BlogDUE

Habemus Pancharevo – A new chapter of the EU citizenship fairy-tale

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SUMMARY: 1. The facts at the main proceedings and the preliminary questions. – 2. The CJEU ruling: a new stone in the EU Babel Tower. – 3. The exquisite implications of the EU citizenship: Is the Tower cracking?

1. In the fall 2021, the Court of Justice of the European Union (hereinafter "CJEU") has been presented with the question whether EU law imposes on a Member State a duty to issue birth certificates that allow same-sex couples to be both registered as parents of a child, if and when the given child has been previously issued with such birth certificate in another Member State.

The statement above summarises the questions brought before the CJEU in the case C-490/20, *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, by the Administrative Court of the City of Sofia, Bulgaria. This preliminary ruling procedure was triggered within a dispute involving two women, a Bulgarian and a British national, and their attempt to be issued by the Bulgarian authorities with a birth certificate for their daughter in order for her to then be able to obtain a Bulgarian identity document and passport.

The couple had been residing in Spain since 2015 and got married there in 2018: a year later, the family welcomed their first daughter, who was born in Spain and resides there. The daughter was issued with a birth certificate by the Spanish authorities, where both mothers resulted as parents.

In 2020, the applicant at the main proceeding, holding Bulgarian nationality, applied to Sofia's municipality to be issued with a birth certificate for her daughter, so that she could use it to then obtain a Bulgarian identity document for the child.

Such an application was subsequently rejected on the basis that a reference to two female parents in a birth certificate would be against Bulgarian law and public policy of that State. The refusal, grounded on the acknowledgment that same-sex marriage is not permitted in Bulgaria, was then appealed by the

applicant and landed before the Administrative Court of the City of Sofia, which in turn sought a clarification from the CJEU.

2. The CJEU decision in this case piles up on what is now a consolidated jurisprudence focusing on the effects and implications of the EU citizenship (for a very recent output on the various connotations of the EU citizenship, see D. KOSTAKOPOULOU, D. THYM (eds.), *Research Handbook on European Union Citizenship Law and Policy. Navigating Challenges and Crises*, Cheltenham, 2022, pp. 1-424). As a consequence, the CJEU relatively short decision is quite effective in providing further clarifications on how the EU citizenship operates and more particularly in clarifying to what extent Bulgarian authorities' refusal to issue a birth certificate including both mothers as the child's parents had resulted into an infringement of EU law (an insight on this ruling is also provided by P. DE PASQUALE, *Cittadini LGBTIQ tra uguaglianza e discriminazioni*, in *Studi sull'integrazione europea*, 2021, pp. 493-508, at 499).

While the Advocate General ("AG") Opinion of 15 April 2021 had been split in two, covering a first scenario where both the applicant and her daughter were to be EU nationals, and then a second scenario, where only the mother held the EU citizenship, the Court's reasoning mainly targets the former, i.e. the situation where the applicant's child was a Bulgarian national, and thus a EU citizen under Art. 20(1) TFEU. Before tackling the reasoning of the Court, it should be noted how the substantive implications of the decision – and the enjoyment of free movement rights under EU law – would not be affected by the child not being a EU national: as clarified by both the AG and the CJEU, should the daughter not qualify as EU national, she would still be entitled to access derivative free movement rights by virtue of one of her parents being a EU national (see, *ex multis*, S. MANTU, P. MINDERHOUD, E. GUILD, *EU Citizenship and Free Movement Rights. Taking Supranational Citizenship Seriously*, Immigration and Asylum Law and Policy in Europe Series, Vol. 47, Leiden, 2020, pp. 1-434; K. LENAERTS, *EU Citizenship and the European Court of Justice's 'Stone-by-Stone' Approach*, in *International Comparative Jurisprudence*, 2015, pp. 1-10).

Once clarified this preliminary point, the Court's reasoning is articulated around two main aspects. A first element lies on the necessity to balance the rights (and obligations) stemming from the EU legal system, and the EU citizenship in particular, with the absolute (?) sovereign power, and thus discretion, Member States hold when laying down the rules governing individuals' personal and civil status. A second aspect of the analysis involves the need to assess to what extent the refusal to issue a birth certificate

accommodating homosexual parenthood could hinder the freedom of EU nationals to move across the EU, and if such refusal could somehow be justified.

