

Provisional text

ORDER OF THE COURT (Tenth Chamber)

24 June 2022 (*)

(Reference for a preliminary ruling – Article 99 of the Rules of Procedure of the Court of Justice – Citizenship of the Union – Articles 20 and 21 TFEU – Right to move and reside freely within the territory of the Member States – Birth certificate issued by the Member State of birth of the child and designating two mothers in respect of that child – Refusal by the Member State of origin of one of those two mothers to transcribe that birth certificate into the national register of civil status – Transcription of that certificate being a prerequisite for the issuing of identity documents – National legislation of that Member State of origin not recognising the parenthood of persons of the same sex)

In Case C-2/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Wojewódzki Sąd Administracyjny w Krakowie (Regional Administrative Court, Kraków, Poland), made by decision of 9 December 2020, received at the Court on 4 January 2021, in the proceedings

Rzecznik Praw Obywatelskich

other parties to the proceedings:

K.S.,

S.V.D.,

Prokurator Prokuratury Okręgowej w Krakowie M.C.,

Prokuratura Krajowa,

Kierownik Urzędu Stanu Cywilnego w Krakowie,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of the Chamber, M. Ilešič (Rapporteur) and D. Gratsias, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having decided, after hearing the Advocate General, to rule by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

- 1 This request for a preliminary ruling concerns the interpretation of Article 20(2)(a) and Article 21(1) TFEU, as well as Article 7, Article 21(1) and Article 24(2) of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between the Rzecznik Praw Obywatelskich (Commissioner for Human Rights, Poland) and the Kierownik Urzędu Stanu Cywilnego w Krakowie (Head of the

Civil Registry Office of Kraków, Poland) ('the Head of the Civil Registry Office') concerning the latter's refusal to transcribe into the Polish register of civil status the birth certificate of the daughter of K.S. and her wife S.V.D., issued by the Spanish authorities.

Legal context

International law

3 Article 2 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989 (*United Nations Treaty Series*, Vol. 1577, p. 3), provides:

'1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

4 Article 7 of that convention provides:

'1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.'

European Union law

The FEU Treaty

5 Article 20 TFEU provides:

'1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) the right to move and reside freely within the territory of the Member States;

...

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.'

6 Article 21(1) TFEU states:

'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.'

The Charter

7 Article 7 of the Charter, entitled 'Respect for private and family life', provides:

‘Everyone has the right to respect for his or her private and family life, home and communications.’

8 Under Article 21(1) of the Charter, ‘any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited’.

9 Article 24 of the Charter, entitled ‘The rights of the child’, is worded as follows:

‘1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.’

Directive 2004/38/EC

10 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigendum OJ 2004 L 229, p. 35) provides in Article 4 thereof, entitled ‘Right of exit’:

‘1. Without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State.

...

3. Member States shall, acting in accordance with their laws, issue to their own nationals, and renew, an identity card or passport stating their nationality.

4. The passport shall be valid at least for all Member States and for countries through which the holder must pass when travelling between Member States. ...’

Polish law

11 Article 18 of the Konstytucja Rzeczypospolitej Polskiej (Constitution of the Republic of Poland) is worded as follows:

‘Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.’

12 Article 7 of the ustawa – Prawo prywatne międzynarodowe (Law on Private International Law) of 4 February 2011 (consolidated version) (Dz. U. of 2015, item 1792) provides:

‘Foreign law shall not apply if the effects of its application would be contrary to the fundamental principles of the legal order of the Republic of Poland.’

13 Article 104(5) of the ustawa – Prawo o aktach stanu cywilnego (Law on Civil Status Records) of 28 November 2014 (consolidated version) (Dz. U. of 2020, item 463), as amended, provides:

‘Transcription shall be compulsory if the Polish citizen concerned by a foreign civil status document has a civil status record confirming previous events which was drawn up in Poland and if he or she

requests that actions be performed with regard to the registration of civil status or applies for a Polish identity document or a [Powszechny Elektroniczny System Ewidencji Ludności (PESEL) number (an identification number for natural persons who are Polish nationals)].’

14 Article 107 of the Law on Civil Status Records is worded as follows:

‘The Head of the Civil Registry Office shall refuse to transcribe a document if:

- 1) the document is not recognised in the country of issue as a civil status document, or does not have the authority of an official document, or was not issued by a competent authority, or raises doubts as to its authenticity, or confirms an event other than a birth, marriage or death;
- 2) the foreign document was created as a result of transcription in a country other than the country in which the event took place;
- 3) the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland.’

