated two forms of same-sex unions: formal civil unions and non-formal civil unions. Under Article 2 of ZPZ, a (formal) civil union is a domestic community between two women or two men and has the same legal consequences as marriage in all legal spheres unless otherwise provided by ZPZ. The third paragraph of Article 2 then further stated that civil union partners cannot adopt children together and shall not have the right to bio-medically assisted procreation. Instead of listing and defining each right recognised to same-sex partners in civil unions, ZPZ thus opted to refer to the general act regulating marriage⁹ and listed exceptions instead. Consequently, the formal civil union was brought much closer in substance to marriage, with said exceptions and with a different designation. Furthermore, unlike ZRIPS, ZPZ also regulated a non-formal civil union, i.e. a long-term domestic community between two women or two men who have not formalised a civil union, but there are no reasons for the civil union between them to be invalid.¹⁰ Such union has the same legal consequences for

org/web/20110926104357/www.mdds.gov.si/si/delovna_podrocja/druzina/zakonska_zveza_in_druzinska_razmerja/druzinski_zakonik1/> (accessed on 10 September 2022).

6 For more, see the State Election Commission's report and statistics concerning referendum, available at <<https://www.dvk-rs.si/volitve-in-referendumi/referendumi/volitve-referenduma/zakonodajni-referendum-o-druzinskem-zakoniku/>> (accessed on 10 September 2022).

7 For more, see the State Election Commission's report and statistics concerning referendum, available at <<https://www.dvk-rs.si/volitve-in-referendumi/referendumi/volitve-referenduma/referendum-o-zzzdr-d/>> (accessed on 10 September 2022). The report on the results of referendum was also published in the Official Gazette of the RS, No. 13/16.

8 ZPZ was adopted on 21 April 2016 and became applicable on 24 February 2017.

9 When ZPZ came into force, marriage and family relations were still regulated by ZZZDR.

10 The decision on the existence of non-formal civil union can only be issued in a procedure where

partners as if they had formalised their civil union and the same legal consequences as cohabitation in those legal spheres where cohabitation has legal consequences unless otherwise provided by ZPZ (Article 3 of ZPZ). Again, ZPZ explicitly provided in the fourth paragraph of Article 3 that partners living in a non-formal civil union cannot adopt children together, nor do they have the right to bio-medically assisted procreation.

The currently valid Family Code (*Družinski zakonik*, hereinafter: DZ)¹¹ applies from 15 April 2019, when it replaced ZZZDR as a general act regulating rights and obligations related to family and family life.¹² To avoid another referendum but to still address other pertinent legal issues, especially those related to the protection of children and their best interest, the legislator avoided the most controversial issues and retained definitions of marriage and cohabitation as a union of a man and a woman;¹³ however, it expanded the circle of potential adoptive parents to include cohabiting partners (of different sex). Under Article 213 of DZ, spouses or cohabitants may adopt a child only jointly, except in cases where one of them adopts the child of their spouse or cohabitant. By exception, a single person who is not married or cohabiting may adopt a child in cases where this is in the child's best interests. Applicants wishing to apply for adoption (spouses, cohabitants or individuals) are required to lodge with a social work centre a written application in which they express their wish to adopt (Article 223 of DZ). Both articles purposefully omit same-sex partners when listing possible candidates for adoptive parents.

Even though Slovenian legislation evidently contains no provisions that would permit the adoption of a child by same-sex partners and even explicitly bans joint adoption by such couples, some deviations from the general prohibition of adopting have already developed in Slovenian case law, and some more permissible solutions are advocated for in literature. In 2010, the Supreme Court of the RS upheld a decision delivered by the District Court in Ljubljana on the recognition of the US court (New Jersey) decision, by which the latter finalised the adoption of a girl by same-sex partners holding Slovenian and American citizenship. The Supreme Court emphasised that the decision under review was not a decision concerning the adoption of a child by same-sex partners but merely a decision concerning the recognition of a final foreign decision, which was already enforced in the state of origin (the girl lived with adoptive parents since her birth and they were solely responsible for her care). It argued that while it would be possible to reject the recognition of a foreign judgement on the grounds of public order, such conditions were not met.

a decision on a right or obligation depends on the existence of such union, with legal effect only in the matter in which the issue was resolved. See the third paragraph of Article 3 of ZPZ.

11 Official Gazette of the RS, No. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odl. US and 94/22 – odl. US.

12 DZ comprehensively regulates marriage, cohabitation, relations between parents and their children, assistance provided by the state in cases of difficulties in cohabitation and family life, measures to protect the best interests of the child and maintenance obligations, adoption, granting of parental responsibility to a relative, foster care and guardianship for children and other adult persons requiring special protection.

