EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 3443/18
Ann-Katrin KÖHLER
against Germany

The European Court of Human Rights (Third Section), sitting on 7 September 2021 as a Chamber composed of:

Paul Lemmens, *President,*
Georgios A. Serghides,
Georges Ravarani,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Andreas Zünd, *judges,*

and Milan Blaško, *Section Registrar,*

Having regard to the above application lodged on 10 January 2018,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Ms Ann-Katrin Köhler, is a German national who was born in 1980. She was represented by Mr P. Köhler, a lawyer practising in Berlin.

2. The German Government ("the Government") were represented by their Agent, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

A. The circumstances of the case

3. The facts of the case, as submitted by the parties, may be summarised as follows.

1. Events in the former German Democratic Republic ("GDR")

4. The applicant lived in the former GDR with her biological mother ("the mother"). Her father lived in West Berlin and had been banned from entering the GDR.

5. In November 1981 the applicant's grandmother put the applicant into state care without the mother's consent. The GDR authorities provisionally placed the applicant in a children's home and considered, on the basis of the grandmother's account, that the mother had neglected her child.

6. On 20 January 1982 the authorities ordered the applicant's permanent placement in the children's home, and the mother had to contribute to the accommodation costs. The mother visited the applicant several times in the children's home.

7. On 7 September 1983 the mother was convicted of "anti-social behaviour" and of having violated her obligation to pay maintenance. She was sentenced to one year and two months' imprisonment. In prison she regularly wrote letters to the applicant in which she expressed her intention to take the applicant home once she had served her sentence. The children's home did not forward those letters to the applicant.

8. In January 1984 the authorities initiated court proceedings in order to withdraw parental custody from the mother. They argued, *inter alia*, that the mother was not aware of her duties concerning her child's upbringing because she had had no regular job, had failed to pay maintenance and had stayed in contact with her child only sporadically and reluctantly.

9. On 4 May 1984 the Prenzlauer Berg District Court (*Stadtbezirksgericht Berlin, Prenzlauer Berg*) withdrew parental custody. The mother was also instructed to pay maintenance and was requested not to contact the applicant. Accordingly, the mother no longer had contact with the applicant, and she payed maintenance.

10. On 13 June 1985 Ms B., who held a leading position in the children's home, was appointed as the applicant's guardian, and the applicant started to spend time with Ms B.'s family.

11. In September 1986 the applicant was discharged from the children's home and started to live with Ms B.

12. In 1986 the applicant's first name was changed; she was given the last name of Ms B. and eventually the last name of Ms B.'s husband when Ms B. got married in 1990.

2. Events after German reunification

13. In 1991 Ms B. and the youth office, which had then become in charge of the applicant's case, entered into a foster care agreement in respect of the applicant.

14. In 1994, in the context of a discussion between the mother and the youth office about outstanding maintenance payments, the mother asserted

that her child's removal from her home had been unlawful and that she wished to have her daughter back or at least to have contact with her.

15. When the youth office informed the applicant about the mother's wishes, the applicant refused to see the mother because she did not have any memories of her, and the mother was unknown to her.

16. In 1996 the mother requested, with the assistance of a lawyer, information from the youth office about who had custody of the applicant, because she wanted to obtain parental custody herself. After the youth office had furnished the requested information, the mother did not take any further action.

17. In 2001 the applicant met the mother for the first time as an adult, and the mother informed her about the circumstances of the applicant's removal as a child. According to the applicant, she did not believe her mother and she continued to have only occasional contact with her until 2005.

18. In 2003 the applicant consulted her file at the youth office. The file included*, inter alia*, a report of the GDR authorities in which the applicant's situation before her removal from her mother was described and in which no indications for negligence of the child had been noted. Furthermore, the decisions by the GDR authorities in 1981 and 1982, the decision by the Prenzlauer Berg District Court, the letters from the mother between 1983 and 1984 with the children's home's comments that those letters had not been forwarded to the applicant, and internal notes of the youth office about the mother's requests and accusations in 1994 and 1996 had been taken to the file. The applicant was not able to inspect the complete file. It is unclear which parts were shown to her, but she did not see the letters from her mother.

3. The adoption proceedings

19. In 2007 the applicant and Ms B. initiated adoption proceedings; they sought that Ms B. be allowed to adopt the applicant.

