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Global Citizenship Observatory (GLOBALCIT)
Robert Schuman Centre for Advanced Studies
in collaboration with
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EU law and the mutual recognition of parenthood between Member States: the case of V.M.A. v Stolichna Obshtina

David A.J.G. de Groot[*]

1. Introduction

On 2 October 2020, the Administrative Court of the City of Sofia in Bulgaria requested a preliminary ruling from the Court of Justice of the European Union (CJEU) in the case C-490/20 *V.M.A. v. Stolichna Obshtina, Rayon 'Pancharevo' (Sofia municipality, 'Pancharevo' district)*, concerning the recognition of a birth certificate mentioning two women as parents in order to get proof of nationality.

On 12 November 2020, the Commission published the LGBTIQ Equality Strategy 2020-2025, in which it stated that i.a. "[t]*he Commission will push for mutual recognition of family relations in the EU. If one is parent in one country, one is parent in every country. In 2022, the Commission will propose a horizontal legislative initiative to support the mutual recognition of parenthood between Member States, for instance, the recognition in one Member State of the parenthood validly attributed in another Member State.*" The preliminary questions referred by the Administrative Court will have a major impact in establishing the guiding principles for this proposal.

In this report, I would like to first describe the facts of the case. Then the human rights aspects related to the case and the applicable case law of the European Court of Human Rights (ECtHR) will be explained, followed by a clarification of the issues in the case, whereafter the preliminary questions will be discussed in light of EU law.

2. Facts of the case

V.M.A. is a Bulgarian national married to a UK national, K.D.K. They reside in Spain. On 8 December 2019, a child, S.D.K.A., was born to them and a Spanish birth certificate was issued, mentioning both V.M.A. and K.D.K. as 'mother'.

V.M.A. asked the authorities of the Sofia municipality, Pancharevo district, to issue a birth certificate for the child, which is required for getting a national ID document. The authorities requested V.M.A. to produce, within seven days, evidence of the child's parentage with respect to the biological mother. V.M.A. responded that she could not provide that information and that she was not required to do so in accordance with Bulgarian law.

[*] *EU-CITZEN Network*

Subsequently, the authorities refused to issue the birth certificate. It is against this decision that V.M.A. brought proceedings.

The Administrative Court of Sofia referred the following questions to the CJEU:

> "*1. Must Article 20 TFEU and Article 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that the Bulgarian administrative authorities to which an application for a document certifying the birth of a child of Bulgarian nationality in another Member State of the EU was submitted, which had been certified by way of a Spanish birth certificate in which two persons of the female sex are registered as mothers without specifying whether one of them, and if so, which of them, is the child's biological mother, are not permitted to refuse to issue a Bulgarian birth certificate on the grounds that the applicant refuses to state which of them is the child's biological mother?*
>
> *2. Must Article 4(2) TEU and Article 9 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that respect for the national identity and constitutional identity of the Member States of the European Union means that those Member States have a broad discretion as regards the rules for establishing parentage? Specifically:*
>
> *– Must Art. 4(2) TEU be interpreted as allowing Member State to request information on the biological parentage of the child?*
>
> *– Must Article 4(2) TEU in conjunction with Article 7 and Article 24(2) of the Charter be interpreted as meaning that it is essential to strike a balance of interests between, on the one hand, the national identity and constitutional identity of a Member State and, on the other hand, the best interests of the child, having regard to the fact that, at the present time, there is neither a consensus as regards values nor, in legal terms, a consensus about the possibility of registering as parents on a birth certificate persons of the same sex without providing further details of whether one of them, and if so, which of them, is the child's biological parent? If this question is answered in the affirmative, how could that balance of interests be achieved in concrete terms?*
>
> *3. Is the answer to Question 1 affected by the legal consequences of Brexit in that one of the mothers listed on the birth certificate issued in another Member State is a UK national whereas the other mother is a national of an EU Member State, having regard in particular to the fact that the refusal to issue a Bulgarian birth certificate for the child constitutes an obstacle to the issue of an identity document for the child by an EU Member State and, as a result, may impede the unlimited exercise of her rights as an EU citizen?*
>
> *4. If the first question is answered in the affirmative: does EU law, in particular the principle of effectiveness, oblige the competent national authorities to derogate from the model birth certificate which forms part of the applicable national law?*"

Before going into the actual substance of the case, it is important to clarify some terminology employed by the referring court, as well as a wider range of issues concerning parentage establishment to same-sex couples and parentage recognition in the case law of the ECtHR.

3. 'Biological mother' and basic concepts of parentage establishment and recognition in ECtHR case law

3.1. Different forms of parenthood and modes of parentage establishment

In the questions referred and throughout the preliminary reference the term 'biological mother' is used repeatedly.

What the referring court is probably referring to with this term is 'the woman who gave birth to the child' (in para. 25 of the reference, the referring court states that it is unclear which of the two is "*the child's biological mother or became a mother by way of another procedure*"). This is the *mater semper certa est* principle.

Conversely, if one speaks about 'biological father', what is meant is only the man whose gametes resulted in the conception of the child, in other words: the DNA donor.

By limiting the definition of 'biological mother' to the category of *mater semper certa est*, the DNA link to the child that was established by a woman's gametes is meaningless. However, one should consider that if a woman gives birth to a child, this does not necessarily mean that she also contributes to its genetic material. Only the gametes of the woman whose ovum is used can create a DNA link. One should take into account that, if Bulgaria had required a DNA test, the result, in accordance to their own legal definition of mother, would technically have no evidentiary value.

The term 'biological mother' is therefore very confusing. This is because it can refer either to (1) the woman who gave birth to the child, or (2) the woman whose gametes resulted in the conception of the child. I would therefore in this report use two different words for either version. Borrowing partly from surrogacy terminology the woman giving birth is the 'gestational mother' and the woman whose DNA is used is the 'DNA mother'.

Having different definitions of 'biological' depending on the gender of the parent has clear consequences throughout family law, as will be seen below.

One should also be aware that, regardless of gender, a DNA link to the child is in many circumstances not as relevant as one might expect.

One can actually distinguish three types of parentage: (1) biological parenthood, meaning in principle the DNA relationship; (2) social parenthood, meaning the caretaking of the child; and (3) legal parenthood, meaning that the parentage is established by law which can have its foundation in biological or social parenthood, but does not necessarily have it in both.

In the case at hand (and logically generally, for legal purposes, but especially in recognition cases), the legal parentage is the more crucial element.

There are two principal modes of establishing automatically (*ex lege*) legal parentage at birth:

1. *Mater semper certa est*, meaning the woman who gave birth to the child is the mother; and
2. *Pater est quem nuptiae demonstrant*, meaning the husband of the woman who gave birth is the father.

Next to these, there are several other modes of establishing parentage which require an action and are in principle post-natal (most commonly: acknowledgment, judicial establishment of parentage and adoption).

