Rainbow Families: Pioneering Ruling on Legal Recognition to Same-Sex Parentage Across all EU Member States

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Introduction

Europe has seen a remarkable surge in the prevalence of countries that provide legal recognition to informally cohabiting (same-sex) partners, as well as the number of countries that allow same-sex couples to marry or at least enter into a form of registered partnership. However, even in countries where same-sex marriage is accepted, same-sex parentage is questioned. The rights of bisexual, trans, and LGBTIQ parents have not been treated in par as heterosexual parent families. This is a complex and delicate subject that touches on human rights, religion, morality, and tradition, as well as constitutional concepts like equality, autonomy, and human dignity. The present right has been in limelight for decades, but a revolutionary precedent has been passed recently in December 2021, by the European Court of Justice (CJEU) in the case of V.M.A v/s Stolichna Obshtina, Rayon ‘Pancharevo’. The facts of this case are that both the parents/mothers of the child are from different nationalities living in Spain. One of them is Bulgarian, and the other is American. Their offspring was not issued a birth certificate as the officers declined to accept same-sex parentage relation. Although the Spanish government recognizes same-sex relationships, this case was treated differently as Bulgaria does not recognize same-sex parentage because of traditional claims that it conflicts with the conventional family and affects the national character per Article 4(2) of Treaty on the Functioning of the European Union (TEU). Secondly, there is a lack of evidence to prove the presence of a biological connection between the child and the Bulgarian mother.

In this case, the jury pronounced that a parent-child bond developed in one member state shall be recognized in all other member states, regardless of the member state’s stance on same-sex marriage. Hence, the member state shall issue any identity document, such as a birth certificate. Furthermore, the jury also claimed that the member states shall acknowledge the right to marry and start a family by same-sex parents. This law shall be applicable uniformly across all member states so that when people from one member state move to another member state, they are not faced with any legal conflicts.

I. Issues at Hand

The Bulgarian government sought refusal to issue the identity document to the child on three key grounds: Bulgaria does not recognize same-sex marriage; Bulgaria, through its refusal, is protecting its ‘national identity’; and without biological evidence, the Bulgarian government cannot recognize the parent-child relationship. The court aims to address the [following issues](https://curia.europa.eu/juris/document/document.jsf?text=&docid=251201&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1353229):

Whether refusal to issue a birth certificate violated [Article 21(1) of the Treaty on Functioning of the EU](https://www.jus.uio.no/english/services/library/treaties/09/9-01/tfeu_cons.xml#:~:text=Article%2021&text=For%20the%20same%20purposes%20as,social%20security%20or%20social%20protection.) (TFEU), which encompasses the Right to move and reside freely?

Whether EU law places an obligation on member states to issue a Birth certificate in order for an identity document to be obtained according to the legislation of the state?

Whether the acts of the government are contrary to [Article 8 of ECHR](https://www.echr.coe.int/documents/convention_eng.pdf), Convention on the Rights of Child, and, [Article 7 and 24 of the Charter](https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child) to deprive the relationship of one parent when exercising the right to reside freely?

Whether [Article 4(2) of the Treaty on EU](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF) (TEU), the national identity clause, serves as justification for refusal to issue a Birth Certificate?

II. Parenting Rights Under ECHR and EU

For recognizing same-sex parentage, there arises a question whether both same-sex parents shall be considered as joint parents, as there includes presence of a donor insemination for formation of a child making, and only one of them is biologically connected to the child. In Europe, only a few countries recognize full parental rights of same-sex parents over their child. There are two laws under which European countries can consider accepting both the parents and child as one family under [EU Law](https://centaur.reading.ac.uk/90835/1/Tryfonidou%20-%20parenting%20rights%20of%20same-sex%20couples.pdf) and [European Convention on Human Rights (ECHR](https://www.echr.coe.int/documents/convention_eng.pdf)). There are distinct parenting rights under EU Law and ECHR.

Same-Sex Parenting Rights under EU Law: There was no enforceable EU legislative instrument in place prior to 1999 that explicitly, or implicitly, safeguarded the rights of people with non-heterosexual sexual orientations. EU legislation did not prevent sexual orientation discrimination, and same-sex relationships were not regarded as equivalent to opposite-sex marriages or relationships outside of marriage. They were treated differently from opposite-sex relationships.

An EU member state’s decision to allow same-sex couples to legally establish a family in their territory by being legally recognized as the joint parents of a child (ab initio) appears to have no connection to EU policies. It does not require EU member states to allow same-sex couples in their territory to become the de facto joint parents of a child. It also does not require EU member states to allow the parents of a child to remarry. As a result, parental rights for same-sex couples differ significantly at the national level across the EU. There are two reasons for such refusal-EU Free Movement Law and EU Fundamental Human Rights Protection. Even if a country recognizes legal ties between a same-sex couple, later it can cause inconveniences such as nationality laws, tax laws, etc. acting as a hindrance to their free movement.  Such EU law shall be applicable only when the couple moves between member states and faces refusal for legally recognizing the parentage of the child, then EU law shall be applicable for breaching the rainbow families’ right to private and family life under [Article 7 of EUCFR](https://fra.europa.eu/en/eu-charter/article/7-respect-private-and-family-life).

Same-Sex Parenting Rights under ECHR: The ECHR, a convention intended to protect human rights, democracy, and the rule of law, has been signed and ratified by all Council of Europe member countries. The Council of Europe’s membership is diverse, with countries at opposing ends of the LGBTIQ equality spectrum represented. Countries usually have high levels of religiosity, which explains why the acts and rhetoric of religious organizations serve as powerful counter-mobilizers against LGBTIQ rights.