20. On 16 October 2007 the youth office prepared a report for the adoption proceedings. The official, who had drafted the report and had been responsible for the applicant's foster family only between 1993 and 1996, described the relationship between the applicant and Ms B. as a stable parent-child relationship. It was also explained that the mother's neglect of the applicant had been the reason for her removal as a child in 1981, that the applicant had had no contact outside the children's home, and that she had never had any visitors there. The report also mentioned the mother's allegations at the youth office about the unlawfulness of the removal and her efforts to establish contact with the applicant (see paragraphs 14 and 16 above).

21. On 6 December 2007 the applicant and Ms B. recorded at a notary the application for an adoption in a manner "giving rise to the same effects

as those arising from the adoption of a minor" (*Annahme mit den Wirkungen der Minderjährigenannahme,* hereinafter "full adoption of an adult", see paragraphs 44 and 45 below).

22. On 27 March 2008 the Tempelhof-Kreuzberg Family Court allowed the adoption of the applicant by Ms B., which took effect on 9 May 2008.

4. The annulment proceedings at issue

23. In 2012 the applicant started to have contact again with her mother.

24. In 2013 the applicant consulted her file at the youth office with the assistance of a lawyer and obtained a copy of it.

25. In 2014 the applicant consulted the files from the office of the Federal Commissioner for the Records of the State Security Service of the former GDR (*Bundesbeauftragter für die Stasi-Unterlagen*) relating to the mother.

26. In October 2015 an expert opinion on the conduct of the GDR authorities, which had been commissioned by the mother, was prepared. On the basis of the youth office files and those of the Federal Commissioner for the Records of the State Security Service of the former GDR, the expert concluded that the withdrawal of parental custody and the applicant's placement in the children's home had been unlawful. He assumed there had been politically motivated persecution of the mother, as she had applied for a visa to leave the GDR.

27. In December 2015 the applicant applied for an annulment of the adoption as she had not known of the unlawfulness and the true circumstances of her placement in a children's home. She alleged that she had been deceived by Ms B. and the youth office. The youth office should have included the true circumstances in its report for the adoption proceedings (see paragraph 20 above).

28. On 21 March 2016 the Pankow-Weißensee Family Court dismissed the application for annulment as time-barred. Moreover, the application was considered to be ill-founded as the applicant had neither shown that she had been deliberately deceived by the youth office or Ms B. nor that they had known about the unlawfulness of her placement in the children's home.

29. On 8 September 2016 the Berlin Court of Appeal dismissed an appeal by the applicant. It found that an annulment of the adoption could only be requested within three years after the adoption had taken effect because the three-year time-limit for adoptions of minors under Article 1762 of the Civil Code was also applicable pursuant to Articles 1767 § 2, 1772 § 2, 1760 of the Civil Code to full adoptions of an adult. In general, also taking into account the best interests of the child, there was a need that legal ties in family law could not be annulled in an unlimited way and at any time. In particular, it must be assumed that an adopted person was integrated in the new family after the lapse of the three-year time-limit.

30. In addition, constitutional reasons, in particular the principle of equality before the law under Article 3 § 1 of the Basic Law and the protection of family life under Article 6 § 1 of the Basic Law, did not require that full adoptions of adults be amenable to annulment without any time-limit, which was exceptionally possible in cases mentioned in Articles 1763 or 1771 § 1 of the Civil Code (see paragraphs 47 and 48 below). Like adoptions of minors, full adoptions of adults provided the adopted person with the same rights and obligations as a biological child. At the same time, unwanted consequences of such adoptions could be mitigated by the rules on names, on disinheritance or those on restricting maintenance obligations.

31. Accordingly, the absolute three-year time-limit had expired on 9 May 2011, but the applicant had lodged her annulment application in the correct form, that is to say an application recorded by a notary, only on 21 March 2016.

32. On 25 November 2016 the applicant lodged a constitutional complaint with the Berlin Constitutional Court against the decision of the Berlin Court of Appeal invoking her right to respect for her family life under Article 8 of the Convention and the equivalent rights under Article 6 of the Basic Law and Article 12 of the Berlin Constitution. She argued that the refusal to annul her adoption, despite the deception of the youth office and Ms B., had violated her rights.

