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Case C-391/09, *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn* v. *Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court (Second Chamber) of 12 May 2011, nyr.

1. Introduction

The central issue of this judgment is the refusal of the Lithuanian Civil Registry Division to modify several civil documents of a Lithuanian national and a Polish national according to the Polish alphabet. The judgment deals with the regulation of names in the Member States and European citizenship, as in the cases of *Garcia Avello* and *Paul and Grunkin*. Moreover, for the second time, the Court referred to the national identities of the Member States within the context of citizenship and free movement. The case also raises important questions on the scope of Union law and the existence and applicability of a principle of non-discrimination on grounds of ethnic origin.

2. Factual background

Ms Runevič-Vardyn was born in 1977 in Lithuania. She belongs to the Polish minority group in Lithuania, and has Lithuanian nationality. According to her own statement, her parents gave her the Polish first name "Małgorzata" and her father's surname "Runiewicz". However, on her Lithuanian birth certificate issued in 1977, and again in 2002, as well as on her Lithuanian passport, issued in 2003, her name was written as "Malgožata Runevič". According to her own statement, a Polish birth certificate was issued to her by the Civil Registry Office of Warsaw in 2006, in which her name was entered as "Małgorzata Runiewicz". After she worked and resided for some time in Poland, she married Łukasz Paweł Wardyn in 2007. On their marriage certificate, issued by the Vilnius Civil Registry Division, his name was spelled "Lukasz Pawel Wardyn", without the distinctive indications – called diacritical marks – in his first names. On the same marriage certificate the name of his wife was spelled as "Malgožata Runevič-Vardyn" since, according to the Lithuanian alphabet, the letter "W" does not exist.

According to the couple, also a Polish marriage certificate was issued by the Polish authorities, on which their entries were spelled according to Polish rules. A few weeks after their marriage, Ms Runevič-Vardyn requested the

Vilnius Civil Registry Division to change her name on her birth certificate into the Polish form of spelling, "Małgorzata Runiewicz", and on her marriage certificate into "Małgorzata Runiewicz-Wardyn".

The Civil Registry Division refused her request, however, because Lithuanian legislation would not allow entries in documents to be changed according to Polish spelling rules. The relevant Lithuanian legislation provides that the surnames and first names of Lithuanian citizens have to be written in Lithuanian characters. Also the entries of nationals of other countries that request a Lithuanian civil document are written in Lithuanian characters, although, upon request, this spelling can be changed into phonetic spelling. Nevertheless, the diacritical marks in the names of other nationals are not recognized. Consequently Mr Wardyn's first name was spelled on the marriage certificate according to Polish spelling rules, but without the Polish diacritical marks.

The couple commenced an action against the refusal of the Civil Registry Division before a national court in Lithuania. They argued, amongst other things, that if they had been married in Poland their names would have been entered on their marriage certificate according to Polish language rules, meaning that Mr Wardyn would have been able to pass on his authentic Polish surname to his wife. Also his first name would, in that case, be entered according to its original spelling.

The Lithuanian Constitutional Court had ruled in 1999 that the constitutional status of the Lithuanian language would be undermined if derogations were allowed with regard to the spelling of names in the Lithuanian alphabet. The referring court, however, doubted whether the present legislation is compatible with Union law. In this context, the national court referred four preliminary questions to the Court of Justice. At the time of the reference the couple had moved to Belgium with their son.