According to the ECtHR judgment *Marckx*, it may not be a condition for the *mater semper certa est* principle that the woman giving birth is married. Consequently, the *mater semper certa est* principle applies by default.

On the contrary, the *pater est quem nuptiae demonstrant* mode (*pater est*) is mostly limited to the marriage status, although some countries have also extended it to registered partnerships. However, the ECtHR has held in *Boeckel and Gessner-Boeckel v. Germany* and *Bonnaud and Lecoq v. France* that this mode of parentage establishment may be limited to marriage and does not have to be extended to a registered partnership. The German *Bundesverfassungsgericht* interpreted these cases to mean that the *pater est* principle can also be restricted within the marriage status to opposite-sex couples and does not have to be extended to same-sex couples when they get access to marriage.

In my view, this was an incorrect interpretation, since the ECtHR cases concerned solely the permissible differentiation between marriage and registered partnerships, and not the permissible differentiation between opposite-sex couples and same-sex couples within the same status.

However, some states (e.g. the Netherlands) have extended the *pater est* principle to the same-sex spouse or (same-sex or opposite-sex) partner of the woman giving birth.

The Spanish provisions based on which parentage was (most likely) established in the case are Article 120(5) Civil Code and Article 7(3) of Law 14/2006 on assisted human reproduction techniques. These do not exactly reflect the *pater est* principle, but are more similar to a pre-natal declaration of acknowledgment (there is a slight differential treatment between a male and a female spouse in Article 44(4) and (5) of Law 20/2011 on the Civil Registry).

An acknowledgment is a mode of parentage establishment which is in principle post-natal, but often a pre-natal declaration can be made, which then applies from the moment of birth. The person (in most cases the DNA parent) declares that (s)he is the parent of the child. This does not necessarily have to reflect the biological truth. Depending on the legal system consent to this declaration of the woman who gave birth to the child is required. However, the use of this mode of parentage establishment is often restricted to men. This restriction might not be in conformity with human rights.

The ECtHR case law concerning parentage and adoption rights of same-sex couples have mostly dealt with the question of which rights have to be attached to the registered partnership (please note that there have been no cases at the ECtHR concerning which rights have to be attached to same-sex marriage, which in my view should be identical to opposite-sex married couples). This case law states clearly that same-sex couples living in a registered partnership should not necessarily be treated the same as married couples. However, they should at the minimum have the same rights as opposite-sex unmarried couples. Opposite-sex unmarried couples do not have access to the *pater est* principle and, consequently, it does not have to be extended to a registered partnership.

However, contrary to the registered partnership, unmarried opposite-sex couples do have access to the acknowledgment procedure. In *Hallier v. France*, which concerned parental leave, the ECtHR had a chance to address this, but only said that parental leave can be restricted to the parent, and since the applicant first had to go through an adoption procedure after the birth of the child, she was not yet a parent, so there was no discrimination. The fact that a male person could have acknowledged the child without being the DNA-parent and have access to parental leave was not considered.

Now, in a pending case before the ECtHR (*R.F. and Others v. Germany*) this is being challenged. In that case reciprocal IVF has been used (reciprocal IVF means that the ovum of the female partner of the woman giving birth to the child was used) and, therefore, the female partner of the woman giving birth is the DNA-mother. Any argument denying an acknowledgment because of the 'impossibility' of being a 'biological parent' consequently fails.

Thus, a case of reciprocal IVF is comparable to a case of an opposite-sex couple where the gametes of the man were used with a donor ovum.

3.2. Surrogacy case law

Coming back to the use of 'biological mother' in the preliminary reference. The referring court mentions the *Mennesson v. France* case. This is one of the key ECtHR cases concerning surrogacy establishing a duty on a state to recognise the parentage of a child born by gestational surrogacy established to a man who is the 'biological father', meaning the DNA father. While, as the referring court states, there is no indication that surrogacy has been used, it correctly assesses that the line of case law based on *Mennesson* could be of relevance.

The referring court states that "*it is clear from this case-law of the ECtHR that the condition applied by the ECtHR is whether at least one of the parents entered on the birth certificate issued abroad is the child's biological parent.*" The referring court then continues, though, stating "[i]*n the present case, however, the applicant has refused to provide the defendant with details about the child's biological mother, which clearly distinguishes the present case from the case before the ECtHR.*" Here the referring court seems to mix up the two different 'biological mother' concepts, for it seems from the facts that the Bulgarian authorities requested to know who gave birth to the child and not who is the DNA mother. In surrogacy cases the woman giving birth to the child is always the surrogate mother. The 'biological mother' in such cases always means the DNA-mother.

Parentage establishment to the 'intended mother' is a rather new line of case law of the ECtHR. The referring court mentions the first case, which was also the first Advisory Opinion made on the basis of Protocol 16, concerning the female intended parent in the *Mennesson* case (the *Mennesson* judgment only concerned the male intended parent).

In that Advisory Opinion, the ECtHR held that "*the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the 'legal mother'.*" This mode of establishment did not necessarily require that a foreign birth certificate would have to be directly recognised (of course it is an option). However, some other mode of recognising or regularising the legal parentage established abroad has to be available in domestic law (e.g. adoption), at the latest when it becomes a practical reality (meaning exercise of social parenthood). The Court also made it very clear that the intended mother in the Advisory Opinion was not the DNA-mother stating "[a]*lthough the domestic proceedings do not concern the case of a child born through a gestational surrogacy arrangement abroad and conceived using the eggs of the intended mother, the court considers it important to emphasise that, where the situation is otherwise similar to that in issue in the present proceedings, the need to provide a possibility of recognition of the legal relationship between the child and the intended mother applies with even greater force in such a case.*" Consequently, when the 'intended mother' is also the 'DNA mother', an easier method than adoption might be required to recognise or regularise the parentage established.

The referring court in the CJEU case we are discussing in this report added that Bulgaria had not ratified Protocol 16 and was consequently not bound by the Advisory Opinion. It should be noted though, that the ECtHR has already repeated its ruling on two occasions (*C and E v. France* and *D v. France*). In *D v. France,* the intended mother was actually the DNA mother, but for some reason had never provided this fact during the national proceedings and only stated so at the ECtHR when she was asked directly. This made this extra fact inadmissible, while it would have changed the setting of the case (see for this aspect of the case especially the Concurring Opinion of Judge O'Leary in *D v. France*).

In surrogacy cases, it is important that at least one of the intended parents is the DNA parent. When an intended father is the DNA parent, an acknowledgment procedure combined with a DNA test can be required (see *D. and Others v. Belgium*). It is only when none of the intended parents have a DNA relationship with the child that the state can intervene (see the Grand Chamber judgment of the ECtHR in *Paradiso and Campanelli v. Italy*).

3.3. Circle of Life principles

One has to know that there is a differentiation between private and family life, which are often considered a 'single human right'. Based on the newer case law one can distinguish them quite clearly, but it has to be said that some older case law relied mostly on family life, while based on newer case law, these are quite clearly private life cases (e.g. *Wagner and J.M.W.L. v. Luxembourg*).