33. On 12 July 2017 the Berlin Constitutional Court endorsed the findings of the Court of Appeal and dismissed the constitutional complaint. It found that the absolute three-year time-limit under Article 1762 § 2 of the Civil Code, which governed the annulment of adoptions of minors, was also applicable to full adoptions of adults. In order to reach that conclusion, the court had analysed the legislative procedure and had studied the explanatory memorandum to the provisions to establish the legislator's intention. It further referred to relevant case-law and legal literature.

34. The court found further that the application of the time-limit to full adoptions of an adult did not raise pertinent constitutional concerns. In the context of defining the legal concept of 'family', it was within the legislator's margin of discretion to allow an annulment of a full adoption of an adult only within three years *("Dass der Gesetzgeber die Aufhebung der Adoption lediglich innerhalb von drei Jahren ermöglicht hat, liegt jedenfalls im vorliegenden Fall einer Volljährigenadoption mit den starken Wirkungen einer Minderjährigenadoption [...] noch im Gestaltungsspielraum, welcher dem Gesetzgeber bei der rechtlichen Ausgestaltung der Familie zukommt.").*

35. In that context, it referred to a case of the Federal Constitutional Court of 8 June 2015 (1 BvR 1227/14). In that case, which concerned an adult who had been adopted as a minor, the Federal Constitutional Court had found that even the most serious misconduct of a party to the adoption

proceedings did not justify the annulment of the adoption. It had acknowledged that there had been an interference with the fundamental rights of the applicant in that case because the legal attribution to a parent could in certain situations become similarly important for the comprehension and the development of the individual's personality as biological descent ("*Die familienrechtliche Zuordnung im Rahmen eines Eltern-Kind-Verhältnisses mag für das Verständnis und die Entfaltung der eigenen Individualität in bestimmten Situationen ähnliche Bedeutung gewinnen wie etwa die biologische Abstammung*"). However, negative consequences of such adoptions could be mitigated by the possibility to change the family name or by rules on disinheritance or those on restricting maintenance obligations. Thus, it had been within the legislator's margin of discretion to exclude the annulment of adoptions of minors after they had attained the age of majority. It had been legitimate to promote a lasting integration of adopted children in the new family by fully harmonising the legal status of biological and adopted children. It also had been consistent that adoptions of adults, which had not taken effect as full adoptions, could be annulled because in those cases a full legal integration in the new family had never been envisaged.

5. Administrative proceedings by the mother

36. On 21 November 2017, in the course of administrative proceedings initiated by the mother, the *Land* of Berlin acknowledged the unlawfulness of, *inter alia*, the decisions of the GDR authorities concerning the applicant's placement in the children's home and the *de facto* ban on her having access to her child.

B. Relevant domestic law and practice

1. Provisions of the Basic Law and of the Berlin Constitution concerning the protection of family life

37. At the federal level, Article 6 of the Basic Law, in so far as relevant, provides:

Article 6

"(1) Marriage and the family shall enjoy the special protection of the State.

(2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty.

(3) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect ..."

38. Article 12 of the Berlin Constitution, in so far as relevant, provides:

Article 12

(1) Marriage and the family shall enjoy the special protection of the State.

(2) ...

(3) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them.

(4) Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians neglect their duties ..."

2. *Relevant provisions concerning constitutional review by the Federal Constitutional Court and by the constitutional court of a* Land

39. Article 100 of the Basic Law reads, in so far as relevant, as follows:

Article 100

"(1) If a court considers a law, on whose validity its decision depends, to be unconstitutional, the proceedings shall be stayed and, in cases concerning the violation of the constitution of a *Land*, a decision [shall be obtained] from the court of the *Land* with jurisdiction over constitutional disputes or, in cases concerning the violation of this Basic Law, a decision shall be obtained from the Federal Constitutional Court. This shall also apply where a violation of the Basic Law by a law of the *Land* or where the incompatibility of a law of the *Land* with a federal law is at issue.

..."

40. Section 31(2) of the Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht*) confers statutory force on any decision of the Federal Constitutional Court declaring a law unconstitutional following a constitutional complaint lodged by an individual.

41. Section 90 of the Federal Constitutional Court Act governs the lodging of a constitutional complaint with the Federal Constitutional Court and reads, in so far as relevant, as follows:

Section 90

"1. Anyone who claims that one of his basic rights ... has been violated by a public authority may lodge a constitutional complaint with the Federal Constitutional Court.