In the first place the referring court wondered whether national legislation, according to which first names and surnames on civil documents may only be written in the characters of the national language, constitutes indirect discrimination on the ground of ethnic origin, as prohibited by Directive 2000/43.[1] Secondly, the national court asked the Court whether national legislation providing that the forenames and surnames of individuals of another nationality could be spelled according to the Roman alphabet, but without recognizing the diacritical marks, constitutes indirect discrimination on the ground of ethnic origin. Third, the Lithuanian court asked whether national legislation, according to which only the Lithuanian alphabet is used

1. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180; see Art. 2(2) b, on indirect discrimination.

to spell names on civil documents for Lithuanian nationals, is compatible with the free movement of Union citizens (Art. 21(1) TFEU) and the prohibition of discrimination on the ground of nationality (Art. 18(1) TFEU). Finally, the national court wondered whether the legislation, providing that entries on civil documents for non-nationals are spelled according to the Roman alphabet, but refusing to recognize the original diacritical marks, is compatible with Article 21(1) TFEU and Article 18(1) TFEU.

3. Opinion of the Advocate General

In the preliminary observations of his Opinion, Advocate General Jääskinen, recalled that the Member States are competent to organize their system of recording surnames and first names, so that each Member State may adopt its own legislation and its own criteria for entries on civil documents. Nevertheless, this competence should be exercised with due respect for Union law, especially for the principle of non-discrimination, the provisions on European citizenship and the free movement of persons within the EU. The second preliminary issue dealt with by the Advocate General is the temporal scope of application of EU law. Ms Runevič-Vardyn requested the Lithuanian authorities to amend her birth certificate issued in 2003, but Lithuania joined the European Union in May 2004. Hence, at the time the birth certificate was issued, the *acquis communautaire* was not applicable to the Lithuanian legal order. Since Ms Runevič-Vardyn requested the revision of her entries to facilitate her free movement, the Advocate General was of the view that her request was not retroactive to the time before the accession of Lithuania.

In the third place, the Advocate General discussed whether the situation of Ms Runevič-Vardyn has a cross-border dimension. According to the Lithuanian Government her request to revise her birth certificate has to be regarded as a solely internal situation, since Ms Runevič-Vardyn is a Lithuanian national who requests a Lithuanian civil document. The Advocate General rejected this argument on two points. First of all, for the applicability of Directive 2000/43 a cross-border dimension is not a prior condition, since the Directive implements the general principle of non-discrimination under Article 13 EC (now 19 TFEU), which also applies to non-cross-border situations. Secondly, with regard to the birth certificate, the situation of Ms Runevič-Vardyn does have a cross-border link, since she has exercised her free movement rights (she now lives in Belgium) and has married a Union citizen from another Member State and faces difficulties because her and her husband's names are spelled differently.

The Advocate General went on to analyse whether the particular Lithuanian legislation is compatible with Directive 2000/43, which implements the principle of equal treatment between persons irrespective of their racial or ethnic origin. According to Lithuania, and five of the six intervening Member States and the Commission, the Directive is not applicable to the present situation. The essential point of discussion is the interpretation of the material scope of Directive 2000/43, as laid down in Article 3. According to that Article, the Directive is only applicable, within the limits of the competences of the Union, to employment, vocational training, social protection, social advantages, education and to access to public goods and services (such as housing). The couple argued, however, that the Directive is applicable to all kinds of elements of social life and that the Lithuanian rules restrict them in their opportunity to use goods and services. The Advocate General rejected this argument and took the stance that the Directive is not applicable to Lithuanian legislation governing entries in civil documents under the present circumstances. Although the Directive does not exclude the regulation of civil registration, the recording of first names and surnames in civil status registers does not fall within the competence of the Union. Therefore, this area falls outside the scope of the Directive.

As to the argument that the couple were indirectly discriminated against in their access to goods and services (such as opening a bank account or purchasing plane tickets) the Advocate General stated that "if there were any discrimination . . . it would stem not from the legislation concerned itself but from the reactions of suppliers of goods and services to the documents indicating civil status presented to them. Such behaviour on the part of private persons must be distinguished from measures taken by the public authorities".[2] He adds that there is no doubt as to the existence of the union between the couple based on their marriage certificate.

Secondly, the Advocate General warned the Court that the effect of a broad interpretation of Article 3(1)(h) could be "excessive" and "unjust", since it would also include service providers who are obliged, due to technical or normalization restraints, to use only a limited selection of graphemes and marks in documents they issue in respect of their customers.