13 See Articles 3 and 4 of DZ.

The fact that Slovenian regulation of adoption prevents two same-sex partners from adopting a child does not suffice for a conclusion that the effects of such foreign judgement contravene international public order as established by international law and European values (especially the European Convention on Human Rights, hereinafter: ECHR); Slovenian courts cannot reject the recognition of foreign judgements that contravene Slovenian public order if such rejection would not be justified from the “European perspective”.¹⁴ Accordingly, joint adoptions by same-sex partners were already possible for those couples who adopted a child abroad and applied for the recognition of such judicial decision before Slovenian courts. Furthermore, Slovenian legal doctrine already established that the provision of DZ (and previously of ZZZDR) regulating a unilateral adoption of a child should be interpreted in a way that does not limit the possibility of such adoption on the grounds of sexual orientation. There are two types of unilateral adoption; the first refers to the exceptional adoption of a child by an individual when that is in the child’s best interest (e.g. when a suitable couple cannot be found), while the second refers to the adoption of a child by their parent’s partner (the adoption of a stepchild).¹⁵ As there are far fewer children in Slovenia in need of adoptive parents than potential parents seeking to adopt, the first option is basically theoretical, whereas the adoption of the partner’s child is always allowed, as long as it is in the child’s best interest.¹⁶ Therefore, under the established interpretation, which is also being adhered to by Slovenian state authorities, joint parenthood of same-sex partners was already possible, as long as one of them unilaterally adopted the other partner’s child.¹⁷

14 For more details, see the Supreme Court of the RS decree No. II Ips 462/2009 of 28 January 2010. See also Kogovšek Šalamon, N., *Je posvojitev, izvedena v tujini, lahko v nasprotju z javnim redom RS?*, *Pravna praksa*, Vol. 28, No. 42, 2009, p. 13-15; Weber, N., *Priznavanje tujih sodnih odločb o posvojitvi otroka s strani istospolnih partnerjev*, *Pravna praksa*, Vol. 29, No. 27, 2010, p. 16-17.

15 For more, see Kraljić, S., *Družinski zakonik s komentarjem*, Poslovna založba Maribor, Maribor, 2019, p. 742.

16 See Novak, B., *Možnosti, da istospolni partnerji v slovenskem pravnem redu postanejo starši*, *Podjetje in delo*, Vol. 42, No. 6/7, 2016, p. 1054-1065.

17 See also Kogovšek Šalamon, N., *Iskanje pravnih razlogov za priznanje enakih pravic istospolnim partnerjem in njihovim družinam*, *Socialno delo*, Vol. 49, No. 5/6, 2010, p. 319-330; Sobočan, A. M., *Enostranske posvojitve v istospolnih družinah v praksi socialnega dela*, *Socialno delo*, Vol. 50, No. 6, 2011, p. 369-378; Weber, N., *Posvojitev partnerjevega otroka*, *Pravna praksa*, Vol. 33, No. 29/30, 2014, p. 17-18; Novak, B., *Družinsko pravo*, 2nd edition, Uradni list RS, Ljubljana, 2017, p. 270; Novak, B., *Možnosti, da istospolni partnerji v slovenskem pravnem redu postanejo starši*, *Podjetje in delo*, Vol. 42, No. 6/7, 2016, p. 1054-1065. See also ECtHR, *E.B. v. France*, no. 43546/02 of 22 January 2008, in which ECtHR found that refusal to authorise an adoption application by a woman in a same-sex relationship, on the basis of her sexuality, amounted to a violation of Articles 14 and 8 of the European Convention on Human Rights. The applicant in the case, who had been in a stable relationship with another woman, was denied authorisation to adopt a child, despite French legislation expressly granting single persons a right to adopt, on the ground that the child’s best interests would not be served due to the lack of a paternal role model (paternal referent) and her partner’s ambivalence or lack of commitment to the adopted child.

3. Intervention by the Constitutional Court of RS

On 16 June 2022, a momentous step forward in achieving the equal treatment of persons regardless of their sexual orientation was taken by the Constitutional Court of the RS, which delivered two landmark decisions concerning discrimination against same-sex partners.

By the first decision, No. U-I-486/20, Up-572/18,¹⁸ the Constitutional Court established that the statutory regulation determining that marriage may only be entered into by two persons of different sex is inconsistent with the Slovenian Constitution.¹⁹ It argued that Slovenian legislation treats same- and different-sex partners differently by regulating different types of unions (marriage and formal civil union), which differ in both their names and their consequences. As such different treatment is based solely on the personal circumstance of sexual orientation, the challenged regulation interferes with the right to non-discriminatory treatment of same-sex partners from the first paragraph of Article 14 in relation to Article 53 of the Slovenian Constitution. Such discrimination cannot be justified by referring to the traditional concept of marriage as a union of husband and wife or by stating that it is supported by the majority of the population. Protection of the family may constitute a constitutionally permissible goal, but denying same-sex partners the possibility of marriage is not an appropriate means of achieving this goal. Within the reasoning, the Constitutional Court further emphasised that the decision neither diminishes the importance of the traditional institution of marriage as a life union between husband and wife nor does it alter the conditions or consequences of marriage between persons of different sexes. It merely means that same-sex partners may now enter into marriage in addition to different-sex partners. Until the unconstitutional regulation is remedied,²⁰ a marriage shall be deemed to constitute a life union of two persons regardless of their sex.²¹ Therefore, as a consequence of this decision, same-sex partners are not only granted equal rights as different-sex partners when entering into a legally recognised union²² but are also no longer compelled to use different terminology, which implied that such union is not, in fact, equal to marriage.²³

18 Constitutional Court of the RS decision No. U-I-486/20, Up-572/18 of 16 June 2022, available at <<https://www.us-rs.si/odlocitev/?q=+U-I-486%2F20-20&caseId=&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=117906>> (accessed on 10 September 2022).