From this case law, we can deduce certain principles concerning private and family life, which actually apply not only to parentage relationships, but to any form of status (be it a civil status, residence status, professional status or any other status).

A status is protected by private life, consequently the establishment and recognition of such a status fall within the ambit of private life. Rights can be attached to this status. These rights can fall within the ambit of other human rights, like the right to family life (e.g. think of family reunification). These rights are often not limited to a specific status, but are also permitted to be exercised without the status. However, where they are exercised outside of a status, certain facts constantly have to be proven (think of the proof that couples in durably attested relationships have to provide for a residence permit), whereas the status is exempted from providing such proof (this affirms it falls within the ambit of private life). The status is proof in itself. However, the durable exercise of a right without it being attached to a status, obliges the state to give the opportunity to (1) recognise a status previously established abroad, which the state would not recognise before, or (2) to regularise the situation in a legal status, which will exempt from having to provide proof in the future. After this, the rights would be exercised on the basis of the status, reinforcing the status itself. In my PhD which I intend to defend in the first quarter of 2021, I have named this 'the circle of life'.

This can have a follow up effect: the status of biological parent (DNA falls under private life) is not a legal status, but it might give access to family life. The durable use of this family life might require the state to confirm this again in a legal parent status, through which the family life rights would then be exercised.

3.4. Application of ECtHR case law on recognition/regularisation by Bulgaria

In any case, we do not know whether V.M.A. is the DNA mother, and to be fair, it is not really relevant, because there is a legal status and/or durable exercise of family life. What is relevant

is the question whether Bulgaria provides for a means to recognise or regularise the legal parentage established in Spain.

In this context the referring court mentioned adoption, stating that according to Bulgarian Private International Law the law applicable to the adoption would be the law of the place of residence of the child and thus Spanish law. This is paradoxical and would not solve the issue in the least but would lead to the exact same situation in the end. It would have to entail a stepchild adoption or a full adoption by both parents in accordance with Spanish law, who according to Spanish law are already the parents. A full adoption by both parents is completely ridiculous, for one would replace the two parents by the same persons. A stepchild adoption according to Spanish law would equally not be possible because the adopting parent is already considered the parent.

Not even considering the fact that the adoption would not be possible according to Spanish law since both parents are already considered the parents according to Spanish law, would Bulgaria recognise this adoption? No, because, again, there would be two female parents.

Anyhow, according to the ECtHR Advisory Opinion (and its follow-up case law) the procedure of regularisation should be in the domestic law of the receiving state. It is exactly because private international law fails to recognise the legal parentage already established, that such a procedure is required to avoid limping legal relationships. So the question is: does Bulgarian law provide for an alternative?

A single parent adoption in accordance with Bulgarian law could be an option. However, it would violate the parentage connection to K.D.K., because this relationship would subsequently be dissolved (this happened accidentally in *Emonet and Others v. Switzerland* and was also at issue in *E.B. v. France*). A step child adoption according to Bulgarian law might theoretically be an option in order to regularise the parentage according to Bulgarian law. However, according to Article 81(3) Family Code, only a spouse has access to a stepchild adoption. Since Bulgaria will not recognise the marriage, this might be an issue. Technically speaking, according to *Oliari v. Italy*, and especially *Orlandi v. Italy*, Bulgaria is under an obligation to create some form of registered partnership based on which a same-sex marriage established abroad can be recognised, which might have the step child adoption option attached (It is not required if step child adoptions are limited to marriage, see *Gas and Dubois*. When the step child adoption is available to unmarried opposite-sex couples it is required to permit the step child adoption to the registered partnership, see *X and Others v. Austria*). Since Bulgaria has limited the step child adoption to marriage, an analogue interpretation of the ECtHR case law would not require that a same-sex marriage in Bulgaria would automatically have this right as a registered partnership.

The CJEU could of course, extend the *Coman* judgment, by stating that an additional 'single purpose recognition' (the judgment established that the same-sex marriage legally established in a Member State would have to be recognised as a marriage for the sole purpose of acquiring a residence right under Directive 2004/38/EC, but not necessarily for other rights) should be applied in accordance with Article 20 and 21 TFEU for the purpose of allowing a step child adoption in accordance with Bulgarian law. This should then also take into account that when the same-sex marriage between V.M.A. and K.D.K. was established in 2018 in Gibraltar, it was an EU civil status and should continue to be treated as such.

The main issue remains that according to Article 103(2) Family Code a new birth certificate should be drawn up after a step child adoption, keeping in the parent to whom relations are maintained and adding in the new adoptive parent. This Bulgaria would again refuse, for the same reasons as the original case: both parents are women and a birth certificate

can according to Bulgarian law only contain one woman and one man as parents. Any adoption procedure would therefore only postpone the issue and not solve anything.

Consequently, just looking at this from the perspective of the ECHR, Bulgaria is violating Article 8 ECHR by not recognising the legal parentage established abroad, nor having any mode of establishment of parentage in domestic law capable of regularising this legal parentage established abroad.

4. Confusing element in the case

Before delving into the questions referred, it is imperative to discuss a few contradictory elements which are confusing, like the use of 'biological mother', which was already explained above. These elements are core to the case and it is of the utmost importance to shed some light on them.

4.1. Refusal of recognition or of registration?

There is especially one point which is rather unclear, which goes to the heart of the case: have the Bulgarian authorities refused to recognise the parentage established in Spain, or have they recognised the parentage, but refuse to register this? This is a very important distinction.

The main issue of the case, as described by the referring court, is – in essence – that the Bulgarian authorities will not issue a Bulgarian identity document to the child, S.D.K.A.. The reason for this is that one needs a Bulgarian birth certificate to get the document. This birth certificate is not issued because it would require to name two woman as mother, which is not possible because the Bulgarian birth certificate has only two columns, one for a mother and one for a father.

The authorities furthermore refused to issue the certificate because V.M.A. did not answer their questions as to who is the 'biological mother' of the child. From this point of view, it seemed the refusal was based on doubt about the parentage. Additionally, the authorities argue, based on Article 4(2) TEU, that recognising the foreign birth certificate would conflict with the Constitution and therefore the entire second question concerns the 'establishment of parentage' (as will be explained below, this is an incorrect approach).

However, simultaneously, the Administrative Court states that the fact that the child is a national is not in doubt, because Article 25(1) of the Constitution and Article 8 of the Law on Bulgarian Nationality both state that "[a] *person is a Bulgarian national by parentage if at least one of their parents is a Bulgarian national*." This would mean that the parenthood of V.M.A. is not in doubt irrespective of the mode it was established by.

So on the one hand the parentage is not recognised, but on the other hand the parentage is not in doubt in the least. This makes no sense!

If the only issue is the fact that two women cannot both be entered on the Bulgarian birth certificate, because of two gender-defined columns, and not that the parentage cannot be recognised, this becomes an administrative issue and not a legal one.