As the Advocate General found that Directive 2000/43 is not applicable, he turned his attention to analysing whether the Lithuanian rules on the spelling of names are in compliance with Articles 18 and 21 TFEU. Three situations were distinguished: the refusal to revise Ms Runevič-Vardyn's birth certificate, the refusal to acknowledge the Polish diacritical marks in the names of Mr Wardyn, and the fact that Ms Runevič-Vardyn has a different surname from her husband on their marriage certificate. The Advocate

2. Opinion, para 62.

General assessed these three situations with regard to Articles 18 and 21 TFEU separately.

First, with regard to Article 18 TFEU, the Advocate General was of the opinion that a refusal to revise Ms Runevič-Vardyn's birth certificate does not fall within the scope of that prohibition since she is a national of the Member State whose legislation is at issue. She was not being discriminated against on the ground of having another nationality and Article 18 TFEU does not cover discrimination on grounds of ethnic origin.

With regard to the situation of Mr Wardyn, the Advocate General found that only the refusal to enter the Polish diacritical marks constitutes discrimination on the ground of nationality. According to the Advocate General "no discrimination can occur where a national of a Member State has been deprived of the opportunity to pass on to his wife his surname in its original form, since such an alleged 'right' seems to me to be incompatible with the principle of equality between the sexes which is enshrined in, *inter alia*, European Union law".[3] Nevertheless, the Advocate General took the stance that non-Lithuanian nationals are disadvantaged compared to Lithuanian nationals, in terms of indirect discrimination, with regard to the spelling of their names. With regard to safeguarding the national language for reasons of national unity, as a justification for this indirect discrimination, the Advocate General referred to Article 7 of the Charter of Fundamental Rights and Article 8 of the ECHR, which both contain the right to family life. According to the case law of the ECHR, the spelling of names can fall under the scope of protection of Article 8 ECHR. However, such interference could be justified by relying on the national identity of Lithuania, for instance (Art. 4(2) TEU). In that respect the Advocate General concluded that the national rules concerning the writing of names of non-Lithuanian nationals is not proportional, since also less restrictive measures could have been adopted to protect the Lithuanian language.

The Advocate General discussed whether Article 18 TFEU had been infringed in one of the three situations. First, with regard to the birth certificate he was of the opinion that the refusal to amend the entries is not precluded by Article 21 TFEU, since he did not consider the issues of identification in other Member States as restricting Ms Runevič-Vardyn's right to free movement. Second, he did not consider the omission of diacritical marks to be a restriction of the free movement of Mr Wardyn, since the deletion of such marks is quite usual in other Member States in practice. Third, he did consider the fact that the last name of Ms Runevič-Vardyn was written as Vardyn, instead of Wardyn, to be an infringement of Article 21 TFEU. He was of the opinion that she had been disadvantaged, because she married a national from another

3. Opinion, para 74.

Member State, whose name is written with letters that are not recognized in Lithuania. The Advocate General concluded that the legislation is not proportional in order to safeguard the Lithuanian language and he advised the Court to declare that Article 21 TFEU precludes such a refusal to amend the marriage certificate in the authentic name of her husband.

4. Judgment of the Court

As observed above, the couple argued that the scope of the Directive has to be interpreted so as to include different situations connected to social life. The Court emphasized that the Directive indeed lays down a broad framework to combat discrimination on grounds of ethnic or racial origin, and that the scope of protection for individuals goes beyond the area of employment, as is declared in the preamble to the Directive. Nevertheless, the Court found that the present Lithuanian rules on the spelling of names on civil documents do not fall within the material scope of the Directive. The Court stressed that the scope of the Directive should not be interpreted too restrictively, since it implements the general principle of equality, also recognized by the Charter on Fundamental Rights (in Art. 21). The Council did, however, unanimously reject the proposal of the European Parliament to broaden the Directive to the actions of any public body. It is in this context that the Court decided that the legislation regulating entries in civil documents does not fall under the scope of Directive 2000/43.

