

Case C-713/23

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

23 November 2023

Referring court:

Naczelny Sąd Administracyjny (Poland)

Date of the decision to refer:

8 November 2023

Appellants:

JC- T

MT

Respondent:

Wojewoda Mazowiecki

Subject matter of the main proceedings

Appeal on a point of law against the refusal to enter into the civil registry in a Member State a certificate of a same-sex marriage between persons who are citizens of that Member State, which marriage was contracted in another Member State of which one of those persons is a citizen

Subject matter and legal basis of the request

Incompatibility of the refusal to enter into the civil registry a certificate of a same-sex marriage contracted in another Member State with Article 20(2)(a) and Article 21(1) TFEU – Article 267 of the Treaty on the Functioning of the European Union

Question referred for a preliminary ruling

Must the provisions of Article 20(2)(a) and Article 21(1) TFEU, read in conjunction with Article 7 and Article 21(1) of the Charter of Fundamental Rights of the European Union and Article 2(2) 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 be interpreted as precluding the competent authorities of a Member State, where a citizen of the Union who is a national of that State has contracted a marriage with another citizen of the Union (a person of the same sex) in a Member State in accordance with the legislation of that State, from refusing to recognise that marriage certificate and transcribe it into the national civil registry, which prevents those persons from residing in that State with the marital status of a married couple and under the same surname, on the grounds that the law of the host Member State does not provide for same-sex marriage?

Provisions of international law relied on

European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') – Article 8(1), Article 12 and Article 14

Provisions of European Union law relied on

Treaty on European Union – Article 6

Treaty on the Functioning of the European Union – Article 20(1), Article 20(2)(a) and Article 21(1)

Charter of Fundamental Rights of the European Union ('the Charter') – Article 7, Article 21(1) and Article 45

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 – Article 2(1)–(3)

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 – Article 4

Provisions of national law relied on

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Constitution of the Republic of Poland of 2 April 1997) – Article 18, Article 31 and Article 47

Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy (Law of 25 February 1964 – Family and Guardianship Code) – Article 1(1) and Article 3

Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Law of 23 April 1964 – Code of Civil Procedure) – Article 1138

Ustawa z dnia 4 lutego 2011 r. – Prawo prywatne międzynarodowe (Law of 4 February 2011 – Private International Law) – Article 7

Ustawa z dnia 28 listopada 2014 r. – Prawo o aktach stanu cywilnego (Law of 28 November 2014 on Civil Status Records; ‘the LCSR’) – Article 3, Article 104(1), (2) and (5), Article 105(1) and Article 107(3)

Case-law of the Court of Justice relied on

Judgment of 2 October 2003, *Garcia Avello*, C-148/02, EU:C:2003:539, paragraph 25

Judgment of 14 October 2008, *Grunkin and Paul*, C-353/06, EU:C:2008:559, paragraph 16

Judgment of 18 July 2013, *Prinz and Seeberger*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 23

Judgment of 2 June 2016, *Bogendorff von Wolfersdorff*, C-438/14, EU:C:2016:401, paragraph 32

Judgment of 24 November 2016, *Parris*, C-443/15, EU:C:2016:897, paragraph 59

Judgment of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 52

Judgment of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraphs 32, 35 and 36

Judgment of 14 December 2021, *Stolichna obshtina, rayon ‘Pancharevo’*, C-490/20, EU:C:2021:1008, paragraph 47

Selected case-law of the European Court of Human Rights ('the ECtHR') relied on

ECtHR judgment of 11 July 2002, *Goodwin v. United Kingdom*, ECLI:CE:ECHR:2002:0711JUD002895795

ECtHR judgment of 24 June 2010, *Schalk and Kopf v. Austria*, ECLI:CE:ECHR:2010:0624JUD003014104

ECtHR judgment of 21 July 2015, *Oliari v. Italy*, ECLI:CE:ECHR:2015:0721JUD001876611

ECtHR judgment of 17 January 2023, *Fedotova and Others v. Russia*, ECLI:CE:ECHR:2023:0117JUD004079210