On the first element of the investigation, the Court notes that Member States have full competence in setting up the conditions for acquisition and loss of nationality, as well as in defining the rules on marriage and parentage. Nevertheless, as already pointed out in *Coman* (C-673-16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări and o.*), the actual exercise of these competences require Member States to accommodate the freedom conferred to all EU nationals to move and reside freely in the EU Member States, and thus a need to recognise – for that purpose – "the civil status of persons that has been established in another member State in accordance with the law of that Member State" (para. 52).

Once clarified that – given the features of the dispute – the Bulgarian authorities' decision not to issue the birth certificate affected the individual's actual possibility to be issued with an identity card or a passport, and thus her capacity to move freely across the EU, the Court could easily conclude this will result in an obstacle to the free movement and ultimately jeopardise the individual's 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" (para. 47).

The scenario above could only be revisited in case of a justification under Art. 4(2) TEU, whereby EU law is committed to respect Member States' national identities. Despite the Bulgarian authorities' attempt to motivate the refusal to issue the requested birth certificate on public policy reasons – and particularly on its inconsistency with Bulgarian Constitution and Bulgarian family law – the Court outlines two points preventing the justification under Art. 4(2) TEU from operating. First, the Court recalls how any "derogation from a fundamental freedom should be interpreted strictly", the public policy exception thus requiring "a genuine and sufficiently serious threat to a fundamental interest of society" (para. 55). Second, the Court focuses on the human rights implications triggered by the Bulgarian authorities' refusal. As a further clarification on how the justification under Art. 4(2) TEU shall operate, the CJEU points out how all national measures capable of hindering the exercise of the free movement of EU nationals and their family members across the EU – whether justified or not – require compliance with the EU provisions on fundamental rights and the Charter of Fundamental Rights of the European Union (EUCFR) in particular. In the given case, the refusal to

issue the requested birth certificate will result in depriving "the child of the relationship with one of her parents when exercising her right to move and reside freely" within the EU, or the exercise of that right will be made "impossible or excessively difficult in practice on the ground that her parents are of the same-sex" (para. 65). Such a scenario conflicts with at least two provisions of the Charter, Art. 7 EUCFR on the right to respect for private and family life and Art. 24 EUCFR enunciating the best interests of the child principle, and ultimately result in a breach of EU law.

3. Since its inception, the EU citizenship has proven its great capacity to evolve and to adapt to almost all new circumstances.

The CJEU case-law focusing on the scope and effects of the EU citizenship has in fact built a solid jurisprudence that made of this status (one of) the *enfant(s) prodige(s)* within the EU legal order, to the point of accepting – if not an abusive – certainly a very utilitarian reliance on it (see, for instance, C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*). Notwithstanding the above, the common thread within the CJEU rulings has been and still is to require EU free movement rights to be somehow at – potential or actual – stake.

The CJEU most recent jurisprudence, however, shows a slight change of focus. While in the earlier decisions the EU citizenship status would serve one specific purpose – i.e. enabling the free movement rights by removing any obstacle – an additional goal seems to have now arisen. The EU citizenship has now become the key for boosting the principle of mutual recognition to a new level, where Member States' compliance with the obligation to "trust each other" entails the necessity of accommodating higher (and eventually harmonised?) thresholds in the field of EU equality law, and within the protection of human rights more in general (A. YONG, *Free movement or fundamental rights? EU citizenship as a legal gateway to fundamental rights protection*, in D. KOSTAKOPOULOU, D. THYM (eds.), *Research Handbook on European Union Citizenship Law and Policy: Navigating Challenges and Crises*, cit., pp. 149-164).

On this point, *Pancharevo* ruling is quite eloquent. As already seen in *Coman*, the CJEU not only clarifies that there is a duty to recognise people civil and personal status whenever a given status has been acquired in a EU Member State, but it also highlights that such status shall be reflected into the scope of application *ratione personae* of Directive 2004/38/EC. Such an approach, that can and should certainly be welcomed in light of enhancing the rights of EU nationals and their family members, presents the added value of boosting the applicability of Directive 2004/38: it could easily be argued that

any new form of "marriage" introduced at domestic level will trigger a presumption for such status to be possibly accommodated in all cross border situations within the EU Member States.

If the enhanced approach towards the potentialities of the EU citizenship should not interfere with the substance of family law provisions of the EU States, its effects go beyond the situation where an individual intends to move across EU countries. As also highlighted by the CJEU in *Pancharevo*, the recognition of a parental relationship, and of personal status more in general, ultimately ensure the respect of individuals' fundamental rights by enabling the enjoyment of the right to enjoy family life (para. 61).

