

EU rights in home Member State for child whose parents of same sex are designated in birth certificate issued by host Member State (VMA v Stolichna obshtina, rayon ‘Pancharevo’)

This analysis was first published on Lexis®PSL on 22 December 2021 and can be found [here](#) (subscription required).

EU Law analysis: This judgment is about the rights of an EU citizens who is a minor, born and resident in a Member State other than that of their nationality and whose parents are persons of the same sex. The Court of Justice, Grand Chamber, held that the home Member State must recognise the birth certificate issued by the host Member State and which refers to the two parents as mothers and issue an identity document, even though domestic law does not allow marriage and parenthood for persons of the same sex. On the one hand, the judgment acknowledges the right of each Member State to lay down the rules that govern the right to marry and the right to found a family. On the other hand, it makes it clear that, in exercising this right, domestic law must comply with EU law, including the right of EU citizens to move and reside in another Member State and lead a life there with their family. The judgment is of interest to practitioners as it highlights the significance of EU citizens’ rights in the context of Member States whose regulation of institutions such as marriage and parenthood may vary widely. Written by Professor Panos Koutrakos, barrister at Monckton Chambers and Professor of EU Law and Jean Monnet Professor of EU Law at City, University of London.

VMA v Stolichna obshtina, rayon ‘Pancharevo’ Case C-490/20

What are the practical implications of this case?

The judgment reaffirms the principle that, while it is for each Member State to decide whether to allow marriage and parenthood for persons of the same sex, they must do so in compliance with EU law. In this case, it is the EU right of a minor to move and reside freely within the territory of the EU with her parents who are of the same sex that is protected.

It is the lack of uniformity in the EU about how Member States regulate marriage and parenthood that underlines the significance of the judgment. In effect, Member States are required to recognise the more liberal arrangements allowed in other Member States. However, this obligation is by no means unlimited: it applies in so far as it pertains to the exercise of the rights of EU citizens (in this case, to the issue of the document that is necessary for a minor who is an EU citizen to be able to cross the border and reside in another Member State and lead a normal family life there with her parents).

The judgment builds on Coman ([Case C-673/16](#)), another Grand Chamber judgment where the court interpreted the term ‘spouse’ in the [EU Citizens Rights Directive \(Article 2\(2\)\(a\)\)](#) so as to cover the same-sex spouse of the EU citizen concerned. The thread that brings the two judgments together is clear: while Member States are free to define the rules on, among others, marriage, they may not restrict the rights of EU citizens who have relied on the more liberal rules of another Member State.

The judgment also confirms the principle that any justification of a domestic restriction of EU citizens’ rights is construed narrowly: vague and unsubstantiated arguments about public policy would not be accepted. Instead, specific evidence needs to be produced about, for instance, a genuine and sufficiently serious threat to a fundamental interest of society which may only be prevented by restricting the EU rights in question.

What was the background?

This reference from a Bulgarian Administrative Court was about a minor born and resident in Spain whose birth certificate, issued by the Spanish authorities, referred to a Bulgarian and a UK citizen of the same sex, married in Gibraltar and then resident in Spain, as parents (‘Mother A’ and ‘Mother’).

While Bulgarian law recognised the child as a Bulgarian national by birth, the application by her Bulgarian mother in Sofia for a birth certificate, necessary for the issuing of a Bulgarian identify document, was turned down. This was due to the lack of information about who the child's biological mother was. Furthermore, a reference to two female parents on a birth certificate issued in Bulgaria was viewed as contrary to public policy, for domestic law does not permit marriage between two persons of the same sex.

The main issue raised by the referring court was whether the refusal by the home Member State to issue a birth certificate in such circumstances was contrary to the rights that the child derived from her EU citizenship ([Articles 20](#) and [21](#) TFEU), as well as the EU Charter rights to respect for private and family life (Article 7) and the rights of a child (Article 24). The question also arose whether the action by the domestic authorities was justified by the obligation on the EU to respect national identity ([Article 4\(2\)](#) TFEU).

What did the court decide?

In the case of a minor who is an EU citizen and whose birth certificate from the host Member State designates as her parents two persons of the same sex, the home Member State may not require a birth certificate to be drawn by its national authorities in order to issue to that child an identity card or a passport. This duty follows from the EU law obligation of the home Member State to issue its nationals, in accordance with its own laws, these documents stating their nationality ([Article 4\(3\) of Directive 2004/38 on Citizens' Rights](#)). The court held that every Member State must recognise the document from the host Member State that permits the minor, as an EU citizen, to move and reside freely and to lead a normal family life with her two mothers in her host Member State and in the Member State of which she is a national when she return to its territory.

The obligation to recognise a birth certificate issued by another Member State and which designates as parents of a minor who is an EU citizen two persons of the same sex does not interfere with the right of each Member State to decide whether to allow marriage and parenthood for persons of the same sex under their national law. This right must be exercised in compliance with EU law and the above obligation is imposed only for the purposes of allowing an EU citizen to exercise their EU rights to move and reside within the EU.

The above obligation does not run counter to public policy, as it poses no genuine and sufficiently serious threat to a fundamental interest of society, neither does it undermine national identity. In fact, it is contrary to the fundamental rights guaranteed by Articles 7 and 24 of the EU Charter for the child to be deprived of the relationship with one of her parents when exercising her right of free movement or for her exercise of that right to be made impossible or excessively difficult on the ground that their parents are of the same sex.

Case details

- Court: Court of Justice
- Judge: Grand Chamber
- Date of judgment: 14 December 2021

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