19 *Ustava Republike Slovenije*, Official Gazette of the RS, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a.

20 The Constitutional Court held that the unconstitutionality must be remedied within six months.

21 See also the Constitutional Court's Press Release of 23 June 2022, available at <<https://www.us-rs.si/decision/?lang=en&q=U-I-91%2F21-19+Up-675%2F19-32&caseId=&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=117934>> (accessed on 10 September 2022).

22 With the exception of procedures for medically assisted reproduction.

23 The first same-sex marriages have already been concluded following the Constitutional Court's decision. See, for example, news article of 3 August 2022 covering the first two same-sex marriages in the RS, available at <<https://www.rtv-slo.si/slovenija/na-podlagi-odlocbe-ustavnega-sodisca-sta-se-porocila-prva-dva-istospolna-para/636170>> (accessed on 10 September 2022).

Even though the presented decision is arguably even more critical from the perspective of same-sex partners and their status, this paper focuses on the second decision, No. U-I-91/21, Up-675/19,²⁴ which complemented the first one in the pursuit of equal treatment by addressing the issue of a joint adoption by same-sex couples, with very similar results. In a like manner, the Constitutional Court thus found that the existing regulation determining that same-sex partners living in a formal civil union may not jointly adopt a child is inconsistent with the Slovenian Constitution and established that until this unconstitutionality is remedied, it shall be deemed that same-sex partners living in a formal civil union may jointly adopt a child under the same conditions as spouses.²⁵ Reasoning and arguments used to justify this decision, as well as its implications for the status of same-sex couples in Slovenian adoption procedures, are analysed below.

a. Background

The Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022 was delivered as a result of proceedings to review the constitutionality of statutory provisions at issue, initiated after a same-sex couple – the applicants – filed a constitutional complaint against the final judgement of the Administrative Court, which denied their request to be entered into the register of potential candidates for joint adoption.²⁶ Their application for obtaining the status of candidates for adoptive parents was first rejected by the Social Work Centre and dismissed by the Ministry of Labour, Family, Social Affairs and Equal Opportunities for failing to fulfil legal requirements. The applicants subsequently brought an action before the Administrative Court against the Ministry's decision, claiming the violation of their right to non-discriminatory treatment²⁷ and the infringement of the principle of equality before the law.²⁸ The Administrative Court dismissed their action upon assessing that the Ministry's decision was correct, given that the applicants lived in a registered same-sex civil partnership at the time the application was submitted and that applicable legislation explicitly stated that no one could be jointly adopted unless

24 Constitutional Court of the RS Decision No. U-I-91/21, Up-675/19 of 16 June 2022, available at <<https://www.us-rs.si/odlocitev/?q=U-I-91%2F21-19+Up-675%2F19-32&caseId=&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=117905>> (accessed on 10 September 2022).

25 See also the Constitutional Court's Press Release of 23 June 2022, available at <<https://www.us-rs.si/decision/?lang=en&q=U-I-91%2F21-19+Up-675%2F19-32&caseId=&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=117934>> (accessed on 10 September 2022).

26 Administrative Court judgement I U 1497/2016-17 of 17 January 2019.

27 As referred to in the first paragraph of Article 14 of Slovenian Constitution (in conjunction with Articles 34, 35, 53 and 56 of Slovenian Constitution), Article 14 of Slovenian Constitution in conjunction with Article 8 of ECHR, and Article 1 of Protocol No. 12 to the ECHR. The first paragraph of Article 14 of Slovenian Constitution states that everyone shall be 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.

28 As referred to in the second paragraph of Article 14 of Slovenian Constitution, which simply states that all are equal before the law.

the adoptive parents were spouses.²⁹ It argued that (1) there can be no violation of the right to equal treatment, as the alleged discriminatory treatment does not concern the exercise of any of the human rights (the right to adopt is not protected under the Slovenian Constitution or the ECHR); (2) there is no violation of the principle of equality before the law since the status of partners in registered same-sex civil partnerships is not comparable to that of married spouses as far as joint adoption is concerned (the legislator's supposed aim was to recreate a traditional family for children without parents; the importance of marriage lies in the conception of family, which is why it is granted a special status); and (3) the right to adopt is not protected under applicable statutory provisions.³⁰

The National Assembly of the RS and the Government of the RS³¹ submitted replies to the ensuing constitutional complaint³² in support of the Administrative Court's position and further argued, *inter alia*, that joint adoption by spouses and cohabiting partners is in the best interests of a child (whereas the best interests of a child outweigh the best interests of parents);³³ adoption is not a right of adoptive parents but the right of a child; only marriage and cohabitation of a man and a woman are granted special protection under Article 53 of Slovenian Constitution; international human rights law does not guarantee equal rights to same-sex partners in the context of marriage and the creation of family, the regulation of which remains within the discretion of each state (as long as the differences are not arbitrary and without justified reasons);³⁴ the ability to conceive a child is a real, reasonable and non-arbitrary justification for unequal treatment of same-sex and different-sex partners; defining marriage as a union of two (or even more) persons regardless of

29 The applicants applied for joint adoption under the previously valid ZZZDR, which was later replaced by the Family Code. As already explained above, relevant provisions of both acts stipulated similar requirements and, therefore, both acts prevented same-sex couples from adopting (with ZZZDR also excluding the possibility of joint adoption by non-married cohabiting partners). For that reason, the decision of 16 June 2022 found both ZZZDR (Articles 135 and 138) and DZ (first paragraph of Article 213 and Article 223) unconstitutional and the reasoning of decision refers to both acts.