2. If legal action against the violation is admissible, the constitutional complaint may not be lodged until all remedies have been exhausted ...

3. The right to lodge a constitutional complaint with a constitutional court of a *Land* pursuant to the provisions of the constitution of the *Land* shall remain unaffected.

..."

42. Section 49 of the Berlin Constitutional Court Act (*Gesetz über den Verfassungsgerichtshof*) governs the lodging of a constitutional complaint with the Berlin Constitutional Court, which had jurisdiction to hear

constitutional complaints against decisions of courts of the *Land* of Berlin, such as for example the Berlin Court of Appeal. The provision reads, in so far as relevant, as follows:

Section 49

"1. Anyone who claims that one of his rights guaranteed by the Berlin Constitution has been violated by a public authority of the *Land* of Berlin may lodge a constitutional complaint with the Berlin Constitutional Court, provided that no constitutional complaint has been or will be lodged with the Federal Constitutional Court.

2. If legal action against the violation is admissible, the constitutional complaint may not be lodged until all remedies have been exhausted ..."

3. Relevant provisions of the Civil Code

(a) General permissibility of the adoption of an adult and applicable provisions

43. The basic provision governing the adoption of an adult reads, in so far as relevant, as follows:

Article 1767

"(1) A person of adult age may be adopted if the adoption is morally justified; it is to be assumed to be so in particular if a parent-child relationship has already developed between the adoptive parent and the person to be adopted.

(2) The adoption of persons of adult age is governed by the provisions on the adoption of minors, with the necessary modifications – except as otherwise provided by the following provisions ..."

(b) Effects and special provisions concerning the full adoption of an adult

44. Article 1772 § 1 governs the permissibility and the effects of the full adoption of an adult, that is an adoption which gives rise to the same effects as those which arise from the adoption of a minor. Such an adoption is, *inter alia*, permissible if the adult person to be adopted was taken into the family of the adoptive parent when he or she was a minor.

45. In the event of a full adoption of an adult taking effect, the family ties with the previous parents and family cease to exist pursuant to Article 1772 § 1 in conjunction with Article 1755, the latter provision first and foremost stipulating the effects arising from the adoption of a minor.

(c) Effects of the adoption of an adult, not allowed as a full adoption

46. According to Article 1770 the legal effects of the adoption of an adult do not extend to the relatives of the adoptive parent. Furthermore, the family ties of the adopted person with the previous parents and family, including the rights and duties arising from those ties, continue to exist. That means that the adopted person retains his previous parents, irrespective of whether they were biological or adoptive parents, and additionally gains the adoptive parent.

(d) Annulment of adoptions without a time-limit

47. The family court may annul an adoption of a minor any time provided that the adopted child is still a minor and serious reasons require the annulment of the adoption in the best interest of the child (Article 1763 of the Civil Code).

48. The family court may annul an adoption of an adult, which did not take effect as a full adoption, any time provided that both the adoptive parent and the adopted person apply for the annulment and that there are valid reasons for the annulment (Article 1771 § 1 of the Civil Code).

(e) Annulment of adoptions within time-limits

49. Under Article 1772 § 2 the family court may annul a full adoption of an adult only for one of the reasons set out in Article 1760 §§ 1-5, which first and foremost stipulate further reasons for the annulment of adoptions of minors.

50. Those reasons are, in so far as relevant, if the application for the adoption was induced by wilful deceit (*arglistige Täuschung*) about the essential circumstances (Article 1760 § 2 (c)), or was unlawfully induced by duress (Article 1760 § 2 (d)).

51. The relevant provision governing time-limits and formal requirements for the annulment of an adoption of a minor reads, in so far as relevant, as follows:

Article 1762

"(1) ...

(2) The application may only be made within one year provided that less than three years have passed since the adoption. The period starts

a) ...

b) in the case[s] of Article 1760 § 2 ... (c) [the adoption was induced by wilful deceit], at the time when the applicant (*Erklärende*) discovers ... the deceit;

c) in the case of Article 1760 § 2 (d) [the adoption was unlawfully induced by duress], at the time when the duress ends; ...

(3) The application [for annulment] must be recorded by a notary."

