Recognition of LGBTQI+ parent families across European borders

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Abstract
The legal recognition of LGBTQI+ parent families differs considerably across Europe and is a matter that is largely outside of the remit of EU law. This creates difficulties for LGBTQI+ parent families who cross European borders as legal parent-child relationships established in one Member State may not be recognized in another, resulting in limping legal parentage. In the case of V.M.A. v. Stolichna obshtina, the CJEU found that where one EU Member State recognizes the legal parentage of same-sex parents, all other EU Member States must also recognize those parent-child relationships for the purpose of free movement. This article examines the significance and limitations of the decision.

Keywords
LGBTQI+ parenthood, family law, children’s rights

1. Introduction
Under EU law, Member States have exclusive competence in the fields of nationality as well as family law. Thus, the legal recognition of parent-child relationships is a matter for the discretion of individual States, with the result that the legal recognition of LGBTQI+ parent families varies considerably across Europe. While Regulation (EU) 2016/1191 simplifies the requirements for presenting certain public documents in the EU, it ‘does not apply to the recognition in a Member State of legal effects relating to the content of public documents issued by the authorities of another

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As a result, there is no requirement for a Member State to recognize parentage that is established in a public document (such as a birth certificate) issued by another Member State. For LGBTQI+ parent families, this means that legal parentage established in one country may not be recognized in another such that, commonly, the second State will only recognize the child’s legal relationship with one of their parents (typically the birth mother or genetically related father). It may, however, also sometimes result in a complete refusal by the other State to recognize the legal parentage of either parent, depending on national laws.

While Member States have exclusive competence to regulate their family law, they must remain cognisant of EU free movement laws. In Coman et al v. Inspectoratul General pentru Imigrări, the Court of Justice of the European Union (CJEU) found that the term ‘spouse’ for the purpose of family reunification rights under EU free movement law, includes the same-sex spouse of a Union citizen. Hence, where the Union citizen has exercised their right to move and reside in another Member State and entered into a marriage with a third-country national of the same-sex under the law of that Member State, other Member States cannot refuse to grant that spouse a right of residence even where the other State does not recognize marriage between persons of the same sex.

Coman clarified that free movement rights extend some protection to LGBTQI+ families in the form of family reunification for spouses, but it was confined to consideration of marriage and did not consider the recognition of parent-child relationships. The cross-border legal recognition of rainbow families was considered by the CJEU for the first time in V.M.A. v. Stolichna obshtina. This case has clarified that LGBTQI+ parent families enjoy the same rights to freedom of movement under EU law as any other family. While this is significant in many respects, analysis of the case reveals its limitations as it shows that the decision does not require that all Member States recognize all families for all legal purposes.

### 2. Relevant facts

The case of V.M.A. concerned a female couple who were refused a birth certificate in Bulgaria for their daughter who had been born in Spain. In Spain, both women are legally recognized as the child’s parents, and are listed as such on the child’s birth certificate. One of the mothers, K.D.K., is a UK national but was unable to transfer UK citizenship to her daughter under the terms of the British Nationality Act 1981 as the mother had been born in Gibraltar of British descent. The other mother, V.M.A., is a Bulgarian citizen. She requested a birth certificate for the child from the Bulgarian authorities in order to enable a subsequent application for a Bulgarian identity document for the child listing the two women as parents. In order to process the request for the birth certificate, the authorities requested that V.M.A. specify which of the two women is the biological mother of the child. The authorities stipulated that only the biological mother could be listed on the child’s birth certificate in accordance with Bulgaria’s conception of the ‘traditional’ family. V.M.A. refused to supply the requested information and so the Bulgarian

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1. Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012, [2016] OJ L 200.
2. Case C-673/16 Coman et al v. Inspectoratul General pentru Imigrări, EU:C:2018:385.
3. Case C-490/20 V.M.A. v. Stolichna obshtina, EU:C:2021:1008.
authorities rejected the application for the birth certificate. As a result, the child was unable to claim citizenship through either mother and was left legally ‘stateless.’ The applicants subsequently brought an application to the Administrativen sad Sofia grad (Administrative Court of the City of Sofia) claiming that the refusal to issue a Bulgarian birth certificate for the child constituted an infringement of Article 21 TFEU, which gives EU citizens the right to move and reside freely within the territory of the Member States, and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, which establishes the right of EU citizens and their family members to move and reside freely within the territory of the Member States.