30 For more, see Administrative Court judgement I U 1497/2016-17 of 17 January 2019 and Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022.

31 The respective 14th Government of the RS (in office from 13 March 2020 to 1 June 2022) consisted of parties on the more conservative side of political spectrum that consistently advocate for traditional values. Some of these parties also played a major role in both referendums against attempts to introduce the more inclusive definition of marriage.

32 Alleging the same violations of constitutional provisions as in the above-mentioned action.

33 The Government of the RS supported this claim by citing several studies either stating that the best environment for the successful development of a child is with married father and mother or cautioning that there is no consent amongst experts concerning the welfare of children living with same-sex parents. For more, see Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022, points 16, 23-29.

34 The Government of the RS supported this claim by referring to several international treaties, including Article 16 of the Universal Declaration of Human Rights (hereinafter: UDHR), Article 23 of the International Covenant on Civil and Political Rights (hereinafter: ICCPR), and Article 12 of the ECHR, as well as to several ECtHR decisions (e.g. *Schalk and Kopf v. Austria*, no. 30141/04 of 24 June 2010, *Vallianatos and Others v Greece*, no. 29381/09 and 32684/09 of 7 November 2013, *Hämäläinen v Finland*, no. 37359/09 of 16 July 2014, *Schwizgebel v Switzerland*, no. 25762/07 of 10 June 2010, etc.).

gender would deprive the union of a woman and a man of the special status arising from the ability of conceiving a child; the right of a child to know their parents would have no meaning if the child grew up with same-sex partners who would not reveal the child's origin; voters had already rejected such proposals of equal treatment in past referendums; the issue under consideration falls within the competence of the legislature, not the Constitutional Court.³⁵

The applicants defended their standpoint by arguing that the Constitutional Court of the RS already adopted the position that registered same-sex civil partnerships are comparable to marriage in their factual and legal elements;³⁶ registered same-sex civil partnerships are formalised to the extent that can only be compared to marriage; in terms of parenting, no significant differences exist between partners of same or different sex; the reduction of the importance of marriage to the natural reproductive capacity of spouses denies the legitimacy of marriages with no children; some same-sex couples have the biological capacity to conceive and there are already families in the Republic of Slovenia with same-sex parents registered in the child's birth certificate; the ability to conceive a child cannot be a decisive factor in the regulation of joint adoption, considering that only a child who had already been born can be adopted; Slovenian legal order already allows for the adoption of a stepchild (i.e. unilateral adoption) regardless of the adoptive parent's sexual orientation and recognises same-sex adoptions established abroad; studies confirmed that sexual orientation of parents does not adversely affect the child's development.³⁷ They also disputed the interpretation of the ECtHR case law as understood by the Administrative Court and the Government of the RS,³⁸ as well as the credibility of studies and expert opinions presented by the latter. In their view, less favourable treatment of same-sex partners in the context of joint adoption is based solely on the circumstances of gender or sexual orientation, and there are no constitutionally justified reasons for such unequal treatment.

After carefully considering all opposing arguments, the Constitutional Court decided that (1) Articles 135 and 138 of ZZZDR were inconsistent with the Slovenian Constitution; (2) the first sentence of the third paragraph of Article 2 of ZPZ is repealed; (3) the first paragraph of Articles 213 and Article 223 of DZ are inconsistent with the Slovenian Constitution; (4) the National Assembly of the RS must remedy the established non-compliance within six months; (5) until the non-compliance with the Constitution is remedied, the same rules shall apply for joint adoption by same-sex partners in a civil union as those currently regulating joint adoption by married

35 For more details and arguments, see Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022.

36 See Constitutional Court of the RS decisions no. U-I-425/06 of 2 July 2009 and no. U-I-212/10 of 14 March 2013.

37 The applicants also supported their claims by citing several studies and expert opinions stating that sexual orientation of parents has no negative effect for the child's welfare or that children of same-sex parent have even less psychological issues than children growing up with parents of different genders. See Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022, point 22.

38 See Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022, point 21. The applicants maintained that cited cases were either obsolete, irrelevant, different in essential facts or otherwise misinterpreted.

spouses; (6) the appealed judgement of the Administrative Court is set aside, and the case is referred back to the Social Work Centre for reconsideration; and (7) the applicants shall bear their own costs.³⁹ It also provided extensive and comprehensive reasoning to justify the decision, the most important parts of which are discussed below.

b. Reasoning

In accordance with its established practice in similar cases, the Constitutional Court of the RS addressed the following questions when assessing the complaint concerning discriminatory treatment: (1) whether the asserted unequal treatment relates to the exercise of a human right or fundamental freedom; (2) if so, whether the applicant was treated differently than the person with whom they are being compared; (3) if so, whether the compared factual circumstances are essentially the same, meaning that the unequal treatment is based on a personal circumstance referred to in the first paragraph of Article 14 of the Slovenian Constitution; and (4) if so, whether such interference with the right to non-discriminatory treatment is constitutionally admissible.⁴⁰

