

MUTUAL RECOGNITION OF FAMILY RELATIONS IN THE EU. EUROPEAN COURT OF JUSTICE CASE-LAW REGARDING THE CHILDREN OF RAINBOW FAMILIES

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Abstract: *The following study took shape in the context of concerns that exist at the level of the European Union regarding the recognition of filiation in cross-border situations, mainly aimed at the children of same-sex couples. Thus, at the center of the analysis are those established by the Court of Justice of the European Union in case C-490/20, aspects reiterated on the ruling of the Court Order in case C-2/21. The main conclusion refers to ensuring compliance with the best interests of the child by effectively recognizing the freedom of movement and the rights attached to the quality of European citizen, for families with LGBTQ parents.*

Key words: *respect for private and family life, birth certificate, child's best interests, discrimination.*

1. Introduction. General remarks regarding the current context

The European Commission outlined a proposal for a legislative initiative (*Legislative proposal: Regulation on the recognition of parenthood between Member states*) aimed at supporting the recognition, in every Member State of the Union, of parentage validly and legally attributed in another European Member State.

This proposal was generated by the need to improve the legal protection of Rainbow families in cross-border situations, aiming, in particular, for minors to maintain contact with their parents belonging to the LGBTQ community, when they move or settle on the territory of another state, within the European Union.

"*If you are a parent in one country, you are a parent in every country*" is the symbolic statement of the President of the European Commission, by which it is supported, based on the mutual trust that Member States owe each other, the process of facilitating mutual recognition of parenthood between Member States, thus promoting the fight against inequalities based on sexual orientation, and the acceptance of the diversity of

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families, from the perspective of a shared responsibility (see, also, the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: LGBTIQ Equality Strategy 2020-2025*).

Moreover, at the level of the European Union (see *European Parliament resolution of 5 April 2022 on the protection of the rights of the child in civil, administrative and family law proceedings*) it was emphasized that the Member States, as parties to the United Nations Convention on the Rights of the Child, must make the best interest of the child a primary consideration in all public actions, otherwise resulting in a violation of the child's right to be raised and to maintain a relationship with both parents and an impairment of his other rights: rights resulting from maintenance, inheritance, refusal to grant citizenship, school enrollment, medical records, and so on.

In the document entitled "Inception Impact Assessment", the European Commission refers to the difficulties encountered by these families, against the background of the lack, at European level, of harmonized regulations on family law in a cross-border context, as well as to the significant differences between the substantive norms and the conflicting ones of the Member States, in this matter.

In this sense, we also refer to the fact that the European Parliament has carried out a study entitled "Obstacles to the free movement of rainbow families in the EU", through the Policy Department for citizen's rights and constitutional affairs, through which it documented the parental rights of couples of same gender, in accordance with national legislation, concluding that there are considerable differences within the Member States.

This is explained by the fact that the margin of appreciation of each Member State is recognized in adopting its own body of rules that add up to the material law of the family. However, the Commission bases its initiative, which we referred to in the first lines of our study, on the provisions of art. 81 (3) of the Treaty on the functioning of the European Union (consolidated version), according to which: „*measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.*

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision”.

2. Recognition of Rainbow families reflected in the European Court of Justice case-law

Although the Member States have, as we have already shown, the competence to regulate their family relations in their own way (Bracken, 2022, p.400), however, by

exercising this prerogative, they must take care not to affect the fundamental freedoms that constitutes the core of the public market.

Thus, as it was appreciated in the specialized literature (Avram, 2022, p.40), we can talk about a “ricochet” impact on family law, to the extent that the European Union exercises, apparently without any connection with this matter, a so-called “shared competence”.

This is what was also revealed on the occasion of the Decision of June 5, 2018, CJEU (Grand Chamber), in the *case of Coman-Hamilton*, when there was a practical interest in clarifying the notion of “spouse”, in the sense of Union law, in order to grant the right of residence, for a duration of more than 3 months, to the national of a third country, but accompanying a citizen of the European Union, in the exercise of the latter's right to free movement.

Following the ruling of this decision, it was noted (Avram, 2022, p.42) that the right of residence of the spouse, citizen of a third country, is not a right of its own, but a right derived from the right of free movement of the spouse, a European citizen, thus so that the sovereignty of the Member States to regulate marriage is not affected, since the autonomous and neutral notion of husband/wife, in the interpretation of the Luxembourg Court, serves the purpose of ensuring the effectiveness of the right to free movement of European citizens.

This European philosophy, set forth in the preceding lines, is also reflected in the European Court's Decision in case C-490/20, through which it was established that “*the obligation for a Member State to issue an identity card or a passport to a child who is a national of that Member State, who was born in another Member State and whose birth certificate issued by the authorities of that other Member State designates as the child's parents two persons of the same sex, and, moreover, to recognise the parent-child relationship between that child and each of those two persons in the context of the child's exercise of her rights under Article 21 TFEU and secondary legislation relating thereto, does not undermine the national identity or pose a threat to the public policy of that Member State*” (par.56).