The Court therefore analysed the Lithuanian rules in the light of European citizenship. It recalled its established case law that "the status of citizens of the Union . . . is intended to be the fundamental status of nationals of the Member States".[4] As is well established in the Court's case law, Union citizens should be treated equally on grounds of their nationality (Arts. 18 and 21 TFEU) and may not be hindered in the exercise of their free movement rights (Art. 21 TFEU). Although the Member States remain competent to regulate how names are entered in civil certificates, this competence should be exercised in compliance with the limits of EU law, whenever it falls within the scope of Union law. Since the couple have undoubtedly exercised their right to move and reside freely, their particular situation falls within the material scope of Union law. Consequently, the Court examined whether the refusal to revise the name of Ms Runevič-Vardyn on her birth certificate and her name on the marriage certificate constitutes a restriction of the freedom to move and reside freely as provided in Article 21 TFEU. According to the Court the refusal does not constitute a less favourable treatment of Ms Runevič-Vardyn, who

4. Judgment, paras. 59–60.

exercised her free movement rights, in comparison with nationals of Lithuania who have not made use of that freedom. Neither can the refusal to revise entries in civil documents be seen as a restriction on making use of the right to free movement, since Ms Runevič-Vardyn's name is spelled in a uniform way in all civil Lithuanian documents. Although the Court acknowledged that the different spelling of the couple's names could cause inconveniences, it added that in order to constitute a restriction on free movement it "must be liable to cause 'serious inconvenience' to those concerned at administrative, professional and private levels"[5] to be qualified as a restriction in the sense of Article 21 TFEU. The Court left it to the national court to decide whether the couple had indeed been confronted with "serious inconvenience", especially with regard to the identification of the couple as a married couple, because of the different entries on their marriage certificate.

With regard to the omission of the Polish diacritical marks in Mr Wardyn's name, the Court took the position that this does not constitute a restriction on his right to move and reside freely. According to the reasoning of the Court, such a restriction would only be present if the lack of diacritical marks on the certificate led to "actual and serious inconvenience".[6] The Court also agreed with the Advocate General that diacritical marks are often misunderstood and therefore it seemed, to the Court, unlikely that the lack of these Polish diacritical marks would lead to confusion with regard to the identification of Mr Paweł Wardyn.

In the event that the national court were to establish that the difference in the spelling of the couple's surnames did indeed constitute a restriction in the sense of Article 21 TFEU, the Court discussed whether the protection of the national language could constitute a possible justification. The Court answered this question in the affirmative and referred, *inter alia*, to Article 4(2) TEU, which provides that the national identity of Member States should be respected by the EU. The Court left it to the Lithuanian court to balance these different interests: the private and family life of the couple versus the legitimate protection by the Member State of its official national language and its traditions.

5. Ibid., para 76.
6. Ibid., para 81.

5. Comment

5.1. *European citizenship, the regulation of names and "serious inconvenience"*

The present case is not the first case in which the Court has decided on the compatibility of national regulations governing the registration of names with the free movement of Union citizens. In general, the Court of Justice has held in its common case law on free movement that also non-discriminatory measures may constitute a violation of the freedoms whenever a national measure impedes or restricts free movement. In the case law on European citizenship such a shift has also been made: any measure that restricts the free movement of Union citizens, without an objective justification, is prohibited by Article 21(1) TFEU.[7]

In its case law on names and identification, the Court has introduced a "serious inconvenience" test in order to assess whether national rules on the registration of names constitute a restriction. Before the introduction of Union citizenship in the Maastricht Treaty, the Court decided that an erroneous transcription of a name could be regarded as a restriction, in the sense of Article 49 TFEU, especially in the light of "the risk that potential clients may confuse him with other persons".[8] If such doubts arise, Union citizens may be obliged to prove their identity in different Member States.