Who is the 'biological mother', in whichever of its meanings, is an irrelevant issue when it concerns the birth certificate, because the only form of motherhood relevant to the birth certificate is the status of 'legal motherhood'. If the legal motherhood has been recognised,

which seems to be the case, since the child is considered a national, which would not be possible if the legal parentage had not been recognised, regardless of who is the gestational, DNA or social mother is rather immaterial.

The refusal to issue the birth certificate with two women as legal mothers is no longer within the ambit of private international law, because the parentage has been recognised. Instead, it falls within the scope of administrative law, since it only concerns the issuing of a document. By refusing to do so, it has become direct discrimination based on sexual orientation, sex and birth, which cannot be justified on any grounds.

Because it is a matter of 'we cannot put a woman in a man column', it is an issue of administrative convenience, which, in accordance with the case law of the CJEU in *Garcia Avello* and *Grunkin Paul*, is incapable of justifying a restriction of the free movement rights. An argument in name cases like 'the computer program does not allow a space between two names, consequently we cannot register Spanish names', or 'the name has more characters than our registration program can handle' are not acceptable. Equally, 'a column for one person is specifically designed for a woman, and another specifically for a man' are not substantive law, they are administrative issues.

The refusal to issue an administrative document necessarily required by national law in order to receive an identity document stating their nationality that is required abroad equals refusing to issue the ID document itself, in violation Article 4(3) of Directive 2004/38/EC.

To repeat, what was explained above concerning the 'circle of life', if the State accepts that certain rights can be exercised (as they have *in casu* concerning nationality), the authorities will be required to issue a document exempting the necessity to prove the right to exercise this right. By not issuing the birth certificate and consequently the ID document proving acquisition of nationality, Bulgaria is violating Article 8 ECHR and *ipso* Article 7 CFR.

4.2. Why is a Bulgarian birth certificate required?

At this point it might be good to ask, why is a Bulgarian birth certificate necessary, since the child already has a Spanish birth certificate? According to Bulgarian law, Bulgarian citizens are required to provide only documents originating from Bulgarian authorities. Foreign documents are not accepted and have to first be turned into a Bulgarian document.

Therefore, what is at issue is the so-called 'transcription' of the birth certificate. This is an action by which a foreign document is copied into the national registries, giving it the same evidential value as documents issued by the national authorities. In some countries, like the Netherlands, France and Germany, this can be done voluntarily at a specific service (Municipality of The Hague (NL), Central Service for Civil Status of the Ministry of Foreign Affairs in Nantes (FR), Standesamt Berlin I (DE)). If one does not transcribe the document, other services where the document is required can still be accessed, but require the original document with translation, apostile, etc.. A major advantage of transcription is that after transcription, the national authority can also issues copies and extracts of the document and one consequently would no longer have to get those from the original authority abroad. For this reason, next to nationals, refugees always should have the option to have some form of transcription of their documents, because they cannot be expected to get such documents from the state they fled. Other foreigners usually do not have access to this.

Transcription as such, is a good thing, it can make life easier. However, in certain cases it can become a major obstacle, like in the case at hand, where a state does not allow access to any service to its nationals without prior transcription.

This was actually an issue in the *Coman* case and in the Romanian Constitutional Court judgment that followed the CJEU reference. The fact that Mr Coman and Mr Hamilton had not challenged the refusal to transcribe their marriage certificate (because they had never applied for a transcription, but had challenged a request for information) which would be required in order to apply for family reunification with a national, was criticised by judge Pivniceru in her separate opinion to the judgment.

This general refusal to accept public documents from other Member States could actually be considered a violation of Regulation 2016/1191. While that regulation only considers the recognition of the documents themselves, and not the legal effects derived from the content (Article 2(4) of the Regulation), in this case it seems – as stated above – that the legal effects of the acquisition of nationality have already been recognised. The only issue here is the duty of prior transcription of the birth certificate itself, which should not be an obligatory requirement in accordance with Article 4 of the Regulation (exemption from legalisation and similar formalities). The Bulgarian authorities should simply accept the Spanish birth certificate when this is provided in an application for an ID document.

However, in order to avoid future issues of proving the validity of the Spanish birth certificate in Bulgaria, transcription might be a good thing in order to avoid the situation that every time the document is used in front of a different national authority, the duty to accept it would have to be settled in court because there is doubt about its validity. It should be noted, though, that probably even if the birth certificate were transcribed mentioning two mothers, Bulgarian authorities would still express doubts as to whether the document is genuine.

4.3. Where is Article 21(1) CFR?

Curiously absent from the CFR articles mentioned by the referring court in the entire preliminary reference, is Article 21(1) CFR.

This article states: "*Any discrimination based on any ground such as sex, …, birth, … or sexual orientation shall be prohibited.*" One might consider this article of relevance to the case, wouldn't you agree?

Seen from any possible angle, the refusal to issue a birth certificate mentioning two woman as parents of a child born by means of IVF and giving no possibility to regularise such parentage established abroad to a woman, where a man would have such possibility, is direct discrimination based on sex, birth and sexual orientation.

The total absence of Article 21(1) CFR is, therefore, rather striking. In the analysis that will follow, Article 21(1) CFR should always be considered relevant.

5. Assessment of the questions

As was seen in the previous sections, quite a few issues get mixed up in the preliminary reference.

For most of the preliminary questions, the assessment might differ greatly depending on whether the issue concerns the refusal of recognition of parentage established abroad for the purpose of acquiring the nationality of a Member State, or the refusal to register the parentage already recognised which is required to effectively use the nationality that has already been acquired.

As was seen above, it is completely unclear from the reference which of the two versions is applicable. For this reason, in this assessment, both versions will be considered.

Whereas in principle it would be suitable to start with the first question, this question depends a lot on the conclusions of the second question, since specifically the refusal to give information as to the identity of the 'biological mother' is provided as the ground for refusal. Only the second question asks whether such a request for information can be made; therefore it is prudent to start with that question, in the presumption that EU law is applicable.

After the analysis of the second question, the first, third and fourth question will be analysed.

5.1. Question 2 – Constitutional Identity and Margin of Appreciation on parentage establishment

The Question with some remarks

To repeat the second question:

> "*2. Must Article 4(2) TEU and Article 9 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that respect for the national identity and constitutional identity of the Member States of the European Union means that those Member States have a broad discretion as regards the rules for establishing parentage? Specifically:*
>
> *– Must Art. 4(2) TEU be interpreted as allowing Member State to request information on the biological parentage of the child?*
>
> *– Must Article 4(2) TEU in conjunction with Article 7 and Article 24(2) of the Charter be interpreted as meaning that it is essential to strike a balance of interests between, on the one hand, the national identity and constitutional identity of a Member State and, on the other hand, the best interests of the child, having regard to the fact that, at the present time, there is neither a consensus as regards values nor, in legal terms, a consensus about the possibility of registering as parents on a birth certificate persons of the same sex without providing further details of whether one of them, and if so, which of them, is the child's biological parent? If this question is answered in the affirmative, how could that balance of interests be achieved in concrete terms?*"

Some preliminary remarks as to this question are relevant.