Succinct presentation of the facts and procedure in the main proceedings

- 1 The appellants in the present case – JC- T, who has dual Polish/German citizenship, and MT, who is a Polish citizen – were married in Berlin (Germany). After the marriage, JC-T took his spouse's surname as the second element of his surname. Likewise in Poland, at the request of JC-T, by decision of the chief registrar of the Urząd Stanu Cywilnego m.st. Warszawy (Civil Registry Office of the Capital City of Warsaw) where the birth certificates of both appellants were drawn up, his surname was changed with the addition of the second element. The appellants currently reside in Germany, but they intend to move to and reside in Poland with the marital status of a married couple and under the surnames adopted after their marriage.
- 2 The appellants applied to the chief registrar of the aforementioned Civil Registry Office to have their foreign marriage certificate transcribed into the Polish civil registry. Pursuant to Article 107 of the LCSR, the chief registrar refused, by way of decision, to enter that marriage certificate into the civil registry on the grounds that Polish law does not provide for same-sex marriages, and therefore to transcribe that certificate would be contrary to the fundamental principles of the legal order of the Republic of Poland.
- 3 The appellants appealed against the aforementioned decision to the Wojewoda Mazowiecki (Governor of the Mazowsze Province), who upheld the chief registrar's decision. In addition, the governor found the German marriage certificate template and its Polish counterpart to be incompatible, with the result that, when transcribing the document, the given names and surnames of two men would have to be entered, but one of them would have his details entered under the heading 'woman'. In Poland, a marriage can only be contracted by a man and a woman, and therefore it is not permissible to enter the details of two men as spouses in the civil registry, irrespective of the manner in which individual sections are labelled in the certificate template.

- 4 The appellants brought an action against the negative decision before the Regional Administrative Court in Warsaw ('the RAC'), and sought annulment of the decisions refusing the transcription of the foreign marriage certificate.
- 5 In its judgment, the RAC dismissed the action, stating that the appellants were wrong to claim that the obligation to protect marriage as a union between a man and a woman enshrined in Article 18 of the Constitution of the Republic of Poland did not mean that registration of same-sex marriages contracted abroad was prohibited. The RAC held that the entire system of national law constitutes a coherent whole, and therefore regulations contained in lower-ranking legal acts cannot be ignored when interpreting the provisions of the Constitution in the context of the basic principles of the legal order, and Article 1(1) of the Family and Guardianship Code does not provide for marriage as a union between persons of the same sex, since it defines marriage solely as a union between a man and a woman. To accept the appellants' position would mean recognising same-sex marriage in the national legal order, which is not provided for by the Constitution or by statute. Therefore, the effect of transcribing a foreign same-sex marriage certificate would be to violate the basic principles of the Polish legal order. The RAC also found that the refusal to transcribe the certificate did not violate Articles 8 and 14 of the ECHR, read in conjunction with Article 12 thereof, and also Article 21(1) TFEU, since the dispute concerned the issue of marital status, which is unrelated to the right to move to and reside in a Member State.
- 6 The appellants lodged an appeal on a point of law against the judgment of the RAC with the Supreme Administrative Court ('the SAC').

Succinct presentation of the reasoning in the request for a preliminary ruling

- 7 Pursuant to Article 104(2) of the LCSR, the transcription of a foreign civil status document consists in the faithful and literal transfer of the content of that document into the Polish civil registry, both in linguistic and formal terms, without any interference in the spelling of the given names and surnames of the persons indicated in the foreign document. In Article 105(1) of the LCSR, transcription is defined as a material and technical procedure, and the civil status record bears an annotation that it has been transcribed. The direct legal effect of transcription is the creation of a Polish civil status record which becomes 'detached' from the original record registering the event and which has an evidentiary value equal to civil status records created in Poland as a result of the registration of a legal event. Pursuant to Article 107(3) of the LCSR, the chief registrar of the civil registry office refuses to transcribe a document if its transcription would be incompatible with the fundamental principles of the legal order of the Republic of Poland. Furthermore, pursuant to Article 7 of the Law [of 4 February 2011] – Private International Law: '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'.

- 8 Although the case concerns transcription, in the context of the appellants' declared intention to move to and reside in Poland (the host Member State, which does not recognise same-sex marriage) with the marital status resulting from their marriage in Germany and under the surnames adopted subsequent to it, the SAC has doubts concerning the interpretation of Article 20(2)(a) and Article 21(1) TFEU establishing the right of citizens of the Union to move and reside freely within the territory of a Member State, taking into account fundamental rights, particularly those under the Charter, such as the right to respect for private and family life (Article 7 of the Charter) and the prohibition of any discrimination, particularly on the basis of sexual orientation (Article 21(1) of the Charter).
- 9 In that regard, the SAC recalls that the case-law of the Court of Justice states that a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States, and EU law does not detract from that competence (judgments in *Garcia Avello*, paragraph 25, and *Grunkin and Paul*, C-353/06, paragraph 16). While Member States have a margin of discretion whether to introduce same-sex marriage (judgment in *Parris*, C-443/15, paragraph 59), they should, when exercising that competence, comply with EU law and therefore also with the provisions on the freedom to move and reside in the territory of the Member States (judgment in *Bogendorff von Wolffersdorff*, C-438/14, paragraph 32).
- 10 Moreover, according to the case-law of the Court of Justice, nationals of Member States also enjoy 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 that Member State (judgments in *Coman and Others*, paragraph 32, and *Stolichna obshchina, rayon 'Pancharevo'*, paragraph 47).
- 11 In the context of Article 2(2) of Directive 2004/38, which contains a definition of a 'family member' that also includes a spouse, where the concept of 'spouse' within the meaning of that directive is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned, a Member State cannot rely on its national law solely to oppose the recognition in its territory of a marriage contracted by a Union citizen with another person of the same sex in another Member State in accordance with the law of that state (*Coman and Others*, C-673/16, paragraphs 35 [and] 36).
- 12 Therefore, the absence of provisions in national legislation that provide for the possibility of transcribing or registering such a union should not preclude the obligation to recognise certain specific effects in the host Member State of such a union being contracted. An EU citizen who has exercised his or her freedom to move and reside within a Member State other than his or her Member State of origin may rely on all rights conferred on those having that status, including against his or her Member State of origin (judgment in *Prinz and Seeberger*, paragraph 23). Article 21(1) TFEU grants citizens of the Member States the right to lead a normal family life, together with their family members, both in the host