In the cases of *Garcia Avello*, *Paul and Grunkin* and *Sayn-Wittgenstein* the test of "serious inconvenience", with regard to the registration of names within the context of Union citizenship and free movement was further developed. The Garcia Avello children, with dual Spanish and Belgian nationality, were not allowed to have their surname registered in Belgium according to the Spanish tradition of having two surnames – that of their father and that of their mother. The Court found that

> "discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, *inter alia*, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognized in another Member State of which they are also nationals".[9]

7. See e.g. Case C-224/02, *Pusa*, [2004] ECR I-05763, para 20 and Case C-192/05, *Hagen-Tas & Tas*, [2006] ECR I-10451, para 31.
8. Case C-168/91, *Konstantinidis*, [1993] ECR I-1191, para 16.
9. Case C-148/02, *Garcia Avello*, [2003] ECR I-11613, para 36.

In the case of *Grunkin and Paul,*[10] two German nationals living in Denmark gave their son, pursuant to Danish law, the surname Grunkin-Paul. Their son had been born in Denmark and had resided there since then. He had, however, just like his parents, German nationality. The German registry office refused to recognize the surname given to him in Denmark. The authorities argued that the surname of a person should be determined by the law of the State of nationality, and that German law does not allow a child to bear a double-barrelled surname composed of the surnames of both the father and the mother. The Court found in this case that the German rules were incompatible with Article 21 TFEU, since they would cause "serious inconvenience" to the son, who at that time was already 10 years old. The different rules would lead to confusion as to his identity, especially with regard to official documents, such as diplomas and attestations. Since his passport was issued by the Member State of his nationality, the name entered in his passport would be different from the surname given to him in Denmark and entered on his birth certificate. Although the Court accepted that certain interests may justify the principle that a Member State may determine the surnames of its nationals, none of those grounds were found to be sufficiently important to justify the inconvenience caused to the child.

In the case of *Sayn-Wittgenstein*[11] the Court applied the same test. In that case the nobility title of *Fürstin* added to the name of an Austrian national adopted by a German father, who had the title *Fürst*, was the issue of debate. According to Austrian law, and as decided by the constitutional court, Austrian nationals could not include a nobility title in their name, because of the constitutional value of equality between citizens. Also foreign nobility titles fall under that prohibition. The Court found that the Austrian refusal to acknowledge the title *Fürstin* constituted a restriction in the sense of Article 21 TFEU, because the discrepancy in entries in different documents could result in doubts as to Ms Sayn-Wittgenstein's identity. Such doubts and the necessity to dispel those doubts hindered the exercise of her right to free movement. This was especially the case, since she would have different documents with different names from the German and the Austrian authorities. Ms Sayn-Wittgenstein's passport had been issued by the Member State of her nationality, so that in her official passport her name would be

10. Case C-353/06, *Grunkin and Paul*, [2008] ECR I-7639. Already in 2005, the Stadt Niebüll referred questions on this particular case, but those preliminary questions were not answered, since the reference was declared inadmissible, because the Stadt Niebüll was not a judicial body in the sense of Art. 267 TFEU, see Case C-96/04, *Standesamt Stadt Niebüll*, [2006] ECR I-03561.

11. Case C-208/09, *Sayn-Wittgenstein*, judgment of 22 Dec. 2010, nyr. See annotation by Besselink in this *Review*.

spelled differently compared to various other documents in Germany, such as her driving licence.

