

The Supreme Administrative Court of Bulgaria's final decision in the Pancharevo case: Bulgaria is not obliged to issue identity documents for baby S.D.K.A. as she is not Bulgarian (but presumably Spanish)

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On 1 March 2023, the Supreme Administrative Court of the Republic of Bulgaria issued its final decision no. 2185, 01.03.2023 (see here an English translation by Nadia Rusinova) in the *Pancharevo* case. After an appeal from the mayor of the Pancharevo district, the Supreme Administrative Court of Bulgaria ruled that the decision of the court of first instance, following the judgment of the Court of Justice of the European Union (CJEU) in this case, is “valid and admissible, but incorrect”. It stated that the child is not Bulgarian due to the lack of maternal ties between the child and the Bulgarian mother, and thus there is no obligation for the Bulgarian authorities to issue a birth certificate. Hereafter, I will examine the legal reasoning behind its ruling.

Background

On 2 October 2020, the Administrative Court of the City of Sofia in Bulgaria requested a preliminary ruling from the CJEU in the case C-490/20 V.M.A. v. Stolichna Obshtina, Rayon ‘*Pancharevo*’. It sought clarification on the interpretation of several legal provisions. Specifically, the court asked whether a Member State is obliged, under Article 4(2) of the Treaty on European Union (TEU), Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU), and Articles 7, 24, and 45 of the Charter of Fundamental Rights of the

European Union (the Charter), to issue a birth certificate to a child, who is a national of that Member State, in order to obtain the identity document. This inquiry arose with respect to a child, S.D.K.A., born in Spain, whose birth certificate was issued by Spanish authorities, in accordance with their national law. The birth certificate identifies a Bulgarian national, V.M.A., and her wife, a British national, as the child's mothers, without specifying which of the two women gave birth to the child.

The CJEU decided that Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter, read in conjunction with Article 4(3) of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, must be interpreted as meaning that, in the case of 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, the Member State of which that child is a national is obliged

- 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
- 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.

The trajectory of the case within the Bulgarian courts

On the basis of the decision of the CJEU in the *Pancharevo* case, the referring court, i.e. the Administrative Court of the City of Sofia obliged the authorities of the *Pancharevo* district to draw up the birth certificate of S.D.K.A., indicating two women as her parents.

The mayor of the Pancharevo district then filed an appeal to the Supreme Administrative Court of Bulgaria, contending that the decision is inadmissible and incorrect.

Based on its considerations, the Supreme Court held that the decision of the court of first instance is "valid and admissible but incorrect". Its rationale is premised on several arguments. Firstly, it referred to Article 8 of the Bulgarian Citizenship Law, which provides that a Bulgarian citizen by origin is everybody of whom at

least one of the parents is a Bulgarian citizen. In the present case, the Supreme Court deemed it crucial to ascertain the presence of the biological link of the child, S.D.K.A. with the Bulgarian mother, V.M.A. Thus, it referred to Article 60 of the Bulgarian Family Code, according to which the maternal origin shall be established by birth; this means that the child's mother is the woman who gave birth to the child, including in cases of assisted reproduction. Therefore, the Supreme Court proclaimed in its ruling that the Bulgarian authorities could not determine whether the child was a Bulgarian citizen since the applicant refused to provide information about the child's biological mother. Consequently, the authorities could not issue a birth certificate and register the child's civil status. Furthermore, in a written defence presented to the court of first instance by the legal representative of V.M.A., it was provided that S.D.K.A. was born to K.D.K., the British mother, and the British authorities had also refused to issue a passport to the child, as she was not a British citizen.

The Supreme Administrative Court of Bulgaria ruled that the child is not a Bulgarian citizen, and the conclusion of the CJEU that the child is a Bulgarian citizen and thus falls within the scope of EU law (Articles 20 and 21 TFEU and Article 4 of Directive 2004/38/EC) is inaccurate. According to the Supreme Court's legal reasoning, these provisions do not establish a right to claim the granting of Bulgarian citizenship, and Union citizenship is a prerequisite for enjoying free movement rights.

In these circumstances, the Supreme Administrative Court of Bulgaria held that the refusal to issue a birth certificate does not result in the deprivation of citizenship or the violation of the child's best interests. It referred to the law of the host country, Spain. Article 17 of the Spanish Civil Code of July 24, 1889, provides that Spanish citizens by origin are persons born in Spain to parents:

- who are foreigners if at least one of the parents was born in Spain (except for the children of diplomatic or consular officials accredited to Spain),
- who are both stateless, or
- neither of whose national laws confer nationality on the child.

According to this Article, the Supreme Court reasoned that since the national laws of the parents named in the child's birth certificate (i.e. Bulgarian and UK legislation), issued in Spain, do not grant citizenship to the child, baby S.D.K.A. must be considered a Spanish citizen by virtue of this provision.

The applicability of Spanish law was expressly confirmed by the Spanish Government during the hearing at the CJEU, provided in paragraph 53 of Advocate General Kokott's Opinion, stating that if the child could claim neither Bulgarian nor UK nationality, she would be entitled to claim Spanish nationality. Thus, the Supreme Court ruled that the child is Spanish and averted the risk of leaving the child stateless.

Is the decision of the Supreme Administrative Court of Bulgaria in conformity with EU law interpretation?

In light of the ruling of the CJEU on the *Pancharevo* case, certain aspects might have required further scrutiny and more attention from the Supreme Court. Paragraph 68 of the *Pancharevo* judgment provides:

*"A child, being a minor, whose status as a Union citizen is not established and whose birth certificate, issued by the competent authorities of a Member State, designates as her parents two persons of the same-sex, one of whom is a Union citizen, **must be considered, by all Member States, a direct descendant of that Union citizen** within the meaning of Directive 2004/38 for the purposes of the exercise of the rights conferred in Article 21(1) TFEU and the secondary legislation relating thereto."*

According to this paragraph, it can be inferred that Bulgaria and other Member States must recognize a child with at least one Union citizen parent as a direct descendant of that Union citizen. This paragraph has important implications as regards the establishment of the parent-child relationship. The CJEU, in its case law (C-129/18 SM v Entry Clearance Officer), has firmly established that the term "direct descendant" should be construed broadly, encompassing both biological and legal parent-child relationships. Hence, as a family member of the Bulgarian mother, according to Article 2 (2)(c) of Directive 2004/38, baby S.D.K.A., should enjoy free movement and residence rights as a family member of a Union citizen. In its decision, however, the Supreme Administrative Court of Bulgaria did not conform to the CJEU's expansive understanding of the parent-child relationship. Therefore, its persistence in relying on its national law to establish parenthood exclusively on the basis of biological ties appears to contradict the interpretation of EU law by the CJEU.

The Supreme Administrative Court of Bulgaria seems relieved to discover that the

child probably has Spanish nationality. It can be doubted, however, at what conclusion the court would have arrived if the child were not recognized as Spanish under Spanish nationality laws, especially considering that the child was not granted nationality under UK legislation either. In such a scenario, the Supreme Court might have explored alternative outcomes to prevent the child from becoming stateless and to ensure that the child's best interests are always protected.