The Administrative Court of Sofia referred the matter to the CJEU for a preliminary ruling. In doing so, however, the Court clarified that the failure to issue a Bulgarian birth certificate in this case did ‘not constitute a refusal of Bulgarian nationality’ since Bulgarian nationality is granted to a child under Article 25(1) of the Constitution of the Republic of Bulgaria where one of the parents has Bulgarian nationality. At the same time, the Court recognized that the failure to issue the birth certificate would impede the exercise of the child’s rights as a Bulgarian national or EU citizen in practice because no identity document could be issued without it.5

Among the reasons given to justify the request for the preliminary ruling was the fact that the Family Code of Bulgaria only permits legal recognition of one legal mother and one legal father; there is no provision for the recognition of two legal mothers nor any procedure to record two legal mothers on a child’s birth certificate. The Administrative Court was uncertain as to whether reasons relating to the protection of public policy or national identity within the meaning of Article 4(2) TEU could justify a restriction of the child’s right to freedom of movement guaranteed by Article 21 TFEU.6

A number of questions were referred to the CJEU. In essence, the Administrative Court sought clarity as to whether a Member State must issue a birth certificate showing two women as mothers in a situation where one of the mothers is a national of that Member State and the two women are already recognized as mothers on a birth certificate issued by another Member State.

A. The Advocate General’s opinion

Advocate General Kokott formed the view that a balance must be struck between the national identity of the Member States and the right to freedom of movement of the child and of his or her parents.7 It was noted that failure to recognize the family relationships in Bulgaria would create serious obstacles to enjoyment of their family life in that country and may deter V.M.A. from returning to her country of origin. This, in itself, could constitute an obstacle to V.M.A.’s ability to exercise her right to free movement. Moreover, in the event that the child was found to be a Bulgarian national, the effective exercise of the child’s right to free movement would also be seriously compromised if that child had no valid identity document.

Advocate General Kokott was satisfied that the recognition of family relationships established in Spain for the sole purpose of applying the EU secondary law relating to the freedom of movement of

4. At the hearing, the Spanish Government clarified that, in the event that the child could not acquire either UK or Bulgarian nationality, she would be entitled to claim Spanish nationality in accordance with Article 17 of the Spanish Civil Code.

5. Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, Case C-490/2, 2 October 2020, para 33.

6. Ibid., para 22.

7. Opinion of Advocate General Kokott, 2021 in Case C-490/20 V.M.A. v. Stolichna obshtina, EU:C:2021:1008.
citizens would not alter the concept of parentage or marriage under Bulgarian family law and therefore did not threaten or infringe the State’s national identity. Accordingly, Advocate General Kokott found that Bulgaria could not refuse to recognize the parentage of the child in this case for the purpose of free movement on the ground that Bulgarian law does not provide for same-sex marriage or joint parentage for persons of the same sex. However, the Advocate General clarified that there was no obligation on Bulgaria to recognize the parentage of the child for the purpose of national family and inheritance law and that the refusal of such recognition does not infringe Article 2 TEU (respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities) or Article 21(1) TFEU (free movement).

3. The reasoning of the Court

On 14 December 2021, the CJEU issued its ruling, closely mirroring the rationale advanced in the Advocate General’s Opinion. The Court ruled that Bulgaria was required to recognize the parent-child relationship established in Spain in order to give effect to the child’s right to freedom of movement under Article 21(1) TFEU. The Court was satisfied that the child was a Bulgarian national and so the Bulgarian authorities were required to issue to her with an identity card or a passport stating her nationality and her surname as it appears on the Spanish birth certificate. The Court found that the obligation to issue the identity card or passport applied regardless of whether a new Bulgarian birth certificate was drawn up for that child. Moreover, the Court held that, in the event that it transpired that the child was found not to have Bulgarian nationality, she would nonetheless be regarded as ‘direct descendant’ and a family member of a Union citizen (V.M.A.) for the purpose of free movement.