In that same sense, the Court emphasized that the entries in the civil documents of Ms Runevič-Vardyn were uniform, and did not raise doubts as to her identity as such.[12] Indeed, Ms Runevič-Vardyn possesses different documents in which the same Lithuanian entries are laid down. This situation differs from the previous case law in the sense that Ms Runevič-Vardyn requested the authorities of her own Member State to revise the spelling of her name according to the rules of another Member State of which she is not a national. She does not reside in that Member State either. The question is how the Lithuanian spelling could cause a restriction on her free movement, since she does not have to prove her identity in other Member States, because of inconsistent entries on different documents. The decision of the Court that this does not constitute a restriction of her free movement seems correct, at least in the sense of Article 21 TFEU. This is especially understandable, taking into account that also the entries on her birth certificate in 1977 were entered according to the Lithuanian alphabet.

The more pragmatic arguments of the Court with regard to the name of Mr Wardyn are noticeable. In order to qualify whether serious doubts could arise as to the identity of Mr Wardyn, the Court stated, *inter alia*, that persons unfamiliar with the diacritical marks would not notice their omission on the certificate. Nevertheless, and in the same practical sense, in a time in which symbols and diacritical marks can be downloaded quite easily, it does not seem proportional to refuse to enter those marks on an official document. This is especially the case, since also the character "W" has been recognized in the name of Mr Wardyn, which does not exist in the Lithuanian alphabet either.

The Court did not assess whether the refusal to recognize the diacritical marks could also be qualified as discrimination on the ground of nationality (Art. 18 TFEU). Had the couple been married in Poland, their names would have been entered on their marriage certificate according to the Polish rules. If the Court had assessed the case under the prohibition of discrimination on the ground of nationality, the Lithuanian authorities would have to justify the non-recognition of foreign diacritical marks. Although the protection of the Lithuanian language and practical arguments may be sufficient to justify this discrimination, the assessment of that justification would have taken place also in the light of the principle of proportionality. It is remarkable that the Court did not further analyse Article 18 TFEU, especially in the light of the Opinion of the Advocate General on this point and the questions of the referring court.

12. Judgment, para 70.

Only the spelling of Vardyn instead of Wardyn on the marriage certificate could be qualified as a restriction in the Court's view. The Court left it to the national court to determine whether the refusal to enter "Wardyn" on the marriage certificate, as part of the name of Ms Runevič-Vardyn, would cause serious inconvenience to the couple and would therefore be in violation of Article 21(1) TFEU.

The Court also referred to Article 7 of the Charter and Article 8 of the ECHR, but left the balancing of those interests to the national court. According to the European Court of Human Rights disputes such as in the present case fall under the application of Article 8 of the Convention. In the case of *Mentzen v. Latvia,*[13] a similar situation was the subject of a judicial dispute. The applicant, who had married a German national with the surname "Mentzen", had her passport, according to Latvian spelling rules, in the name of "Mencena". According to the ECHR this difference in names could result in the couple suffering inconveniences in their professional and social life. The legislation was qualified as a restriction on her right to have her private and family life protected. The ECHR did, however, accept that Latvia may legitimately protect its language, especially in the light of the Soviet regime in Latvia's recent history. The ECHR considered that the measure was proportional, since, among other things, Ms Mentzen did not have difficulties that were sufficiently serious to amount to a disproportional interference with her right to private and family life.

The Court would probably have come to the same conclusion in the present case with regard to the marriage certificate. However, the Court did not examine whether the difference in the spelling constituted a restriction at all. Therefore the question whether the protection of private and family life was infringed was also not assessed by the Court. In the light of earlier decisions, this "hands-off approach" is quite remarkable. In previous case law, the Court examined whether confusion would arise concerning the identity of the persons involved because of the rules governing the spelling of names. Now the Lithuanian court has to examine the practical impact of the refusal to enter the "W" in the surname of Ms Runevič-Vardyn and whether this would constitute a restriction of the couple's free movement.