Moreover, according to par. 57 of the same decision, the Member State is not requested “*to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents*”.

With all the limitations of this decision, it is appreciated (Tryfonidou, 2021, retrieved from Web) that the Decision in the *case of V.M.A v. Stolichna obshtina, rayon Pancharevo* has a symbolic effect in the recognition of families with LGBTQ parents, being an indication that the family, in the sense of European law, is becoming increasingly inclusive and diverse, no longer limited to the traditional nuclear family.

Given the impact of this interpretation of the Court, in the matter we are dealing with through this study, we find it useful to make a few mentions related to the circumstances of the case and to the considerations, on which the Court's response to the request for issuing the preliminary decision, is based.

Thus, this case originates in a domestic dispute involving a lady, a Bulgarian national, and another lady, a citizen from the United Kingdom. The two women married and lived together in Spain where their daughter was registered, to whom the authorities of this state issued a birth certificate listing both women as mothers.

Later, the couple with their daughter wanted to settle in Bulgaria, in which sense they addressed to these national authorities, for the transcription of their daughter's birth, in order for her to receive a Bulgarian identity document.

In a first phase, the authorities requested the Bulgarian lady to present evidence regarding the parentage of the child. Since she did not comply, her request was rejected, motivated mainly by the fact that the mention of two parents of the same female gender, in a birth certificate, was contrary to public order and to the national identity of the Bulgarian state. In such a context, V.M.A. filed a civil action at the Administrative Court in Sofia, which, based on the doubts related to the interpretation in accordance with the Union law, addressed the request for a preliminary ruling to the Luxembourg Court.

In essence, the Court was invited to rule on whether *“EU law requires a Member State to recognise, for the purpose of issuing a birth certificate, that a married couple who are women are the parents of a child, as determined in a public document issued by another Member State, or whether, on the contrary, that first Member State is free to determine parentage in accordance with its national law where that entails recognising only one woman as the mother”* (par.40 of the Opinion of Advocate General Kokott, delivered on 15 April 2021).

In addressing this issue, the Advocate General suggested the Court to examine, first of all, whether the refusal to issue the identity documents, by the Bulgarian state, can be considered an obstacle to the rights enshrined by the primary law of the Union, and, of course, if such eventual obstacle can be justified in relation to the national identity of the member states.

Following this way of analyzing the legal issue, in the considerations of this decision, the Court showed, in accordance with the previous jurisprudence, that *“a national of a Member State who has exercised, in his or her capacity as a Union citizen, his or her freedom to move and reside within a Member State other than his or her Member State of origin, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU”* (par.42) and that *“the rights which nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in their host Member State and in the Member State of which they are nationals when they return to the territory of that Member State”* (par.47).

Regarding the justification of the derogation from a fundamental freedom enshrined at the level of the European Union, the Court showed that it must be interpreted strictly, appreciating that it can be invoked *“only if there is a genuine and sufficiently serious threat to a fundamental interest of society”* (par.55), which was not the case here.

Moreover, regarding the interpretation of the notion of national identity, in the sense of art. 4(2) of the Treaty on the European Union, as shown in the Opinion of the Advocate General, this is an autonomous notion, the interpretation of which rests with

the Court (par. 70).

Thus, in the decryption key provided by the Advocate General, the Union's obligation to respect the national identity of the Member States can be understood as an obligation to respect the plurality of conceptions and, consequently, the differences that characterize each Member State, an interpretation that guarantees the motto of the Union European: "Unity in diversity" (par. 71).

On this line of thinking, the margin of appreciation recognized by the Member States finds its limit in the obligation of loyal cooperation, so that only a conception of national identity that is in accordance with the fundamental values of the Union can be protected (par. 73 of the Advocate General Opinion).

Therefore, in the disposition of this decision we find the following answer of the Court: *"Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States".*

This answer comes to ensure the best interest of the child, by respecting his rights, in the light of art.7 and art.24 (2) of the Charter, which constitutes an integration into European Union law of those enshrined in the Convention on the Rights of the Child, ratified by all the Member States of the Union.

Effectiveness is also given to the principle of non-discrimination, which requires that the rights of the child be ensured without discrimination based on the sexual orientation of its parents (par. 63 and 64 of the Decision).

The relevant provisions were interpreted in the same way in case C-2/21, as it is about a similar legal issue. For this reason, in this last case the Court ruled through a reasoned Order, taking into account art.99 of the Court's Rules of Procedure.

3. Conclusions

The case of *V.M.A. v. Stolichna obshtina* gave the Luxembourg Court the opportunity to clarify that Rainbow families benefit from the recognition of European fundamental freedoms, just like any other family. Emphasis was also placed on the need to take into account the principle of the best interests of the child, whose rights would have been seriously harmed, in the absence of such an interpretation.

Together with other authors (Tryfonidou, 2021, retrieved from Web), we appreciate that it is a partial solution to the problems faced by these families, in a cross-border context, which can be completed by a harmonized legislative framework, likely to prevent the inequitable consequences inherent in such situations.

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