The Court dismissed the argument advanced by the Bulgarian authorities that it would be contrary to its public policy and national identity to recognize the parent-child relationships since the Bulgarian Constitution and Bulgarian family law ‘do not provide for the parenthood of two persons of the same sex.’ The Court endorsed the findings of Advocate General Kokott that the obligation to issue an identity card or a passport to a child who is a national of that Member State, and the requirement to recognize the parent-child relationships for the purpose of free movement ‘does not undermine the national identity or pose a threat to the public policy of that Member State.’ It was noted that the regulation of marriage and parentage are matters that are within the exclusive competence of the Member States, which are ‘thus free to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law.’ Hence, the Court clarified that the obligation to recognize parent-child relationships for the purpose of free movement does not require the Member State to recognize the parenthood of two persons of the same sex ‘for purposes other than the exercise of the rights which that child derives from EU law.’

8. Ibid., para 110.
9. Ibid., para 115.
10. Ibid., para 129.
11. Case C-490/20 V.M.A. v. Stolichna obshtina, para 67.
12. Ibid., para 53.
13. Ibid., para 56.
14. Ibid., para 52.
15. Ibid., para 57.
Instead, the obligation placed on the ‘home’ Member State in circumstances where the child of the same-sex parents is an EU citizen is:

(i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child’s right to move and reside freely within the territory of the Member States.16

4. Comments

The CJEU decision signifies that where one EU Member State recognizes the legal parentage of same-sex parents, all other EU Member States must also recognize those parent-child relationships for the purpose of free movement. In addition to its practical impact, the ruling has symbolic effect in recognizing LGBTQI+ parent families. As Tryfonidou notes, ‘it demonstrates that for the purposes of EU law, rainbow families are “families”, this being another indication that the “family” of EU law is increasingly inclusive and diverse and no longer confined to the traditional nuclear family.’17

It is important to acknowledge, however, that the decision concerns just one aspect of cross-border movement of LGBTQI+ parent families: free movement. The decision does not suggest that each Member State must recognize all legal family relationships that are established in another country for all legal purposes. As the CJEU noted, the obligation to recognize the parent-child relationships, ‘does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship.’18 This narrow focus is in line with the earlier Coman decision, which similarly was confined to family recognition for the purpose of free movement and does not extend to recognition of the same-sex marriage for other purposes under national law.19

At the same time, it is notable that the CJEU in V.M.A. placed considerable emphasis on the rights of the child in line with Article 24 of the EU Charter of Fundamental Rights, which integrates aspects of the United Nations Convention on the Rights of the Child (UNCRC) into EU law. In considering the issues in V.M.A., the CJEU specifically noted the need to take account of the best interests of the child (Article 3 UNCRC) and the right to non-discrimination (Article 2 UNCRC). In respect of the latter, it was noted that this includes ‘discrimination on the basis of the sexual orientation of the child’s parents,’20 signalling that it is a fundamental feature of the child’s EU rights that they are not treated less favourably than another child on this basis. It was further noted that a failure

16. Ibid., para 69.
17. A. Tryfonidou, ‘The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: A Critical View of the ECJ’s V.M.A. ruling’, European Law Blog (2021) https://europeanlawblog.eu/2021/12/21/the-cross-border-recognition-of-the-parent-child-relationship-in-rainbow-families-under-eu-law-a-critical-view-of-the-ecjs-v-m-a-ruling/.
18. Case C-490/20 V.M.A. v. Stolichna obshtina, para. 57 (emphasis added).
19. For analysis, see D.V. Kochenov and U. Belavusau, ‘After the Celebration: Marriage Equality in EU Law Post-Coman in Eight Questions and Some Further Thoughts’, 27(5) Maastricht Journal of European and Comparative Law (2020), p. 549.
20. Case C-490/20 V.M.A. v. Stolichna obshtina, para. 64.
to recognize the child’s relationship with one of her parents when exercising her right to move and reside freely within the territory of the Member States, or practices that make the exercise of the right ‘impossible or excessively difficult’ would be contrary to the child’s EU rights under the Charter. The CJEU does not elaborate on this point but it is clear that a failure to recognize the parent-child relationship for the purpose of national law would make the exercise of the right to reside in the Member State incredibly difficult for the child in terms of accessing local services, benefits, rights and duties. It may also result in a situation where the child of a same-sex couple (whose legal relationship with both parents is not recognized for the purpose of national law) is treated less favourably to the child of an opposite-sex couple (whose legal relationship with both parents is recognized for the purpose of national law), thereby falling foul of Article 2 UNCRC.