Member State and in the Member State of which they are nationals (judgment in *Lounes*, paragraph 52).

- 13 The SAC also points out that Article 7 and Article 21(1) of the Charter contain normative content that is essentially identical to the provisions of Article 8(1) and Article 14 of the ECHR, respectively. In its case-law, the European Court of Human Rights interprets the aforementioned provisions, taking into account Article 12 of the ECHR, and the SAC recognises that this case-law has evolved over the past 20 years in terms of its evaluation of national regulations concerning the legal recognition of same-sex unions.
- 14 Thus, in the *Goodwin* case, the ECtHR held that the concepts used in Article 12 of the ECHR relating to the right of a man and a woman to marry can no longer be understood as concepts that determine gender solely according to biological criteria. In the *Schalk and Kopf* case, the ECtHR argued for the legal recognition of relationships between partners who, as a family, can be covered by the protection of Article 8 of the ECHR, although it noted that the states which are parties to the ECHR enjoy a certain margin of appreciation until an appropriate legal regulation is in place. In the *Oliari* case, the ECtHR held that the provision of Article 8 of the ECHR can be understood as imposing a positive obligation on state parties to the ECHR to regulate the legal status of same-sex unions in order to recognise and protect those unions.
- 15 In the *Fedotova* case, the ECtHR for the first time interpreted Article 8 of the ECHR to mean that the states parties to the ECHR have an obligation to regulate same-sex unions institutionally and thus to adequately recognise and protect them. According to the ECtHR, private life cannot be interpreted merely as the right to privacy, but also as the right to form and develop relationships with other people, and the protection of the traditional family model cannot justify the absence of any legal recognition and protection of same-sex rights. Owing to social considerations, the ECtHR allowed states some margin of discretion in choosing the manner in which unions are to be registered, only requiring that civil partnerships or other types of unions be institutionalised.
- 16 The SAC is inclined to interpret the TFEU provisions in question as precluding a refusal to transcribe a foreign marriage certificate into national civil status records, since this constitutes a manifestation of the host Member State's failure to respect the right to family life of Union citizens having the marital status they acquired after contracting a marriage in a Member State in accordance with the legislation of that state, and is at the same time a sign of discrimination on the basis of gender and sexual orientation, which prevents such persons from fully exercising their right to move to and reside in the host Member State. EU law does not differentiate between family members – spouses or partners with whom a Union citizen has entered into a registered partnership – on the basis of their gender, so this concept is gender-neutral.

- 17 National regulations related to civil status, including marriage, are the competence of Member States, but states should exercise that competence in accordance with EU law, including in regard to freedom of movement. National regulations must not violate ‘common values’ (recital of the Charter’s preamble), and therefore the fundamental rights of every EU citizen.
- 18 On the other hand, the aforementioned provisions of the TFEU can also be interpreted as not precluding the refusal in question. Indeed, the refusal to transcribe a marriage certificate on the grounds that the host Member State recognises marriage exclusively as a union between a man and a woman is not tantamount to depriving EU citizens of their right to move and reside freely in that Member State, but rather accounts for the fact that the internal law of that state does not recognise same-sex unions. The Union respects ‘the diversity of the cultures and traditions of the peoples of Europe’ (recital of the Charter’s preamble).
- 19 After receiving an answer to the question referred for a preliminary ruling, the SAC will consider whether the absence of provisions in national legislation that provide for the possibility of registering a same-sex union amounts to excluding the obligation to recognise certain effects of entering into such a union.