According to the ECtHR the contracting states have a wide margin of discretion where it concerns rules on establishing a status. However, this case is not about 'establishing' a status, but about 'recognising' a status already established. In recognition cases, the margins are narrower. Thus, whereas a broader discretion might exist for 'establishment' of a status, in this case it is not relevant. This question should therefore be rephrased, asking not whether the Member States have a broad discretion as regards rules of establishing parentage, but whether the Member States have a broad discretion as regards rules of recognising parentage duly established in another Member State.

The main question and the first sub-question seem to relate to recognition of parentage, whereas the second sub-question clearly concerns the registration. As was stated above, registration can only be an issue after recognition has already happened. It must, therefore, be made clear that if the parentage has already been recognised for the purpose of acquiring Bulgarian nationality, the main question and first sub-question are obsolete.

Article 9 CFR, mentioned in the main question, concerns the right to marry and to found a family.

Article 9 CFR has in accordance with Article 53 CFR, at the minimum, the same scope as Article 12 ECHR. Whereas 'to found a family' might sound as if parentage were a part of this article, it is not. Parentage, even where it is established on the basis of a marriage, is not covered by Article 12 ECHR, but by private life in Article 8 ECHR. Even if this case were to involve the recognition of the marriage established abroad, the right to private life would be applicable to the recognition of the marriage status and not Article 12 ECHR, which only covers the establishment of a marriage. This means, that not Article 9 CFR should be considered, but Article 7 CFR (private (and family) life), as is done in the sub-question).

Assessment

Let's start with the first part of the question: Do Article 4(2) TEU and Article 9 CFR allow a broad discretion as regards rules for establishing/recognising parentage?

Due to the use of Article 9 CFR, the first part of preliminary question 2 seems to be specifically aimed at the same-sex marriage concluded by the applicant and her spouse, since the parentage might be based on it. Bulgaria has not introduced same-sex marriage and, consequently, sees it counter to its public order to recognise such a marriage.

However, as was explained above, Bulgaria is actually under a duty based on the ECHR to have some form of registered partnership instead of marriage for same-sex couples, in so far as it has not opened marriage to same-sex couples. Same-sex couples have the right to family life (*Schalk and Kopf*) and, consequently, the durable use of this right requires the State to provide for some form of status exempting them from having to prove family life at every occasion (*Oliari*, 'circle of life'). While there is no duty to recognise a same-sex marriage as a marriage, there is a duty in such cases to recognise the marriage as another status which has to be available (*Orlandi*). Consequently, the argument that the same-sex marriage cannot be recognised in any form is already a violation of Article 8 ECHR.

In *K.B.* the CJEU stated that legislation which, in breach of the ECHR, prevents a couple from fulfilling the marriage requirement, which must be met to benefit from certain rights, must be regarded as being, in principle, incompatible with the Treaties (C-117/01 *K.B.*, para. 34). While in the pending case, according to the ECHR, the marriage does not have to be recognised as a marriage, the failure to recognise it in a different form is a violation of the ECHR.

Consequently, Article 4(2) TEU cannot be relied on by a Member State where the national legislation – or absence of national legislation – is breaching the ECHR.

Additionally, as already stated, the existence of the marriage or its recognition as a registered partnership is not really relevant; and anyway, there is a quite wide margin of appreciation as to which modes of parentage establishment can be connected to a registered partnership (to repeat, this means at the minimum, those rights that are granted to unmarried opposite-sex couples or those attached to marriage, which replace those for unmarried couples, when the registered partnership is also excluded from the unmarried versions by comparing it to their exclusion for marriage).

The only reason why the marriage might be of relevance is for the incidental question in private international law as to the validity of the marriage based on the existence of which the parentage was established (extended *pater est*), where the CJEU could state that the *Coman* judgment has to be extended to also apply to such situations. However, as also stated above, the Spanish method of establishing parentage to the female spouse of the woman who gives birth

to the child seems to come closer to a pre-natal acknowledgment than an extended *pater est* (even though the marriage seems to be a prerequisite for the declaration).

As was explained above, the fact that the acknowledgment procedure is limited to men, while there is no condition that the acknowledging father is also the DNA father, might be considered a violation of the right to private life in conjunction with the principle of non-discrimination based on sex and sexual orientation.

As to the first sub question, does the constitutional identity (Article 4(2) TEU) allow the authorities to request information on the biological parentage?

As was explained above, which of the two forms of 'biological parentage' applicable to women is intended (gestational or DNA) is unclear.

We should consider in which circumstances similar requests can be made.

In surrogacy cases, a DNA test can be required – because the DNA connection to one of the intended parents distinguishes surrogacy from adoption – in order to make sure that it does not concern a circumvention on the rules of international child adoptions (ECtHR, *D. and Others v. Belgium*). It has also been reported that if a child is born in a country where surrogacy is permitted, officials of the state of nationality might require proof from the mother that she gave birth to the child, where they had reason to doubt the truthfulness and such proof would eliminate a suspicion of circumventing the rules of international child adoptions. In such cases, such a requirement could be considered justified.

In certain states, a DNA test is also required for the purpose of acquiring nationality where an acknowledgment has been made many years after the birth of the child. For example in the Netherlands, before reaching the age of seven, a child will be considered a national upon acknowledgment without proof of DNA-parentage (Art. 4(2) RWN). Afterwards, while still a minor, the child will also automatically acquire the nationality if the acknowledging parent with the acknowledgment, or within one year afterwards, provides proof that (s)he is the DNA-parent (Art. 4(4) RWN).

It has been reported, that certain Member States (e.g. Belgium, Luxembourg and Spain) have created certain rules countering fake acknowledgments, requiring for the purpose of family reunification that a DNA-test is submitted (in some cases it was 'voluntary', but if it was not submitted the request would be refused, see 2016 study, p. 111). Considering the fact that acknowledgments do not necessarily have to reflect the DNA truth if there is family life, such requirements are not only hypocritical by applying them only to parentage established abroad, but they also violate the right to private life, when family life is obviously exercised.

While in certain cases described here, the legality of a general requirement of providing a DNA test might be problematic, under certain circumstances such a requirement might be justifiable. Though, in all the cases where it might be permissible to have proof of who gave birth or DNA, it is to protect the best interest of the child, stop child trafficking and the circumvention of the international rules on adoption. These are not matters of national identity, but of international requirements. It is not possible, nor is it suitable, to compare Article 4(2) TEU to such rules. Additionally, any justification on the basis of Article 4(2) should first be assessed in its compatibility with human rights, as stated concerning the first part of this question, meaning that, in accordance with *K.B.*, a Member State cannot rely on national provisions that violate human rights.