5.2. *The national constitutional identities of the Member States*

Another interesting point of the judgment is the reference of the Court to the "new" Article 4(2) TEU, introduced by the Treaty of Lisbon.[14] According to

13. ECHR, Appl. no. 71074/01, *Juta Mentzen also known as Mencena against Latvia*, 7 Dec. 2004.

14. Judgment, para 86.

that Article "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government . . . ". Previously, Article 6(3) TEU guaranteed that "the national identities of the Member States" would be respected by the EU. It therefore seems that the present Article 4(2) TEU is broader than its previous version, referring also to the *fundamental, constitutional and political structures* of the Member States.[15]

In *Sayn-Wittgenstein* the Court referred for the first time to Article 4(2) TEU.[16] Austria argued that the prohibition on nobility titles for Austrian citizens was a constitutional rule that should ensure equality between citizens in Austria. The Court emphasized, in that context, that "in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic".[17] In that case Article 4(2) TEU seems to have been used, although not explicitly, to support the justification of the restriction caused by the prohibition of nobility titles. This could lead to a broader scope of justifications for restrictions on the free movement of EU citizens and to a different balance between the interest of free movement and those of the Member States, with more room for national interests. In other words, the duty to respect the national identities of the Member States may be used to interpret possible justifications for free movement and to strike a balance between the constitutional interests of the Member States and the right to the free movement of persons.[18] What belongs to the national identity of a Member State may vary from one Member State to another.[19] That means that national identity as a ground for justification may be invoked with regard to specific national interests, even if those interests are not shared among the majority of the Member States.

In the present case, the Court also recognized the protection of the official language of a Member State as part of the national identity of that Member State.[20] In the context of a justification for a possible restriction on the free movement of the couple, this protection of the Lithuanian language is a legitimate aim to restrict free movement. The national court may weigh the

15. See in this respect also Besselink, "National and constitutional identity before and after Lisbon", (2010) *Utrecht Law Review*, 36–49; Besselink, annotation of *Sayn-Wittgenstein* in this Review; and Von Bogdandy and Schill, "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty", (2011) CML Rev., 1417–1454.

16. Previously the Court referred to national identity in Case C-473/93, *Commission* v. *Luxembourg*, [1996] ECR I-3207, para 35.

17. *Sayn-Wittgenstein*, cited *supra* note 11, para 96.

18. Von Bogdandy and Schill, op. cit. *supra* note 15, 1442.

19. Judgment, para 87.

20. Ibid., para 86.

interest of the couple against the interest of Lithuania in maintaining its spelling rules for its own nationals in the proportionality test.[21] The protection of the Lithuanian language is provided for in the Lithuanian Constitution and has also been declared to be one of the constitutional values of Lithuania by the Lithuanian constitutional court. The fact that the Court qualified this protection as part of the national identity of Lithuania is therefore not surprising. In addition, respect for linguistic diversity is explicitly laid down also in the EU Treaty and the Charter (in Art. 3(3) TEU and Art. 22 of the Charter). Also in previous case law the Court has demonstrated caution with regard to the protection of language by Member States. In the case of *Groener,*[22] for instance, the requirement for teachers to have a certificate of proficiency in the Irish language was held to be proportional. According to the Court in that case, maintaining and promoting the use of the Irish language could be qualified as an "expression of the national identity and culture".[23] In other case law the Court has also established that, to a proportional extent, free movement rights may be restricted by language requirements. [24] Article 4(2) TEU supports this ground of justification even more.

5.3. *The rights of persons who belong to a minority group*

Although Lithuania may legitimately protect its national language and the coherence of the entries relating to its nationals in official documents, the culture and identity of members of the Polish minority group may also be at stake at the same time. The rights of members of minority groups may also be qualified as a constitutional value of the European Union. Article 21 of the Charter prohibits any discrimination on the ground of membership of a minority group. Even more importantly, since Lisbon the rights of persons who belong to minority groups are explicitly included, for the first time, in the EU Treaty. According to Article 2 TEU "respect for human rights, including the rights of persons belonging to minorities" belongs to the values on which the EU is founded. This wording places the rights of members of minority groups within the context of human rights protection.[25] Since Lisbon and in the same Article, also respect for "the Union's rich cultural and linguistic diversity" is explicitly stated to be one of the objectives of the EU (see also Art.