Furthermore, it should be recalled that ‘any national measure which is capable of hindering or rendering less attractive the exercise by European Union nationals of the free movement of citizens may constitute an obstacle to that freedom.’ Where the legal parentage of a child is not recognized under national law, resulting in a situation where that child is deprived of certain rights and entitlements when compared to other children, residence in that Member State would certainly be less attractive and may amount to a barrier to the free movement of both the parents and child. In Garcia Avello and Grunkin Paul, a refusal by a Member State to recognize the surname of a child that was registered in accordance with the law of another Member State caused ‘serious inconvenience’ for the child, which amounted to an obstacle to their right to free movement. In that case, it was held that ‘[n]ational legislation which places certain of the nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction’ on the right to free movement. This was such notwithstanding that ‘the rules governing a person’s surname are matters coming within the competence of the Member States.’

By analogy, a refusal to recognize legal parentage for the purpose of national law may also amount to a ‘serious inconvenience’ that hinders the right to free movement. Indeed, as Rein-Lescastereyres notes, ‘the non-recognition of a parent-child relationship is likely to have a far greater restrictive effect on free movement than a limping surname.’ The restriction of rights in the context of free movement may be justified where it is ‘based on objective considerations and... proportionate to the legitimate aim pursued.’ However, it is difficult to see how denying rights and protections to the children of LGBTQI+ parents would pursue any sort of legitimate aim particularly when the CJEU in V.M.A. dismissed the arguments advanced by Bulgaria that recognition of the parent-child relationships would be contrary to its public policy and national identity. When all of these considerations are combined, there is a strong argument that restrictions on the rights of the child that are connected to non-recognition of their legal relationship

21. Ibid., para 65.
22. Opinion of Advocate General Kokott, 2021 in Case C-490/20 V.M.A. v. Stolichna obshtina, para. 59.
23. A. Tryfonidou, ‘EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?’ 38 Yearbook of European Law (2019), p 245.
24. Case C-353/06 Garcia Avello and Grunkin Paul, EU:C:2008:559, para. 29.
25. Ibid., para. 21.
26. Ibid., para. 16.
27. I. Rein-Lescastereyres, ‘Recent Case Law on Cross-Border Surrogacy’, in K. Boele-Woelki and A. Fuchs (eds.), Same-sex Relationships and Beyond (3rd edition, Intersentia, 2017), p. 140.
28. Case C-353/06 Garcia Avello and Grunkin Paul, para. 29.
29. Case C-490/20 V.M.A. v. Stolichna obshtina, para. 56.
with both of their LGBTQI+ parents would amount to an unjustified obstacle to the right to free movement.

The *V.M.A.* decision does not, however, require that the child of an EU citizen will always be entitled to acquire EU citizenship from an LGBTQI+ parent, which will impact on the applicability of the argument advanced above. *V.M.A.* indicates that where one of the parents listed on the child’s birth certificate is an EU citizen, they may nonetheless be prevented from passing their EU citizenship to the child in situations where the ‘home’ state does not recognize the legal parentage of that individual since parentage and nationality are matters within the exclusive competence of each Member State. In *V.M.A.*, it was noted that in the event that the child does not have Bulgarian and hence EU citizenship, she would nonetheless be regarded as a ‘direct descendant’ of the EU citizen mother within the meaning of Article 2(2)(c) of Directive 2004/38. Such recognition would enable her to exercise family reunification rights based on the relationship with her EU-citizen mother but would not create independent free movement rights. Moreover, Directive 2004/38 applies only to EU citizens who move to or reside in a Member State other than their own and so is of little use to families returning to the ‘home’ State of one of the parents.30

Another limitation of the *V.M.A.* decision is that the obligation to recognize the legal parent-child relationships appears to only arise in the case of a child who is born in a ‘host’ Member State, that is ‘a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child’s parents two persons of the same sex.’31 The same approach was adopted in the earlier *Coman* case, which focused on marriages concluded in EU Member States.32 This suggests that where the child is born outside of the EU, there would be no equivalent obligation to recognize parentage, even where both same-sex parents are recognized on the child’s birth certificate. At the same time, it should be noted that this point has not yet been clarified by the CJEU.33 After all, if the applicable rules on nationality establish that the child is an EU citizen, they would be entitled to exercise their free movement rights regardless of the country of birth. In addition, the Court’s finding that the definition of ‘direct descendant’ within the meaning of Article 2(2)(c) of Directive 2004/38 extends to the child of a same-sex couple could prove to be significant as it means that family reunification rights would apply even where the child is not themselves a Union citizen, albeit this Directive does not apply to recognition in the EU citizen’s ‘home’ State.