In the case at hand there is no doubt as to the fact that either V.M.A. or K.D.K. gave birth to the child and that the other, in accordance with Spanish law, is considered the legal parent and has family life with the child. Consequently, a request for proving who is the

gestational mother or DNA mother is not justified. Additionally, as was also explained above, if the Bulgarian authorities wished to know the identity of the gestational mother, a DNA test would be unsuitable. One should also consider that if one of the two had been a man, a DNA test for proving the acknowledgment would, most likely, not have been required. Thus, making such a request only to lesbian couples would additionally be direct discrimination based on sex and sexual orientation prohibited by Article 21(1) CFR.

Considering that nothing in the Bulgarian Family Code, Civil Registration Code or Assisted Reproduction Code hints at mentioning in a birth certificate whether a parent is the DNA parent or not when IVF has been used, confirms this.

Additionally, the only reason why the Bulgarian authorities might want to have the information concerning the 'biological mother', is to enter only one of the two women on the birth certificate. As will be explained concerning preliminary question 4, the Bulgarian authorities have no choice but to enter V.M.A. on the birth certificate, irrespective of whether she is the 'biological mother' – in whatever form – because the entire truthfulness of the birth certificate would be placed in doubt by entering only K.D.K.

Consequently, while in certain circumstances questions concerning the biological truth might be justified, in the case at hand, there is no valid reason why the information concerning the 'biological mother' is relevant and consequently, Article 4(2) TEU does not justify such a request, additional to the fact that the absence of rules allowing for the recognition or registration justified by Bulgaria on the basis of Article 4(2), violates Article 7 CFR and 8 ECHR.

Considering the second sub question, there is no doubt as to whether the best interest of the child, as protected by Article 24(2) CFR, will have to be taken into account when considering to refuse the recognition of the parentage or the issue of a birth certificate. It always has to be taken into account in such cases and it makes the margin of appreciation even slimmer.

Article 7 CFR should especially be considered since it concerns the recognition of parentage already established. Furthermore, Article 7 CFR should be considered since the rules of national identity on which the state wants to rely might not be in conformity with this article.

Since this sub-question only relates to the registration, and thus the phase subsequent to the recognition of the status established abroad, this is an administrative matter.

Let's be clear. Under no circumstance may a state refuse to register or provide proof of the existence of a status as crucial as the parentage and nationality, while having recognised this status as being validly acquired. It cannot justify its refusal based on national identity at the time of registering a national, while already having acknowledged that the person is a national. If it does so, like in the case at hand, for the sole reason of the gender of the parents or the mode of birth, it does so in violation of Article 21(1) CFR as it constitutes direct discrimination based on birth, sex and sexual orientation.

Furthermore, the state would violate Article 7 of the Universal Declaration of Human Rights and Article 24(2) of the International Covenant on Civil and Political Rights (See also the Resolution of the UN Human Rights Council).

Additionally, in refusing – consciously – to register a Bulgarian national in the civil register, Bulgaria would violate Article 3(2) of its own Civil Registration Act.

Therefore, Bulgaria cannot under any circumstance refuse to register S.D.K.A. since this would constitute a violation of international, European and national law.

How it should register S.D.K.A. is another question which will be considered further when dealing with the fourth preliminary question.

And even if this sub-question were about recognition, the answer would be the same. The refusal to recognise the parentage and consequently grant nationality violates the circle of life and the international instruments mentioned above.

Consequently, there is no need to 'strike a balance'. Bulgaria has to recognise the parentage, since not recognising it constitutes a violation of human rights and *ipso* EU law.

5.2. Question 1

Let's move to the first question:

> "*1. Must Article 20 TFEU and Article 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that the Bulgarian administrative authorities to which an application for a document certifying the birth of a child of Bulgarian nationality in another Member State of the EU was submitted, which had been certified by way of a Spanish birth certificate in which two persons of the female sex are registered as mothers without specifying whether one of them, and if so, which of them, is the child's biological mother, are not permitted to refuse to issue a Bulgarian birth certificate on the grounds that the applicant refuses to state which of them is the child's biological mother?*"

The manner in which the articles mentioned in the preliminary question are applicable differs slightly depending on the question of whether S.D.K.A. has already acquired Bulgarian nationality (implying the parentage has already been recognised) or not. This is especially of importance for Article 20 TFEU.

If the parentage has not been recognised and S.D.K.A. would not be considered a Bulgarian citizen due to the lack of this recognition, Article 20 TFEU would be applicable as it concerns the access to EU citizenship. Even when a person has not yet acquired the nationality of a Member State, the person can invoke Article 20 TFEU in conjunction with Article 7 CFR when confronted with a refusal to grant the nationality of a Member State. Acquisition of nationality is governed by the right to private life (ECtHR*, Genovese v. Malta*) and the circle of life principle equally applies here.

This is especially clear from the ECtHR judgment in *Wagner and J.M.W.L. v. Luxembourg,* where the ECtHR emphasised the importance of the fact that the refusal to recognise a Peruvian adoption and the consequent inability to acquire Luxemburgish nationality, impeded the child because it lacked the acquisition of EU citizenship. The ECtHR stated that "*not having acquired Luxembourg nationality, the second applicant does not have the advantage of, for example, Community preference; if she wished to serve an occupational apprenticeship she would not obtain a work permit unless it were shown that an equivalent candidate could not be found on the European employment market. Next, and above all, for more than ten years the minor child has had to be regularly given leave to remain in Luxembourg and has had to obtain a visa in order to visit certain countries, in particular Switzerland. As for the first applicant, she indirectly suffers, on a daily basis, the obstacles experienced by her child, since she must, inter alia, carry out all the administrative procedures resulting from the fact that the former has not obtained Luxembourg nationality*" (*Wagner and J.M.W.L. v. Luxembourg*, para. 156). This is also clear from the surrogacy case law mentioned above, where the ECtHR stated in the Advisory Opinion that "*there is a risk that such children*

will be denied the access to their intended mother's nationality which the legal parent-child relationship guarantees" (Advisory Opinion, para. 40).

However, if S.D.K.A. is considered a national – and thus an EU citizen – the case would not directly concern the acquisition of nationality, but more the access to effectively exercise the rights derived from that status, because proof of acquisition of the status has been denied. This still brings it within the ambit of Article 20 TFEU – because, can you think of a national measure that has a greater effect of depriving citizens of the Union of the genuine enjoyment of the substance of rights conferred by virtue of their status as citizens of the Union (C-34/09 *Ruiz Zambrano*) than the refusal to acknowledge that the status of Union citizen itself has been acquired? I cannot. It is the ultimate restriction.

The refusal to give effective access to the status in turn restricts the free movement rights of S.D.K.A., since the child cannot prove the acquisition of nationality when wanting to exercise this right. Therefore, Articles 21 TFEU and 45 CFR are applicable due to the fact that the refusal by the Bulgarian authorities limits the free movement rights of S.D.K.A., by not having issued the child with an ID document stating that the child holds Bulgarian nationality as is required by Article 4(3) of Directive 2004/38/EC. This makes the child *de facto* 'EU stateless' (*de facto* stateless is a term used for persons who technically have a nationality, but do not have any documentation proving it or who cannot benefit from any rights linked to having that nationality). It should, however, be noted that if the child has not yet acquired Bulgarian citizenship, a violation of Article 20 TFEU would first have to be found.