The dispute in the main proceedings and the question referred for a preliminary ruling

15 K.S., a Polish national, and S.V.D., an Irish national, were married in Ireland in 2018.

16 In 2018, their daughter, S.R.S.-D., was born in Spain. The birth of S.R.S.-D. was registered by the Spanish civil registry office on the basis of a joint statement made by the birth mother of the child, K.S., and her wife, S.V.D. That birth certificate designates K.S. and S.V.D. as ‘Mother A’ and ‘Mother B’, respectively.

17 K.S. and S.V.D. applied for the birth certificate issued by the Spanish authorities for S.R.S.-D., who is of Polish nationality, to be transcribed into the Polish register of civil status.

18 By decision of 16 April 2019, that application was refused by the Head of the Civil Registry Office, on the ground that such a transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland. As K.S. and S.V.D. did not challenge the decision refusing their application, that decision became final on 30 April 2019.

19 On 25 September 2019, K.S. sent a request for assistance to the Commissioner for Human Rights, stating that S.R.S.-D. had no identity document, as the application for a Polish passport for that child had been refused on the ground that her birth certificate had not been transcribed into the Polish register of civil status. By letter of 17 February 2019, the Irish authorities responsible for identity documents informed the Commissioner for Human Rights that the child was not of Irish nationality and was therefore not entitled to an identity card; nor was she entitled to a passport.

20 The Commissioner for Human Rights then brought an action, on behalf of K.S. and S.V.D., before the referring court against the decision of the Head of the Civil Registry Office of 16 April 2019 refusing to transcribe into the Polish register of civil status the birth certificate which had been issued by the Spanish authorities in respect of their daughter.

21 During the proceedings before the referring court, the administrative authority of first instance also refused an application for an identity card for S.R.S.-D., on the ground that, under Polish law, a child may have only a woman and a man as parents. As the referring court had considered it reasonable to await the decision of the administrative authority of second instance, the Commissioner for Human Rights, by letter of 30 July 2020, stated that the decision refusing the application for an identity card had been confirmed at second instance.

22 According to the referring court, the provisions currently applicable do not effectively guarantee the right to freedom of movement of a child such as S.R.S.-D., who ‘is indisputably a Polish citizen’ and, therefore, a citizen of the Union, since the documents necessary for the exercise of that freedom, namely a Polish identity card or a Polish passport, cannot be issued to that child because the parents

entered in her birth certificate are two women who have married in accordance with the law applicable to one of them. That court also states that the practical application of those provisions of Polish law makes it difficult for the public authorities, including the courts, to afford effective protection to a minor child by taking its best interests into account.

- 23 The referring court acknowledges that questions of civil status and the rules relating to marriage connected therewith fall within the competence of the Member States and that EU law does not detract from that competence. It considers, however, that the differences between the rules applicable in the various Member States cannot impair the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States.
- 24 That court states that, were it to be found that the refusal to transcribe the birth certificate of a child infringes the provisions of Article 20(2)(a) and Article 21(1) TFEU, read in conjunction with Article 7, Article 21(1) and Article 24(2) of the Charter, it would be in a position to order the Polish authorities to transcribe that birth certificate word for word, which would then make it possible to issue an identity document that would guarantee the child concerned the ability to cross the internal borders of the European Union, and would protect the private and family life of that child.
- 25 In those circumstances the Wojewódzki Sąd Administracyjny w Krakowie (Regional Administrative Court, Kraków, Poland) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must the combined provisions of [Article 20(2)(a) and Article 21(1) TFEU], read in conjunction with Article 7, Article 21(1) and Article 24(2) of [the Charter], be interpreted as precluding the authorities of a Member State of which a minor child is a national from refusing to transcribe that child’s birth certificate, issued by another Member State, that transcription being necessary to enable the child to obtain an identity document for the Member State of which that child is a national, on the ground that that birth certificate designates as parents persons who are of the same sex and the national law of that Member State does not provide for the parenthood of same sex couples?’