According to [Article 8 of the ECHR](https://fra.europa.eu/en/eu-charter/article/8-protection-personal-data), ‘everyone has the right to respect for his private and family life, his home, and his correspondence’, and [Article 12](https://www.echr.coe.int/Documents/Guide_Art_12_ENG.pdf) states that ‘men and women of marriageable age have the right to marry and to found a family, subject to the national laws governing the exercise of this right’. However, the scope of the term ‘family’ is not inclusive nor flexible. Therefore, recently in 2012 in the case of [Gas and Dubois vs France](https://archive.crin.org/en/library/legal-database/gas-and-dubois-v-france.html#:~:text=Case%20Summary%3A&text=Under%20Article%20365%20of%20the,not%20be%20married%20in%20France.), the court held that the same-sex couple and their children can be considered a family under Article 8 of ECHR. However, the determination over whether the right to found a family or adopt a family was not guaranteed under ECHR, as it does not allow same-sex couples to gain parentage rights as a family. But the case of [EB vs France](https://hudoc.echr.coe.int/fre#%7B%22display%22:%5B2%5D,%22itemid%22:%5B%22002-2311%22%5D%7D) adopted grounds for restricting the right to adopt by a single woman based on the fact that she is lesbian, which is discriminatory. Further, such adoption should not be done in an unjustified discriminatory manner under [Article 14 of ECHR](https://www.equalityhumanrights.com/en/human-rights-act/article-14-protection-discrimination).

In case of France, where the government has not ratified the recognition of birth of a child through assisted reproduction by unmarried same-sex couples, it cannot be held as unjustified discrimination as the French Law itself does not legally recognize children of unmarried couples. Presently, rainbow families can assert that ECHR signatory states violate both parents’ and children’s right to private and family life by refusing to pursue cross-border continuity of family ties, both between the child and the biological parent (if one of the parents is biologically related to the child) and between the child and the non-biological parent. This is especially useful for rainbow families because same-sex couples may choose or be required to, for legal or financial reasons, to have a child in a country where they do not intend to live long-term and then return to their country of origin where they must (continue to) be recognized jointly as the legal parents of that child.

III. Critical Analysis: Road to LGBTQI+ Inclusion

The CJEU took an opportunity to send out a strong message; it highlighted that Member states are entitled to determine their stance on the legality of same-sex marriage and parenthood, but this must not serve as a hindrance to their guaranteed Fundamental Rights. Article 21(1) of TFEU, encompasses within itself, the Right to a normal family life with family in its host member states and the member state of a nation when returned. This cannot be curtailed or hindered simply because one has same-sex parents when the Spanish authority had been lawfully successful in establishing the evidence of birth. The court’s observation led to the fact that Article 21 TFEU does not undermine national identity or pose any threat to public policy of member states. The court drew an analogy from Relu Adrian Coman v. Inspector General and Misnisterual, holding that a child whose birth certificate designates a union citizen, the parent must be considered by all member states to be a direct descendant of that union regardless of their sexual orientation.

In the case, the child was determined to have  Bulgarian nationality as established under [Article 25(1) of the Constitution of Bulgaria](https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/26650/72971/F7039954/BGR26650%20En%202007.pdf), which requires at least one parent to be a Bulgarian national. While on the other hand, the government of Bulgaria requires a Bulgarian mother to be recognized and must either disclose that she gave birth or proceed to be a legal parent under [Article 64 of the Family Code](https://kenarova.com/law/Family%20Code.pdf). Member states are therefore obligated to issue a national identity document under [Article 4(3) of the Directive 2004/38/EC (Freedom of Movement Directive)](https://www.legislation.gov.uk/eudr/2004/38/contents).

Taking reference from [MA v. Etat Belge](https://curia.europa.eu/juris/document/document.jsf?text=&docid=238749&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=183708) and [LM v. Center Public D’action Sociale de Seraing](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62019CJ0402&from=EN), the court held that rights of children through Article 5(a) of the Charter overrode the State’s prerogative. From an implementation and impact perspective, CJEU does not provide an exhaustive list of day-to-day activities under Article 21 TFEU, or any secondary legislation, which elaborates on the Right to lead a normal family life. Additionally, the court does not elaborate on the parental rights KDK is entitled to as a non-EU citizen but as a spouse of one.

Despite the open-endedness of the decision in terms of concrete rights of same-sex parents, the court provides a remarkable judgment. Firstly, it draws an excellent illustration of conflict between claims of member states and union citizens as they do not want to be restricted in cross-border activities, values, and legislation of member states. Secondly, the continuity of Coman ruling is upheld as CJEU takes a strictly functional approach by providing the states are not obliged to recognize same-sex marriage, but only questions recognition solely for the purpose of granting derived rights of residence to third-country nationals. Lastly, it provides a holistic approach to the right of union citizens to move and reside freely, while widely exercising rights which a child derives from EU law.

Concluding Remarks

CJEU’s ruling is a significant milestone in the recognition of the rights of rainbow families in the EU. A unified front across the EU to extend rights of LGBTQI+ in the family domain showcases a strong stand of EU Member States. It has proved right that if an individual is a parent in one country, they are parents in every country and that same-sex couples are in the same footing of legal recognition as that of heterosexual couples. A child is in no way responsible for any differences in scales of values and legislation in society between EU Member States. The judgment established a fragile balance between national identity, public policy, and fundamental rights. A purposive interpretation of citizenship ensures a so-called recognition method as an alternative choice of law.