(1) First, the Constitutional Court of the RS rejected the applicants' claim that the constitutional right to family life (Article 53 of the Slovenian Constitution) also guarantees them the right to establish family life through adoption. The right to adopt a child is not a human right or fundamental freedom granted by either the Slovenian Constitution or applicable international treaties.⁴¹ However, for the applicants to invoke discriminatory treatment in the exercise of their right to family life, it suffices that Slovenian legislation already allows for the possibility to establish joint parenthood of same-sex partners through unilateral adoption, but not through joint adoption. Furthermore, while same-sex partners do not have the right to jointly adopt a (particular) child – bearing in mind that the same applies to married and cohabiting partners – they may still be entitled to be entered into the register of potential candidates for joint adoption. Since the applicants claimed that the Social Work Centre did not include them on the list solely because of their sexual orientation, even though they were otherwise suitable adoptive parents (which is obvious, given that they are already taking care of the adopted child), Article 1 of Protocol No 12 to the ECHR also applies. Therefore, the Constitutional Court concluded that the conditions are met for further assessment of the applicants' complaint.

(2) There is no doubt that the treatment of applicants (same-sex partners living in a formal civil union) is indeed different from the treatment of those with whom they are being compared (married partners of different sex) in the area of joint adoption. ZPZ expressly states that same-sex partners living in a civil union cannot

39 See the operative part of Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022.

40 See Constitutional Court decisions No. U-I-425/06 of 2 July 2009, No. U-I-212/10 of 14 March 2013 and No. U-I-68/16, Up-213/15 of 5 May 2015.

41 Neither the Convention on the Rights of the Child (hereinafter: UNCRC) nor the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption require signatory states to grant individuals or couples the right to adopt. See also ECtHR, *E.B. v. France*, no. 43546/02 of 22 January 2008.

adopt a child together, while both ZZZDR and DZ clearly stipulate that only partners of different sex (married partners in the case of ZZZDR, married and cohabiting partners in the case of DZ) may adopt a child. The contested judgement denying the applicants the possibility to become candidates for adoptive parents reflects such regulation.

(3) In its previous decisions,⁴² the Constitutional Court already established that factual circumstances concerning the compared forms of civil unions (different-sex and same-sex) do not differ in a way that would justify unequal treatment. However, since previous cases concerned other rights of same-sex couples (the right to succession or international protection for a family member), the Constitutional Court had not yet assessed the key issue in the case at hand; namely, whether marriage (or cohabitation) is comparable to the most formalised form of civil union available to same-sex partners in terms of the right to be entered into the register of candidates for joint adoption. In this regard, the Constitutional Court agreed that marriage is indeed a constitutional concept under Article 53 of the Slovenian Constitution, as well as a social institution that provides security and stability to the partnership and plays an important role in creating a family. However, Article 53 does not imply that this formal type of partnership is available only to partners of different sex.⁴³ The constitutional concept of marriage is semantically open and allows for different interpretations, taking into account contemporary social realities. The assumption that the legislator intended to limit constitutional protection only to partners of different sex is not supported by the constitution, which contains no provision that would grant special protection or require more favourable treatment of marriage as opposed to other types of unions. Had there been such intention, the constitution would explicitly define marriage as a legally recognised domestic community between a man and a woman, but it does not. Furthermore, while some binding international treaties indeed state that “a man and a woman” are entitled to marry and start a family,⁴⁴ these treaties are also living instruments to be interpreted in light of the current situation.⁴⁵ Recognising that same-sex partners also create loving and lasting relationships, many legal systems (including Slovenian) protect these

42 Including those cited by the applicants; i.e. Constitutional Court decisions No. U-I-425/06 of 2 July 2009, No. U-I-212/10 of 14 March 2013 and No. U-I-68/16, Up-213/15 of 5 May 2015.

43 Article 53 only covers the following requirements: marriage is based on the equality of spouses, it shall be solemnised before competent state authority, legal relationships arising from marriage and family shall be regulated by law. Similarly, it only states that cohabitation of non-married partners shall be regulated by law, without imposing any limits concerning the cohabiting partners' gender. See the first and the second paragraph of Article 53 of Slovenian Constitution.

44 Including ECHR in Article 12, UDHR in Article 16 and ICCPR in Article 23.

45 ECtHR has already adopted the position that Article 12 of ECHR can no longer be restricted to persons of different sex and that it cannot be interpreted to prohibit signatory states from extending the concept of marriage to same-sex partners. See ECtHR *Schalk and Kopf v. Austria*, no. 30141/04 of 24 June 2010, *Vallianatos and Others v. Greece*, no. 29381/09 and 32684/09 of 7 November 2013, *Oliari and Others v. Italy*, no. 18766/11 and 36030/11 of 21 July 2015. Compare with Article 9 of the Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012), which has deliberately abandoned the reference to a man and a woman when determining the right to marry and start a family. See ECtHR, *Christine Goodwin v. the United Kingdom*, no. 28957/95 of 11 July 2002.

stable partnerships (either formal or de facto) with legislation that is increasingly approaching the legal regulation of marriage. Both the Constitutional Court of the RS and the European Court of Human Rights maintain that such partnerships also enjoy the right to respect for family life (under the third paragraph of Article 53 of the Slovenian Constitution and Article 8 of ECHR).⁴⁶