Procedure before the Court

- 26 The referring court has requested that the present case be dealt with under the urgent preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court of Justice.
- 27 By decision of 25 January 2021, the Fifth Chamber of the Court decided, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, that it was not appropriate to grant the request for the present case to be dealt with under the urgent preliminary ruling procedure, as the conditions of urgency laid down in Article 107 of the Rules of Procedure had not been met.
- 28 In view of the connection between the present case and the case which gave rise to the judgment of 14 December 2021, *Stolichna obshtina, rayon ‘Pancharevo’* (C-490/20, EU:C:2021:1008), the proceedings in the present case were stayed by decision of the President of the Court of 26 January 2021 pending delivery of that judgment.
- 29 Following the delivery of the judgment of 14 December 2021, *Stolichna obshtina, rayon ‘Pancharevo’* (C-490/20, EU:C:2021:1008), the Court Registry sent the referring court a copy of that judgment, asking it to indicate whether it wished to maintain the request for a preliminary ruling.
- 30 By letters of 17 and 28 January 2022, the referring court informed the Court of Justice that it wished to maintain the request for a preliminary ruling, stating, in particular, that the judicial proceedings concerning the refusal to transcribe the birth certificate remained suspended pending receipt of the decision of the Court of Justice regarding that request for a preliminary ruling. The referring court also stated that, in January 2022, judicial proceedings seeking annulment of the administrative decision refusing to issue an identity card for the minor child concerned had been brought before the Wojewódzki Sąd Administracyjny w Warszawie (Regional Administrative Court, Warsaw, Poland) by the lawyer of the child’s parents.

Consideration of the question referred

- 31 Pursuant to Article 99 of the Rules of Procedure, where the reply to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.
- 32 It is appropriate to apply that provision in the present case.
- 33 By its question, the referring court asks, in essence, whether Article 20(2)(a) and Article 21(1) TFEU, read in conjunction with Article 7, Article 21(1) and Article 24(2) of the Charter, must be interpreted as meaning that, in the case of a minor child who is a citizen of the Union and whose birth certificate, issued by the competent authorities of a Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged to transcribe such a birth certificate, in order to enable that child to obtain an identity document.
- 34 As a preliminary point, it should be noted that, under Article 20(1) TFEU, every person holding the nationality of a Member State is a citizen of the Union. Since, according to the findings of the referring court, it is not disputed that S.R.S.-D. has Polish nationality, she enjoys, pursuant to that provision, Union citizenship.
- 35 In that regard, the Court has held on numerous occasions that Union citizenship is destined to be the fundamental status of nationals of the Member States (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 41 and the case-law cited).
- 36 As is apparent from the Court's case-law, a national of a Member State who has exercised, in his or her capacity as a citizen of the Union, his or her freedom to move and reside within a Member State other than his or her Member State of origin may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU, including, where appropriate, against his or her Member State of origin. Citizens of the Union who were born in their parents' host Member State and who have never made use of their right to freedom of movement may also rely on that provision and the measures adopted to give it effect (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 42 and the case-law cited).
- 37 Under Article 21(1) TFEU, every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. In order to enable their nationals to exercise that right, Article 4(3) of Directive 2004/38 requires that Member States, acting in accordance with their laws, issue to their own nationals an identity card or a passport stating their nationality.
- 38 Accordingly, since S.R.S.-D. is a Polish national, the Polish authorities are required to issue to her an identity card or a passport stating her nationality and her surname as it appears on the birth certificate drawn up by the Spanish authorities. In that regard, the Court has had occasion to rule that Article 21 TFEU precludes the authorities of a Member State, in applying their national law, from refusing to recognise a child's surname as determined and registered in a second Member State in which the child was born and has been resident since birth (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 44 and the case-law cited).
- 39 It must be made clear that Article 4(3) of Directive 2004/38 requires the Polish authorities to issue an identity card or a passport to S.R.S.-D. regardless of whether the Spanish birth certificate for that child has been transcribed into the Polish register of civil status. Therefore, in so far as Polish law requires the birth certificate to be transcribed before a Polish identity card or a Polish passport is issued, that Member State cannot rely on its national law as justification for refusing to draw up such an identity card or such a passport for S.R.S.-D. (see, by analogy, judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 45).
- 40 Such a document, whether alone or accompanied by others, where appropriate by a document issued by the host Member State of the child concerned, must enable a child in S.R.S.-D's situation to exercise the right to move and reside freely within the territory of the Member States, guaranteed in

Article 21(1) TFEU, with each of the child's two mothers, whose status as parent of that child has been established by their host Member State during a stay in accordance with Directive 2004/38 (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 46).