Articles 21 TFEU and 45 CFR are additionally applicable from the viewpoint of V.M.A.. In her case, the refusal to give her child Bulgarian identity documents hampers her free movement rights.

As was explained above and will also be further elaborated on below, the requirement to provide proof as to who is the 'biological mother' is unnecessary. Additionally, an extra requirement imposed only on lesbian couple, makes it direct discrimination based on sex, birth and sexual orientation prohibited by Article 21(1) CFR.

5.3. Question 3

Coming to the third question, which states:

> *"3. Is the answer to Question 1 affected by the legal consequences of Brexit in that one of the mothers listed on the birth certificate issued in another Member State is a UK national whereas the other mother is a national of an EU Member State, having regard in particular to the fact that the refusal to issue a Bulgarian birth certificate for the child constitutes an obstacle to the issue of an identity document for the child by an EU Member State and, as a result, may impede the unlimited exercise of her rights as an EU citizen?*"

In essence, the question is whether it is relevant to the case that the other mother is a UK citizen, i.e. a third-country national? This question seems to have a far darker background than you might imagine, for it actually asks whether the state can refuse to give the nationality, based on the fact that the child has the nationality of another Member State and thus EU citizenship.

In 2014, the Supreme Administrative Court of Poland decided in a similar case that there was no issue with EU law, since the child had acquired at birth British citizenship and consequently did not need Polish identity documents since it could derive EU citizenship rights from his British nationality and the documents issued by the British authorities. Whereas this

argumentation might have seemed rather dubious already at that time, after Brexit this argument clearly no longer holds.

It should be noted that when the child was born, on 8 December 2019, K.D.K. was an EU citizen.

In principle what the other nationality is, is irrelevant. As I explained in a blog post, there are clear advantages in EU law from having the nationality of more than one Member State. As I also stated there, the lines taken by the CJEU have made it in essence obligatory to allow dual nationality and facilitate access. However, when the other nationality is the nationality of a third-country the recognition of parentage in order to acquire the nationality of a Member State becomes even more imperative.

The question is thus, in essence, whether a Member State can use discriminatory behaviour in its nationality law, if another Member State does not. And let's be clear: the fact that one Member State does not discriminate does not give another Member State a free pass to discriminate. There is no such thing as proportionate discrimination.

Thus, in answer to this question, the legal consequences of Brexit should have no impact on the interpretation of question 1. Whether the other nationality is the nationality of a Member State or of a third country should not have any bearing on whether a Member State can make discriminatory requirements in their nationality law or can refuse to issue a person with an ID document.

5.4. Question 4

> "*4. If the first question is answered in the affirmative: does EU law, in particular the principle of effectiveness, oblige the competent national authorities to derogate from the model birth certificate which forms part of the applicable national law?*"

This question needs a bit of elaboration.

In the preliminary reference, the referring court states that it does not have the jurisdiction to review the legality of the order that established the model certificate. It elaborates that it is not concerned with the multiple orders applicable to the certificate, nor has it jurisdiction to rule of its own motion on the validity of those legal acts. The court continues by stating that it "*cannot replace this approved model certificate with another for the purposes of the case, nor could the registrar replace that model with another.*" The referring court then makes a call for help to the CJEU by asking: *"Should the CJEU conclude that EU law requires the registration of two mothers of the child on the birth certificate, how is such a ruling to be applied?*"

In accordance with the case law of the CJEU, national courts should interpret national provisions as far as possible in light of EU law. If this is not possible, the national court is to disapply any provision of national legislation which is contrary to EU law.

We should therefore consider, first, whether it is possible to apply the birth certificate correctly; second, if this is not possible, whether the national court can invalidate the model birth certificate even if national law does not give it jurisdiction to do so; and third, if the birth certificate is invalidated, how should S.D.K.A be registered?

So, could they use the model birth certificate to register both V.M.A. and K.D.K. as parents? One should remember that there are two gender specific columns for the parents: one for the mother and one for the father.

One could argue that 'mother' and 'father' are just gender-specific synonyms for 'parent' and that one of the two mothers should easily be entered in the father column. Though this argument might be considered a stretch.

An option presented by the referring court is to enter only one of the parents in the 'mother' section and leave the father section blank. This a method employed by some Polish courts.

But one should wonder then, which of the mothers will they enter? If there should be any relevance to the request of the authorities to state who gave birth to the child, one should presume it should be the gestational mother.

But what if K.D.K. were the gestational mother? Would the Bulgarian authorities only mention her on the birth certificate, stating that she only has UK citizenship, and then state that the child acquired Bulgarian citizenship *iure sanguinis a matre*? How would that dispel doubts about the truthfulness of the birth certificate? How could authorities of other Member States consider this document genuine, while it obviously states conflicting information.

It is clear that V.D.M. has to be placed on the birth certificate, which also makes it obvious that next to all the arguments brought about the request for information as to who gave birth to the child are irrelevant.

This option, though, would still cause issues, as the referring court admits that there would be differing Spanish and Bulgarian (and UK) birth certificates. That can lead to a lot of trouble.

But one should for this option also consider, that it is convenient for the Member State, since the fact that the birth certificate is not gender neutral itself violates human rights and allows it to continue discriminatory practices. As was explained above, the acknowledgment procedure is open to unmarried opposite-sex couples, limited to men, while not requiring that the statement reflect the biological truth. This means that this mode of parentage establishment should also be open to lesbian couples. The reasoning of courts that the limitation to men is justified on grounds that biological parentage is possible whereas to the female partner/spouse not is flawed, as shown above concerning the pending case at the ECtHR, *R.F. and Others v. Germany*, where reciprocal IVF has been used. Consequently, a birth certificate allowing two women to be entered as parents should always be available.

This is therefore not a reasonable option.

So, in essence, it is not possible to apply the Bulgarian certificate in a manner that is compatible with EU law and human rights.

Coming to the second issue, can the national court set the model birth certificate aside, even if national procedural law does not give it jurisdiction to do so?

The case law of the CJEU on this matter is very clear and I would like to refer to a few paragraphs of the case *Minister for Justice and Equality and The Commissioner of the Garda Síochána v Workplace Relations Commission* where the CJEU stated that "*it would be contradictory if an individual were able to rely upon the provisions of EU law in a particular area before a body upon which national law has conferred jurisdiction over disputes in that area but that body were under no obligation to apply those provisions by refraining from applying provisions of national law which conflict with them*" (C-378/17, para. 46). The CJEU also stated that the referring body in that case "*must be considered to be a 'court or tribunal' within the meaning of Article 267 TFEU […], it may refer to the Court, pursuant to that article,*

questions of interpretation of relevant provisions of EU law and, as it is bound by the judgment in which the Court gives a preliminary ruling, it must forthwith apply that judgment, disapplying, if necessary, of its own motion conflicting provisions of national legislation" (C-378/17, para. 47). It would be ineffective if a national court could refer a question, but not implement the answer.