In light of the above, the Constitutional Court dismissed the argument that the compared situations are not comparable because of the special importance of the institution of marriage or due to the biological capacity of different-sex partners to conceive a child.⁴⁷ Considering that factual circumstances are essentially the same in the case of married (or even cohabiting) different-sex partners and same-sex partners living in a formal civil union, differences in the regulation of joint adoption are not based on some distinctive impersonal circumstance but on sexual orientation, which is one of the personal circumstances referred to in the first paragraph of Article 14 of the Slovenian Constitution (even if it is not explicitly mentioned).⁴⁸ Even though sexual orientation is not explicitly stated as the criterion of distinction concerning joint adoption under ZZZDR and DZ, the requirement referring to a certain type of domestic community (i.e. marriage or cohabitation) affects only same-sex partners who are not eligible to enter into such union. Therefore, the examined provisions constitute indirect (bordering on direct) discrimination and thus interference with the right to non-discriminatory treatment. Furthermore, ZPZ, which expressly states that partners in a same-sex civil union cannot adopt a child together, directly interferes with the right to equal treatment.

(4) The last question to be answered by the Constitutional Court was whether the established interference with the right to equal treatment is constitutionally admissible. Under the third paragraph of Article 15 of the Slovenian Constitution, human rights may only be restricted with the rights of others and in cases provided for by the Constitution, i.e. in order to protect the public interest. A prerequisite for the admissibility of interference with human rights is, therefore, the assessment that the interference pursues a constitutionally admissible objective (the so-called test of legitimacy or constitutional admissibility), which is then followed by the assessment that the interference is not excessive (the so-called test of proportionality, which considers three aspects of interference; appropriateness, necessity and proportionality in the narrower sense). Only if the interference with human rights and fundamental freedoms passes both tests is it considered admissible.⁴⁹

46 ECtHR, *Schalk and Kopf v. Austria*, no. 30141/04 of 24 June 2010, *X and Others v. Austria*, no. 19010/07 of 19 February 2013, Constitutional Court of the RS, No. U-I-68/16, Up-213/15 of 5 May 2015.

47 The Constitutional Court unceremoniously dismissed all claims referring to the importance of differences in the biological capacity to conceive a child, and fully accepted the applicants' arguments. Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022, point 51.

48 Constitutional Court of the RS, No. U-I-425/06 of 2 July 2009.

49 See Kerševan, E. in Avbelj, M. et al., *Komentar Ustave Republike Slovenije*, Nova univerza, Evropska pravna fakulteta, Nova Gorica, 2019, p. 127; Kresal, B. in Šturm, L. (ed.), *Komentar Ustave Republike Slovenije*, Fakulteta za podiplomske državne in evropske študije, Ljubljana, 2002, p. 55–56; Constitutional Court of the RS decision No. U-I-238/06 of 7 December 2006.

In the case at hand, the Constitutional Court found that the statutory regulation of joint adoption, which distinguished between married spouses and partners in a same-sex civil union, indeed pursues a constitutionally admissible objective: the best interest of a child. In the third paragraph of Article 56, Slovenian Constitution mandates special protection of the state for children and minors who are not cared for by their parents, who have no parents or who are without proper family care, which is realised, *inter alia*, through adoption.⁵⁰ Moreover, the best interest of a child is a fundamental guideline in all activities and procedures relating to a child, which applies not only to the child's parents but to all national authorities and public authority holders, local authorities and other natural and legal persons (the fourth paragraph of Article 7 of DZ).

Considering that the assessed interference with the human right of same-sex partners to equal treatment is not inadmissible in terms of pursuing a constitutionally admissible objective, the Constitutional Court continued to assess whether it also complies with the general principle of proportionality, starting with the criterion of appropriateness (i.e. whether the assessed interference is appropriate to achieve the pursued objective in the sense that this objective can actually be achieved by the said interference with the human right). The Government of the RS argued that the best interest of a child could only be guaranteed by limiting the availability of joint adoption to partners of different sex and cited several studies, opinions and other sources supposedly proving that growing up with same-sex parents is detrimental to the child's development. The Constitutional Court examined all these studies in detail⁵¹ and, based on the evidence provided, finally determined that the Government failed to prove that only a traditional family can ensure the best interest of a child. Furthermore, the view that same-sex partners should be excluded from joint adoption in order to protect the best interest of a child is inconsistent with the fact that the Slovenian legal system already allows for joint parenthood of same-sex partners through the institute of unilateral adoption and the recognition of foreign court decisions on the adoption of a child. It also permits the adoption of a child by a single person,⁵² which obviously does not involve the recreation of a traditional family. The existing regulation can even result in a situation where a homosexual person is already recognised as a suitable adoptive parent as an individual, whereas entering into the same-sex civil union would deprive this same person of the opportunity to become an adoptive parent together with their partner. The Constitutional Court proceeded to establish that denying the possibility of joint adoption to same-sex couples in a civil union actually contradicts the very essence of adoption, which consists in providing

50 Adhering to Article 21 of UNCRC, which also states that the best interests of the child shall be the paramount consideration in the system of adoption. See also Novak, B., *Družinsko pravo*, 2nd edition, Uradni list RS, Ljubljana, 2017, p. 263.