4. *Case-law of the Federal Constitutional Court concerning the scope of constitutional review by a constitutional court of a* Land

52. In a decision dated 15 October 1997 (file no. 2 BvN 1/95), the Federal Constitutional Court clarified the scope of constitutional review by the constitutional courts of the *Länder*. In that case the applicant had argued that his right to be heard had been violated during proceedings before the courts of the *Land*. The Federal Constitutional Court found that a constitutional court of a *Land* was competent to review the courts'

application of federal procedural law on the basis of the applicant's rights in the Basic Law and his or her rights in the constitution of the *Land*, provided that the respective right in the constitution of the *Land* had the same content as the corresponding right in the Basic Law. It specified that it had not to deal with the question whether a constitutional court of a *Land* had the competence to review the court's application of federal substantive law (*materielles Bundesrecht*).

COMPLAINTS

53. The applicant complained that the strict application of the time-limit for an annulment of her adoption violated her right to respect for her family life. At any rate, a hardship clause in the pertinent provision stipulating the limitation period would have been required for cases like hers concerning injustice suffered in the GDR.

THE LAW

54. The applicant relied on Article 8 of the Convention, which reads, in so far as relevant, as follows:

> "1. Everyone has the right to respect for his private and family life, ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Preliminary issue

55. The applicant alleged that the conduct of the GDR authorities had de facto amounted to a forced adoption and that the youth office had contributed to the continuation of that injustice after German reunification.

56. The Court reiterates that the Federal Republic of Germany does not have any responsibility for acts committed by the GDR. The Court lacks competence *ratione temporis* and *ratione personae* to examine the events in the former GDR. There is therefore no question of a continuing violation of the Convention which could be imputable to the Federal Republic of Germany (see, *mutatis mutandis*, *Von Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01 and 2 others, §§ 81-83, ECHR 2005-V).

57. Accordingly, the Court's examination will be limited to the domestic courts' refusal to annul the applicant's adoption.

B. The parties' submissions

1. The Government

58. The Government objected that the applicant had not exhausted domestic remedies as required by Article 35 § 1 of the Convention. They argued that the applicant ought to have complained directly to the Federal Constitutional Court instead of applying to the Berlin Constitutional Court. Although Article 49 of the Berlin Constitution had offered the applicant the choice between the two constitutional courts, the complaint before the Berlin Constitutional Court had not been an effective remedy in view of the circumstances of the case.

59. While a complaint to a constitutional court of a Land and a constitutional complaint to the Federal Constitutional Court were equal, separate and mutually independent remedies for the constitutional review of sovereign acts, they were not equally effective because the constitutional court of a Land had only limited powers of review. A constitutional court of a Land reviewed whether a sovereign act of the Land, which was the decision of the Berlin Court of Appeal in the present case, was in violation of the constitution of the Land. In contrast, the Federal Constitutional Court examined whether sovereign acts of a Land or of a federal authority had violated the Basic Law. The Federal Constitutional Court has so far left open the question whether a constitutional court of a Land was also empowered to review the interpretation and application of federal law.

60. The Government contended that this was, however, immaterial in the present case because the interpretation and application of a law was not at issue. The provisions in question were federal law, but there was no leeway for divergent interpretations. The wording of the provisions on the time-limit for an annulment application, namely the first sentences of Articles 1767 § 2 and 1762 § 2 of the Civil Code (see paragraphs 43 and 51 above), was unequivocal.

61. That was also the reason why the two decisions of the Berlin Constitutional Court, to which the applicant had referred in her observations, differed from the present case. While those decisions concerned the correct interpretation of provisions of the Criminal Rehabilitation Act, they did not declare those provisions to be invalid because of their incompatibility with the Basic Law. Nevertheless, this was the applicant's line of argument in the present case. She had alleged that the absence of a provision allowing redress for the injustice, which she had suffered by the GDR authorities, had breached her rights and an amendment to the law had thus been required.

62. The Government maintained that the Berlin Constitutional Court could not, however, establish the unconstitutionality of the applicant's situation because it was only competent under Article 100 of the Basic Law to decide on the invalidity of a law of the Land. It was rather the sole

prerogative of the Federal Constitutional Court to declare provisions of federal law unconstitutional or to establish that there was an unconstitutional situation arising from an omission by the federal legislator.

63. The applicant's constitutional complaint to the Berlin Constitutional Court had therefore had no prospect of success and there was nothing to suggest that a direct constitutional complaint to the Federal Constitutional Court would have been manifestly doomed to failure.