In this context, at least two observations are required.

A first aspect concerns the reference to Members States' and the EU duty to protect the right to family life as expressed in the EU Charter of Fundamental Rights and in the European Convention on Human Rights. On the one hand, Art. 7 EUCFR shall have the same meaning and scope of Art. 8 ECHR (see Art. 52(3) EUCFR and the Explanations Relating to the Charter of Fundamental Rights); on the other hand – via the CJEU jurisprudence – it seems the scope of Art. 7 EUCFR has to some extent gone beyond the one of Art. 8 ECHR. The reference to the child having a right to have a 'normal' family life by suggesting that in order for the daughter to fully enjoy her fundamental rights she would have to be able to live with their parents in each and every EU State, discloses an attempt to include the concept of 'family unity' into the meaning of 'family life'. Such conclusion, supported by the CJEU more recent case-law, and its approach in enhancing the potential of the EU citizenship, is grounded on an interpretation that departs from the status-quo approach of the European Court of Human Rights (ECtHR) when dealing with Art. 8 ECHR. As a matter of fact, in the context of migration, and in scenarios where families sought to move to or be reunited in a contracting State to enjoy family life there, the ECtHR has elaborated a technique, known as the 'elsewhere approach', to distinguish the circumstances where a State has a duty to allow the fulfilment of family unity within its territory, from those where such duty does not exist. These latter would be all situations where family unity could lawfully be achieved elsewhere (ECtHR, *Abdulaziz, Cabales and Balkandali v the United Kingdom*, paras. 67-68; *ECtHR, Jeunesse v the Netherlands*, para. 107).

In light of *Pancharevo*, one may wonder whether – via the accommodation of the EU citizenship – the CJEU has triggered Art. 53 EUCFR, maximising the standard of protection of the fundamental right to private and family life, at least in cross-border situations.

A second set of observations focus instead on the intersection between the enjoyment of free movement rights and that of the right not to be discriminated against. Among the reasons behind the Court's ruling stating the unlawfulness of the Bulgarian authorities' refusal, the Court mentioned the necessity – under Art. 7 of the UN Convention on the Rights of the Child (CRC) – to ensure that the child of a homosexual couple is not discriminated against on the grounds of her/his/their parents' gender or sexual orientation. This not only represents a 2.0 effect of the free movement rights under the TEU, but, as already seen, it proves once again that equality also works by proxy, i.e. for the benefit of those individuals that are exposed to discrimination because of their ties with another individual whose personal circumstances fall under a 'protective ground' (on this, in the field of non-discrimination on grounds of disability, see C-303/6, *S. Coleman v Attridge Law and Steve Law*).

The scenario just described shows a commitment towards the implementation of the so-called mainstream equality, however, it presents a flaw. The interpretative path set up by the CJEU results in fact into a disparate treatment between cross border situations and purely domestic ones: while these two situations necessarily need to be distinguished on the basis of the presence/absence of a cross-border element, such a distinction should never result into a form of discrimination. With such a disclaimer in mind, the CJEU current approach exposes EU law to at least two possible issues. A first issue concerns the circumstance that only married couples would benefit from the enhanced interpretation of the concept of 'mutual recognition' currently offered by the CJEU: as a matter of fact, the wording of Art. 2(2)(b) of Directive 2004/38 clarifies that, unless domestic law also provides for same-sex partnership, Member States do not have an obligation to allow the free movement rights of same-sex couples that registered their union in another Member State (P. DUNNE, *Coman: vindicating the residence rights of same-sex "spouses" in the EU*, in *European Human Rights Law Review*, 2018, pp. 383-389). A second concern lies on the concept of reverse discrimination: given that the CJEU jurisprudence necessarily applies to cross-border couples only, purely domestic – yet comparable – situations are prevented from acceding 'family unity' and thus enjoying family life, with the ultimate result that – at least in some circumstances – families will be discriminated against only because they share the same nationality and have not otherwise triggered a cross-border element (of this idea, also A. TRYFONIDOU, *The EU Top Court Rules that Married Same-Sex Couples Can Move Freely Between EU Member States as "Spouses": Case C-673/16, Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, in *Feminist Legal Studies*, 2019, pp. 211–221).

This leaves us with the following conundrum: are we then be presented with a reverse form of discrimination on grounds of nationality triggered by the enhanced application of EU law itself?