5. Concluding remarks

Another request for a preliminary ruling concerning the non-recognition of LGBTQI+ parenthood is currently pending before the CJEU.34 This case will provide an opportunity to clarify the questions that are outstanding following the *V.M.A.* decision that are noted above. The pending case

30. J. Rijpma, ‘You Gotta Let Love Move: ECJ 5 June 2018, Case C-673/16, Coman, Hamilton, Accept v. Inspectoratul General pentru Imigrări’ *15 European Constitutional Law Review* (2019), p. 324.
31. Case C-490/20 V.M.A. v. Stolichna obshtina, para. 69 (emphasis added).
32. J. Rijpma, 15 European Constitutional Law Review (2019).
33. A. Tryfonidou, A., ‘The Cross-Border Recognition of the Parent-Child Relationship in Rainbow Families under EU Law: A Critical View of the ECJ’s V.M.A. ruling’, *European Law Blog* (2021) https://europeanlawblog.eu/2021/12/21/the-cross-border-recognition-of-the-parent-child-relationship-in-rainbow-families-under-eu-law-a-critical-view-of-the-ecjs-v-m-a-ruling/.
34. Case C-2/21 Rzecznik Praw Obywatelskich.
concerns the child of a female couple (a Polish national married to an Irish national), who reside together in Spain. The child’s Spanish birth certificate lists the two women as legal parents. A Polish court has referred the case to the CJEU to clarify whether the Polish administrative authorities can refuse to transcribe the Spanish birth certificate (in circumstances where transcription is necessary to enable the child to obtain a Polish identity document), on the grounds that Polish law does not recognize joint parenthood of same-sex couples. In Advocate General Kokott’s Opinion in V.M.A., it was noted that this pending case ‘raises almost identical questions’ to V.M.A. and so that ruling will further clarify the obligations on States as regards the free movement and recognition of parenthood of LGBTQI+ parent families.

It is also important to consider the V.M.A. decision against the backdrop of wider developments at European level that are focused on improving the legal position of LGBTQI+ parent families. In September 2021, the European Parliament adopted a resolution on LGBTQI+ rights in the EU, which, among other things, emphasizes the need for ‘legislation requiring all Member States to recognise, for the purposes of national law, the adults mentioned on a birth certificate issued in another Member State as the legal parents of the child.’ The resolution, which was adopted with 387 votes in favour, 161 against and 123 abstaining, urges the European Commission to introduce such a measure.

The European Commission’s LGBTIQ Equality Strategy 2020–2025 acknowledges that the current situation whereby States are not required to recognize LGBTQI+ parenthood established in another country can negatively impact on the rights of the child as well as the rights of the adults. To facilitate cross-border movement, the Strategy commits to introducing ‘a horizontal legislative initiative to support the mutual recognition of parenthood between Member States’ in 2022. These developments, combined with the decision in V.M.A., point to increased acceptance of, and respect for, LGBTQI+ parent families who move across European borders.

Another important consideration following V.M.A. concerns implementation of the judgment. It is apposite to note that, at the time of writing (February 2022), the Coman decision has yet to be implemented by the respondent state, Romania. As a result, the Coman applicants have lodged a claim with the European Court of Human Rights to address the failure of implementation of the CJEU judgement. The Coman experience suggests that a more interventionist role is needed by the European Commission to ensure that any future judgments of the CJEU regarding the cross-border recognition of LGBTQI+ parent families are implemented effectively. It is to be hoped that implementation of the V.M.A. judgment will not be impeded in the same manner as Coman, allowing Europe to take its first steps towards equality and inclusion for LGBTQI+ parent families in good faith.

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35. Opinion of Advocate General Kokott, 2021 in Case C-490/20 V.M.A. v. Stolichna obshina, para. 4.
36. European Parliament, Resolution of 14 September 2021 on LGBTIQ rights in the EU (2021/2679 (RSP)).
37. European Commission, LGBTIQ Equality Strategy 2020–2025, p 17.
38. ILGA Europe, ‘European Court will consider lack of implementation of EU law to enable freedom of movement for same-sex spouses’, (2021), https://www.ilga-europe.org/resources/news/latest-news/european-court-will-consider-lack-implementation-eu-law-enable-freedom.