- 41 It is important, furthermore, to note that the rights which nationals of Member States enjoy under Article 21(1) TFEU include the right to lead a normal family life, together with their family members, both in their host Member State and in the Member State of which they are nationals when they return to the territory of that Member State (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 47 and the case-law cited).
- 42 It is common ground that, in the case in the main proceedings, the Spanish authorities lawfully established that there was a parent-child relationship, biological or legal, between S.R.S.-D. and her two parents, K.S. and S.V.D., and confirmed this in the birth certificate issued in respect of the child of those two parents. K.S. and S.V.D. must, therefore, pursuant to Article 21 TFEU, as parents of a citizen of the Union who is a minor and of whom they are the primary carers, be recognised by all Member States as having the right to accompany that child when her right to move and reside freely within the territory of the Member States is being exercised (see, to that effect, judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 48).
- 43 Consequently, since S.R.S.-D. has, according to the findings of the referring court, Polish nationality, the Polish authorities are required, as are the authorities of any other Member State, to recognise that parent-child relationship for the purpose of permitting that child to exercise without impediment, with each of her two parents, her right to move and reside freely within the territory of the Member States as guaranteed in Article 21(1) TFEU.
- 44 In addition, in order to enable S.R.S.-D. to exercise her right to move and reside freely within the territory of the Member States with each of her two parents, K.S. and S.V.D. must have a document which mentions them as being persons entitled to travel with that child.
- 45 The obligation for a Member State to issue an identity card or a passport to a child who is a national of that Member State, who was born in another Member State and whose birth certificate issued by the authorities of that other Member State designates as the child's parents two persons of the same sex, and, moreover, to recognise the parent-child relationship between that child and each of those two persons in the context of the child's exercise of his or her rights under Article 21 TFEU and secondary legislation relating thereto 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 between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraphs 56 and 57 and the case-law cited).
- 46 It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 58 and the case-law cited).
- 47 In the situation with which the main proceedings are concerned, the right to respect for private and family life guaranteed in Article 7 of the Charter and the rights of the child guaranteed in Article 24 thereof, in particular a child's right to have his or her best interests taken into account as a primary consideration in all actions relating to children, and a child's right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, are fundamental.
- 48 Accordingly, the relationship between the child concerned and each of the two persons with whom she leads a genuine family life in the host Member State and who are mentioned as being her parents on the birth certificate drawn up by the authorities of that Member State is protected under Article 7 of the Charter.

- 49 In addition, since Article 24 of the Charter, as the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) note, represents the integration into EU law of the principal rights of the child referred to in the Convention on the Rights of the Child, which has been ratified by all the Member States, it is necessary, when interpreting that article, to take due account of the provisions of that convention (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 63 and the case-law cited).
- 50 In particular, Article 2 of that convention establishes, for the child concerned, the principle of non-discrimination, which requires that the rights set forth in that convention, which include, in Article 7 thereof, the right to be registered immediately after birth, the right to a name and the right to acquire a nationality, be ensured in respect of that child without there being discrimination against the child in that regard, including discrimination on the basis of her parents' sexual orientation.
- 51 In those circumstances, it would be contrary to the fundamental rights which are guaranteed to that child under Articles 7 and 24 of the Charter for her to be deprived of the relationship with one of her parents when exercising her right to move and reside freely within the territory of the Member States or for her exercise of that right to be made impossible or excessively difficult in practice on the ground that her parents are of the same sex (judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, EU:C:2021:1008, paragraph 65).
- 52 Having regard to all of the foregoing, the answer to the question referred is that Articles 20 and 21 TFEU, read in conjunction with Articles 7 and 24 of the Charter and Article 4(3) of Directive 2004/38, must be interpreted as meaning that, in the case of a minor child who is a citizen of the Union and whose birth certificate, issued by the authorities of a Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national (i) is obliged to issue to that child an identity card or a passport without requiring the prior transcription of a birth certificate of that child into the national register of civil status, and (ii) is obliged to recognise, as is any other Member State, the document from another Member State that permits that child to exercise without impediment, with each of those two persons, his or her right to move and reside freely within the territory of the Member States.

Costs

- 53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds, the Court (Tenth Chamber) hereby orders:

Articles 20 and 21 TFEU, read in conjunction with Articles 7 and 24 of the Charter of Fundamental Rights of the European Union and Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that, in the case of a minor child who is a citizen of the Union and whose birth certificate, issued by the authorities of a Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national (i) is obliged to issue to that child an identity card or a passport without requiring the prior transcription of a birth certificate of that child into the national register of civil status, and (ii) is obliged to recognise, as is any other Member State, the document from another Member State that permits that same child to exercise without impediment, with each of those two persons, his or her right to move and reside freely within the territory of the Member States.

[Signatures]

- * Language of the case: Polish.