51 And commented on the credibility of each of the proposed sources, see Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022, points 61–64.

52 Under ZZZDR, this type of adoption was considered an equivalent alternative to joint adoption, while DZ favours joint adoption by two parents, but still allows adoption by a single person as an exception. For more, see, for example, Kraljić, S., *Družinski zakonik s komentarjem*, Poslovna založba Maribor, Maribor, 2019, p. 740.

a stable, loving and supportive environment for the child's development, considering that there are no differences between same-sex and different-sex partnerships from the perspective of creating such relationships.

In conclusion, the Constitutional Court determined that the aim of protecting the best interests of a child cannot justify the reviewed regulation of joint adoption, as altogether preventing same-sex partners from being included in the register of candidates for joint adoption is not an appropriate measure for achieving this aim.⁵³ The best interests of a child can only be assessed in the context of individual adoption procedures, in which the most suitable adoptive parents for a particular child are selected from among all potential candidates for joint adoption.⁵⁴ A general *a priori* exclusion of same-sex partners from the possibility of being entered in the register of candidates for joint adoption merely results in a reduction in the number of possible candidates and, therefore, cannot constitute a measure that would increase the likelihood of a decision being made in accordance with the best interests of a child.⁵⁵

c. Implications and conclusions

The analysed Constitutional Court decision No. U-I-91/21, Up-675/19 of 16 June 2022 is undoubtedly the most significant legal step towards achieving the equality of same-sex partners in recent years, especially when considered together with decision No. U-I-486/20, Up-572/18 concerning the definition of marriage. While the status of same-sex partners living in a civil union was already very similar to that of married spouses, some notable differences had a major impact on the quality of their lives, especially concerning their right to family life. The differences concerning adoption and medically-assisted reproduction procedures were explicitly regulated by the applicable legislation and thus the most obvious; however, one should not overlook other inconveniences. As the same-sex civil union was regulated in a separate law that merely referred to the use of DZ provisions when appropriate, there were ongoing cases where a question arose regarding the extent of the partners' rights and how the latter should be interpreted. Interpretations provided by courts (especially by courts of lower instances) were not always consistent with recent legal and societal developments, meaning that same-sex partners often had to

⁵³ Following that conclusion, the Constitutional Court did not need to examine other aspects of the principle of proportionality; the assessed interference did not pass the first aspect of the test of proportionality and is therefore not constitutionally admissible.

⁵⁴ Whether a particular couple (of same or different sex) will actually be selected as the most suitable joint adoptive parents is, therefore, subject to assessment in administrative and judicial proceedings. First, the competent social work centre carries out individual assessment in the procedure for determining the suitability of the adoptive parent (see Articles 224 and 225 of DZ) and then another individual assessment in the selection of the most suitable candidate for the adoption of a specific child (Article 226 of DZ). Social work centre submits its proposal of the most suitable adoptive parent to the court, which conducts the final individual assessment in court proceedings concerning a particular adoption (Article 229 of DZ).

⁵⁵ See also Constitutional Court's Press Release of 23 June 2022, available at <<https://www.us-rs.si/decision/?lang=en&q=U-I-91%2F21-19+Up-675%2F19-32&caseId=&df=&dt=&af=&at=&pri=1&vd=&vo=&vv=&vs=&ui=&va=&page=1&sort=&order=&id=117934>> (accessed on 10 September 2022).

take the case to courts of higher instance, to the Supreme Court of the RS or even to the Constitutional Court. Naturally, that not only delayed the resolution of their legal problem but also significantly reduced the legal certainty of their position.

The decision allowing same-sex partners to enter into marriage should eliminate situations where various state authorities got to provide their own interpretations of whether the concept of same-sex civil union is similar enough to that of marriage to allow the partners of the former to exercise a certain right. After all, DZ provisions referring to marriage and married spouses will already apply to anyone entering into marriage, regardless of their sexual orientation. Technically speaking, this decision alone should have sufficed for the same-sex partners to be eligible to apply for adoption, as long as they entered into marriage and not into a civil union under the parallel system established by the ZPZ. However, it was the second decision, No. U-I-91/21, Up-675/19, that fully eliminated the possibility of some creative interpretation by the legislator that would nonetheless exclude same-sex partners from the joint adoption procedure by clearly establishing that same-sex partners living in a formal civil union may henceforth jointly adopt a child under the same conditions as different-sex spouses.

The successful and timely implementation of the Constitutional Court's decisions should be greatly facilitated by the timing of their delivery, given the composition of the current Government of the RS and the National Assembly of the RS (elected in 2022). The government coalition of liberal and progressive parties, which had already been advocating for the equality of same-sex couples at prior opportunities (and which also hold a large majority of seats in the National Assembly), welcomed both decisions in their public statements⁵⁶ and promptly initiated fast-track legislative procedure. The proposal for the Act Amending the Family Code⁵⁷ provides an amended definition of marriage and cohabitation by replacing the phrasing “a man and a woman” with “two persons” in the first paragraph of Article 3⁵⁸ and the first paragraph of Article 4 of DZ.⁵⁹ As a result of this amendment, same-sex and different-sex partners in these unions will be equal in all legal consequences regulated by DZ,

56 See, for example, RTV news article of 8 July 2022 with statements by representatives of major political parties at <<https://www.rtvsllo.si/slovenija/prepoved-posvajanja-otrok-istospolnim-parom-ni-ustavna-mesec-zakon-je-ze-v-pripravi/633638>> (accessed on 10 September 2022).