The CJEU added that if a body is entrusted with enforcing EU law, which national courts are, and were unable to find that national provisions are contrary to EU law, and were unable to decide to disapply such provisions, it would render EU law less effective.

The court concluded that "[r]*ules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of EU law*".

Coming back to the question, it is beyond doubt that the referring court has jurisdiction to disapply the birth certificate (and the rules stating it does not have jurisdiction to do so).

Now coming to the question: "and what then?" What could the national court do to implement the judgment?

It is a shame that the multilingual standard form birth certificate that exists in EU law, which is in Annex 1 of Regulation 2016/1191, is explicitly only a translational aid and cannot be used autonomously, contrary to a multilingual extract of CIEC Convention No 16. That would have been an easy way out.

There are, however, several options.

For one, the requirement that one needs a Bulgarian birth certificate to apply for a Bulgarian ID document is, as was explained above, a violation of Article 4 of Regulation 2016/1191. The court could therefore rule that this transcription requirement violates EU law and that the Spanish birth certificate has to be directly accepted for the issue of the ID document. It might be good, though, that the Spanish birth certificate would then also directly be entered in the general registry.

For another, the CJEU could refer to its *Freitag* judgment and stated that the national court could "*recognise the right to recognition*" itself based on Article 21 TFEU, as it did in that case.

6. Conclusions

Case C-490/20 *V.M.A. v. Stolichna Obshtina, Rayon 'Pancharevo' (Sofia municipality, 'Pancharevo' district)* is extremely important in the further development of EU citizenship and key to the European Commission's LGBTIQ Equality Strategy 2020-2025. It is all the more striking that a preliminary reference that concerns such an important part of LGBTIQ rights does not mention Article 21(1) CFR even once.

The impact of the case would go beyond the scene of LGBTIQ and would also have connotations for other instances where a Member State refuses to recognise parentage duly established. For example, where the extended *pater est* is attached to opposite-sex registered partnerships and the Member State of nationality refuses to recognise the birth certificate, because it does not recognise the male parent mentioned as father due to the fact that there has been no act of acknowledgment; or in cases of polygamy where parentage established by *pater est* to children born from a second marriage is not recognised due to the non-recognition of the

marriage and the state simultaneously refuses to allow an act of acknowledgment due to the existence of that same marriage. All of these cases violate the principle of the circle of life and states fail to understand that the human rights requirement to provide for a system to regularise the parentage should be outside the scope of the private international law rules, which are at the core of the issue by using different connecting factors to *pater est* and acknowledgments which make amends to limping legal relationships impossible.

The case has one major issue, however: it is completely unclear what is at stake, due to many contradictory elements.

On the one hand, the referring court states that the parentage cannot be recognised; on the other hand, the court states that the child is a Bulgarian national, which is impossible if the state has not previously recognised the parentage, because the only manner the child could acquire Bulgarian nationality is *iure sanguinis a mater*.

It should be clear, that if the parentage has been recognised and thus the nationality acquired, a refusal to register the child is a purely administrative act, the refusal of which is a gross violation of Articles 20 and 21 TFEU, Article 7 CFR and also of Article 4(3) of Directive 2004/38, making the child *de facto* EU-stateless. A matter of administrative convenience, like gender-specific columns in a birth certificate, are incapable of justifying such a violation of EU law and human rights.

An additional confusing element in the case is the fact that the refusal to register S.D.K.A. was based on the fact that V.M.A. did not provide information as to the identity of the 'biological mother', seeming to imply that this means the woman who gave birth of the child, while justifying this request with the surrogacy case law of the ECtHR where a request for the 'biological truth' can made. There however, 'biological parent' means the person whose gametes have been used for the conception of the child. From further analysis in the case, it has also become clear that this request is – next to direct discrimination based on sex and sexual orientation – also completely unfounded.

The manner in which the questions are phrased and the unclarity of terminology used in the preliminary reference (e.g. 'biological mother'), added to the fact that it is unclear whether the parentage has been recognised or not and that very relevant articles of the CFR are not mentioned at all, make it imperative that the CJEU clearly establishes what the exact (legal) facts of the case are and rephrases the questions.

It should be made clear that, contrary to the referring court's assessment, this case has nothing to do with the establishment of parentage, but solely with recognition of parentage duly established in a Member State, to which different rules apply.

For this case it is necessary to know the case law of the ECtHR in depth. From this case law and the derived concepts concerning the right to private life, specifically the 'circle of life', it is clear that Bulgaria is violating human rights on many different levels.

First of all, the fact that Bulgaria does not recognise the marriage based on which the parentage might have been established in any form whatsoever, is a violation of *Orlandi*. To this purpose the CJEU could extend the interpretation given in *Coman,* requiring Bulgaria to apply the 'single purpose recognition' established in that case to also cover the recognition of a same-sex marriage for the purpose of recognition of the parentage ex *pater est* in order for the child to acquire the nationality.

The fact that the birth certificate has gender specific columns is a violation of human rights, due to the fact that the acknowledgment procedure which is limited to men and which does not require biological truth, should also be accessible to married, partnered and unmarried

same-sex couples. This restriction is a direct violation of the principle of non-discrimination on the basis of sex, birth and sexual orientation.

The CJEU has to make clear that the ECtHR case law on surrogacy requires that there is a procedure under national law allowing to formalise a status acquired abroad which it will not recognise, and not – as the referring court seems to think – a procedure in private international law, because it is exactly private international law that has caused the limping legal relationship. The proposals the referring court makes concerning adoption would not solve this case in the least but only postpone it.

The CJEU should reject the option proposed by the referring court – and employed by Polish courts – concerning registering only one of the mothers, which violates human rights and which would undermine the birth certificate.

The Court should also be clear that the question whether the child acquired the nationality of another Member State or of a third country is irrelevant. That another state does not discriminate cannot be a free pass for a Member State to discriminate.

It is clear from the CJEU's case law, that the referring court – contrary to Bulgarian law – has jurisdiction to disapply and to some extent replace the problematic national provisions and models. This analysis also provides for several means by which the national court could register the child in the register without the Bulgarian model birth certificate.

There is no national measure that has a greater effect of depriving citizens of the Union of the genuine enjoyment of the substance of rights conferred by virtue of their status as citizens of the Union than the refusal by the authorities to acknowledge that the status of Union citizen itself has been acquired. The CJEU should under no circumstances accept the arguments of the Bulgarian authorities that they are protecting their national and constitutional identity, for what they are protecting are human rights violations. The Court should repeat its *K.B.* judgment, stating that a breach of human rights equals a breach of EU law and that such a breach can never be a justification.

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