2. The applicant

64. The applicant maintained that she had exhausted domestic remedies because her constitutional complaint before the Berlin Constitutional Court had been an effective remedy. She had chosen the Berlin Constitutional Court in particular because in cases concerning the Criminal Rehabilitation Act that court had dealt with injustice in the former GDR and had given decisions favourable to the applicants.

65. In contrast to the Government's arguments, the relevant provisions of the Civil Code had been capable of being interpreted in conformity with her constitutional rights. By having regard to the relevant case-law of the Federal Constitutional Court, the Berlin Constitutional Court had thus been competent to review the application of the provisions concerning the time-limit for an annulment of her adoption.

66. In that context, the applicant relied on a decision of the Federal Constitutional Court dated 15 October 1997 (see paragraph 52 above), in which that court had recognised such rights of review over federal law on a constitutional court of a *Land,* provided that identical rights existed in the Basic Law and in the constitution of the *Land*. Accordingly, the applicant affirmed that both Article 6 of the Basic Law and Article 12 of the Berlin Constitution protected her right to respect for her family life. She had therefore not been required to bring her case to the Federal Constitutional Court.

3. The Court's assessment

67. The Court reiterates that under Article 35 § 1 of the Convention, it may only deal with an application after the exhaustion of domestic remedies. An applicant is therefore required to make normal use of remedies which are available and sufficient in respect of his or her Convention grievances (see, for example, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 71, 25 March 2014).

68. In the event of there being a number of domestic remedies which an individual can pursue, that person is entitled to choose a remedy which addresses his or her essential grievance. In other words, when one remedy has been pursued, use of another remedy which has essentially the same objective is not required.

69. Accordingly, the Court has to determine whether the Government have submitted any arguments that would indicate that the constitutional complaint before the Berlin Constitutional Court and the constitutional complaint before the Federal Constitutional Court did not have "essentially the same objective", that is to say, whether the remedy at the federal level would have added any essential elements that were unavailable through the use of the remedy before the constitutional court of the *Land* of Berlin (see, *mutatis mutandis*, *Jasinskis v. Latvia*, no. 45744/08, §§ 50-53, 21 December 2010).

70. The Court notes that according to the Government the constitutional complaint before the Berlin Constitutional Court had not been an effective remedy in the present case, that the applicant should thus have complained to the Federal Constitutional Court, which had the sole prerogative to declare provisions of federal law unconstitutional and that the pertinent provision was federal law with an unequivocal wording, which left thus no leeway for divergent interpretations. The Court further observes that in this context, the applicant argued that the application of the time-limit for an annulment of her adoption violated her rights, even though the relevant provisions of the Civil Code had been capable of being interpreted in conformity of her rights. The courts had either been required not to apply the limitation period or a hardship clause in the pertinent provision would have been necessary.

71. The Court notes that in its decision of 15 October 1997 on which the applicant relied, the Federal Constitutional Court had specified that its conclusions only applied to cases where the application of federal procedural law was at issue (see paragraph 52 above). What was at issue before the Berlin Constitutional Court was, however, not the application of procedural law, but the applicant's complaint rather aimed at not applying Article 1762 § 2 of the Civil Code in her case.

72. The Court finds that the applicant's complaint that a statutory provision be not applied in the specific case was closely linked to claiming the unconstitutionality of the pertinent provision. It also notes that according to the applicant a hardship clause in the pertinent provision would have been necessary. Pursuant to the uncontested submission of the Government deciding on the unconstitutionality of the relevant provision of the Civil Code was the sole prerogative of the Federal Constitutional Court.

73. The Government have thus demonstrated that the scope of review by the Federal Constitutional Court was wider and that a direct constitutional complaint at the federal level would have added essential elements that were unavailable through the use of the constitutional complaint to the Berlin Constitutional Court. At the same time, the applicant has failed to plausibly explain that a declaration of unconstitutionality by the Federal Constitutional Court would not have been relevant in the present case.

74. Accordingly, the Court considers that the applicant failed to exhaust the domestic remedies available to her, as required by Article 35 § 1 of the Convention, and concludes that the application must be rejected pursuant to Article 35 § 4 of the Convention.

For these reasons, the Court, by a majority,

Declares the application inadmissible.

Done in English and notified in writing on 30 September 2021.{signature_p_1} {signature_p_2}

Milan Blaško
Registrar

Paul Lemmens
President