57 See Proposal for the Act Amending the Family Code, available at <<https://imss.dz-rs.si/IMiS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/319c0d9411719ad68ea26f9a700996809c6259f53cef0817b3baf2661600393e>> (accessed on 10 September 2022). At the time of writing of this paper, the Proposal already underwent the second reading in the fast-track legislative procedure and given the current political situation in Slovenia, no major delays are expected concerning its adoption. Furthermore, under Article 90 of Slovenian Constitution, no referendum is allowed against such law that remedies the unconstitutionality in the area of human rights or any other unconstitutionality.

58 Definition repealed by the Constitutional Court reads as follows: “Marriage is a domestic community of one man and one woman, the formalisation, legal consequences and termination of which shall be regulated by this Code.”

59 Definition repealed by the Constitutional Court reads as follows: “Cohabitation is a long-term domestic community of a man and woman who are not married but there are no reasons for marriage between them to be invalid. Such community shall have the same legal consequences for the relationship between them under this Code as if the partners had formalised their marriage, and this community shall have legal consequences in other areas if so provided by an Act.”

including adoption, without needing further changes to the act. Furthermore, because the amended definition already covers both constitutionally recognised forms of civil unions for heterosexual and same-sex partners alike, separate regulation of same-sex unions under ZPZ is no longer necessary. Accordingly, the termination of ZPZ is also proposed, with existing formal and non-formal civil unions converting to marriage or cohabitation. With the realisation of the proposed amendment, the only difference in the legal status of same-sex and different-sex couples remains the availability of medically-assisted reproduction procedures, which continue to be accessible only to a man and a woman living in marriage or cohabitation.⁶⁰ As this restriction is stipulated in a separate act that has not yet been subject to the constitutionality review by the Constitutional Court, it remains unaffected by the developments analysed within this paper.

Nevertheless, despite the undeniable importance of the above-discussed decisions, it is worth keeping in mind that legal regulation promoting equality does not necessarily also result in *de facto* equality. As the Constitutional Court was careful to emphasise, its decision did not introduce the right to adoption, but merely determined that same-sex couples are legally entitled to be entered in the register of potential candidates for joint adoption under the same conditions as partners of different sex. The choice of the most suitable adoptive parents for a particular child will still be made by a social work centre, upon whose proposal a court will decide on adoption, taking into account the best interests of the child. This means that in the end, it will still be up to state authorities and their representatives in adoption procedures to interpret and decide whether it is indeed in the child's best interest to be adopted by same-sex adoptive parents, leaving open the possibility of personal convictions and values affecting the outcome. The same arguments as those presented by the previous Government of the RS in proceedings before the Constitutional Court might potentially still be brought into play, albeit at the level of a particular case instead of general legal acts, thus effectively preventing same-sex partners from adopting or making it more difficult for them to do so.

60 Under Article 5 of ZZNPOB, only a man and a woman who are married or cohabiting and who, according to the experience of medical science, cannot expect to achieve pregnancy through sexual intercourse or other infertility treatment procedures, are eligible for such procedures. Thus, single individuals are also excluded. In 2001, the amending act was adopted that would allow single women to benefit from medically-assisted reproduction procedures, but it was rejected at a referendum with 72.36 % of participating voters voting against such amendment (35.66 % of eligible voters actually voted). See the State Election Commission's report and statistics concerning referendum, available at <<https://www.dvk-rs.si/volitve-in-referendumi/referendumi/volitve-referenduma/naknadni-zakonodajni-referendum-o-zdravljenju-neplodnosti-in-postopkih-oploditve-z-biomedicinsko-pomocjo/>> (accessed on 10 September 2022).

PRAVNI STATUS ISTOSPOLNIH PARTNERA U POSTUPKU ZASNIVANJA POSVOJENJA: NOVINE U SLOVENAČKOM PRAVU

Sažetak: Ustavni sud Republike Slovenije je u lipnju 2022 donio dvije značajne odluke s važnim posljedicama za uklanjanje diskriminacije istospolnih partnera. Odlučilo je da postojeća regulativa, koja definira brak kao zajednicu dviju osoba različitog spola i koja je onemogućavala istospolnim partnerima zajedničko posvajanje djeteta, nije u skladu s Ustavom Republike Slovenije, te odredila rok od šest mjeseci da zakonodavac ukloni otkrivene neusklađenosti. Do ispravljanja neustavnosti smatra se da je brak životna zajednica dviju osoba bez obzira na spol i da istospolni partneri koji žive u partnerskoj vezi mogu zajedno posvojiti dijete pod istim uvjetima kao i bračni parovi. Članak se bavi navedenim odlukama, s posebnim naglaskom na prava istospolnih parova u postupku posvojenja. U radu autorica objašnjava pravnu pozadinu, analizira obrazloženja i obrazlaže očekivane posljedice.

Ključne riječi: zajedničko posvojenje, istospolna zajednica, pravo na jednak tretman, najbolji interes djeteta, ocjena ustavnosti.