Analysis: “Cross-Border Recognition of Parenthood for Rainbow Families”

Loxa, Alezini

2021

Document Version:
Publisher's PDF, also known as Version of record

Analysis

Alezini Loxa

“Cross-Border Recognition of Parenthood for Rainbow Families”

www.eulawlive.com

Suggested citation: Alezini Loxa, “Cross-Border Recognition of Parenthood for Rainbow Families”, *EU Law Live*, 14 December 2021

“Cross-Border Recognition of Parenthood for Rainbow Families”

Alezini Loxa

Today, on 14 December 2021, the Court of Justice has delivered its ruling in *V.M.A.* (C-490/20) concerning the mutual recognition of parenthood for children of same-sex families. Mutual recognition of same-sex marriage had been addressed by the Court of Justice a few years earlier, in *Coman* (C-673/16), while a second case on same-sex parenthood is pending before the Court (*Rzecznik Praw Obywatelskich*, C-2/21). In Grand Chamber formation, the Court of Justice, following the suggestions of AG Kokott − albeit not reasoning with the same degree of detail − has decided that the effective exercise of free movement rights for children of same-sex families should not be limited by national measures based on the protection of national identity.

The background of the case concerns a same-sex couple (the Bulgarian V.M.A. and her wife of UK nationality) who lives in Spain and gave birth to a daughter, S.D.K.A., there. The Spanish authorities issued S.D.K.A. with a birth certificate, which recognised both partners as her mothers. V.M.A subsequently made an application to the Bulgarian authorities for the issuance of a birth certificate, which was necessary to attest the Bulgarian nationality of S.D.K.A., and to grant her Bulgarian identity documents. As Bulgaria only recognises ‘traditional’ family and parenthood, the national authorities refused to issue the requested certificate, which would include both mothers, claiming that such a recognition of same-sex parenthood would be against national public policy. Following action by the applicant against the refusal decision, the Administrative Court of the City of Sofia stayed the proceedings and sought the guidance of the Court of Justice on how to weigh the different interests implicated in this case. Namely the national identity of Bulgaria under Article 4(2) TFEU, and the effective protection of the applicant’s rights under Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter.

The diverse national laws regulating family life have been causing different impediments to bi-national rainbow families in the EU. Recognising these difficulties, Ursula Von der Leyen affirmed EU's commitment to strengthen LGBTIQ rights across the EU in the 2020 State of the Union address, where she also noted that '[i]f you are parent in one country, you are parent in every country'. The same statement appeared in the LGBTIQ Equality Strategy 2020-2025 issued a few months later, where the Commission announced an intended legislative initiative for mutual recognition of parenthood between Memberb States.

Against this background, today's decision in *V.M.A*, provides for the juridical response that should guide the Commission's future initiatives. In light of the effective exercise of free movement rights and the enjoyment of Charter rights for EU nationals, the Court of Justice does not leave any discretion to Member States with regard to recognition of family relations established in another Member States. Specifically, the Court begins from the assumption that the child of the same-sex couple is a Bulgarian national and, by this, an EU national. On this point, the Opinion of AG Kokkot had suggested two alternative scenarios: (i) The child is an EU national because VMA is the biological mother or assumes maternity under Bulgarian law, and (ii) the child is a relative in the descending line of VMA, an EU national. These were not followed explicitly by the Court, which presumed the child to be a Bulgarian national in line with the referring court's suggestions and made a short concluding observation about the second scenario.

Without contesting the national competence on family life and the absence of an EU law obligation to provide for same-sex parenthood under national law, the Court was adamant. The exercise of free movement rights under EU law should be facilitated by the recognition of family relations that have been shaped under the laws of another Member State. In this regard, the Member State of origin is not obliged to provide a birth certificate, even if this is a prerequisite for the issuance of identity documents. Instead, it is obliged to issue its nationals with ID documents or passports, in order to allow them to exercise their rights to free movement. It is further obliged to recognise in full the birth certificate issued in the host Member State and to acknowledge the parenthood relations attested therein. Such an acknowledgement should not amount to disrespecting Bulgaria's national identity. What is more, the Court examined the limitations to the exercise of the rights of S.D.K.A. in light of the Charter and decided that they were not in line with the need to respect her right to family life and the best interest of the child as protected by Articles 7 and 24 of the Charter.

The Court concluded by suggesting that, even in the case where the child is not an EU national, then both the child and its mother should be protected as the wife and the direct descendant of V.M.A., the EU national, who needs to be able to effectively exercise her rights.

Much like *Coman* (C-673/16), this case shows that the effective exercise of free movement rights is once again the trump card that saves the day and guarantees EU law protection to family

relations that are not deemed worthy of protection under national law.

Alezini Loxa *is a PhD Researcher at the Faculty of Law, Lund University, Sweden. She is one of the authors of 'Migration Crisis as a Constitutional Crisis of the EU', a chapter forthcoming in V Stoyanova and S Smet, Migrants' Rights, Populism and Legal Resilience in Europe (CUP 2022).*

EU Law Live is an online publication, focused on European Union law and legal developments related to the process of European integration. It publishes News on a daily basis, along with Analyses, Op-Eds, and Weekend Long Reads.

ISSN

EU Law Live	2695-9585
EU Law Live Weekend Edition	2695-9593

Subscription prices are available upon request. Please contact our sales department for further information at

subscriptions@eulawlive.com