21. Ibid., para 91.
22. Case C-379/87, *Groener*, [1989] ECR 3967.
23. Ibid., para 18.
24. Also in *Bickel and Franz* the Court recognized the aim of language protection for minority groups as being legitimate to restrict free movement: Case C-274/96, *Bickel and Franz*, [1998] ECR I-7637, para 29. See also Case C-281/98, *Angonese*, [2000] ECR I-4139.
25. Barten, "Minority rights in the European Union after Lisbon", *UASEC*, p. 6 (to be found at <www.uaces.org/pdf/papers/1102/barten.pdf>)

22 of the Charter). The protection of members of minority groups, including their right to use their own language, is considered to be part of international human rights.[26] The Court referred to the linguistic diversity and the national identity of Lithuania, but remained remarkably silent on the protection of minority rights and their linguistic culture.

Although the Court could still have concluded that the Lithuanian protection of its language would prevail over the right to use the Polish language by members of the minority group, the Court could have taken these rights into account, thereby balancing the different values. It is quite significant that the Court did not refer to the rights of minority groups at all within the context of a possible justification, since these rights also have fundamental value. Perhaps the silence of the Court is the consequence of the fact that the couple had not relied on the protection of members of minority groups explicitly. The protection of a language was, on the contrary, explicitly brought to the fore by the Lithuanian Government. And even the Polish Government argued that the spelling of names falls outside the scope of the Directive.[27]

The topic of the language of members of the Polish minority group in Lithuania is at the moment a very sensitive issue.[28] The sensitivity of the issue, and the fact that the parties did not explicitly refer to the rights of members of minority groups, may be important reasons why the Court did not address the protection of members of minority groups, whereas it did refer to the protection of the Lithuanian language.

Whether the protection of members of a minority group would change the decision of the Court in the present case is doubtful. The balance of the protection of language versus the rights of members of minority groups would not necessarily be in favour for the members of minority groups, at least with regard to the spelling of names. However, the judgment would have been more balanced if the Court had paid attention to the rights of members of minority groups, especially as those rights explicitly belong to the fundamental values of the EU.

26. See Art. 27 ICCPR which states that "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Art. 14 ECHR prohibits discrimination on grounds of "association with a national minority".

27. Judgment, para 37.

28. See also the latest developments on the new Education Law in Lithuania providing that more courses and exams should be provided in the Lithuanian language, also in minority schools. <www.lithuaniatribune.com/2011/11/28/a-kubilius-lithuania-will-not-change-the-education-law-and-the-polish-prime-minister-is-aware-of-this-stance/>.

5.4. *A general principle of equality on the ground of ethnic origin?*

Whenever a situation falls within the scope of Union law, the general principles of Union law are applicable.[29] In that context the Court had the opportunity, also outside the scope of the Directive, to decide the present case on discrimination on grounds of ethnic origin. The fact that the situation did not fall within the scope of the Directive did not exclude their situation falling within the scope of Union law as such. The scope of EU law is triggered in different situations. First, whenever a national measure is an implementation of Union law, that measure falls within the ambit of Union law.[30] Secondly, when Member States derogate from one of the freedoms, the scope of EU law is triggered.[31] The third, and less common, category is constituted by national measures that fall within the scope of Union law, because there is another link with Union law. [32] Such a link with EU law may be present, for instance, when a national measure falls under the exemption of the free movement of goods in the context of the *Keck* exemption.[33]

The situation of the couple in the present case, at least, triggered EU law because they had exercised their right to free movement (Art. 21 TFEU). As observed, also the application of Article 18 TFEU in the situation of Mr Wardyn could have triggered the scope of EU law. Whether a general principle of equal treatment on ethnic grounds exists is not yet clear. There are, however, convincing arguments to assume that such a general principle of Union law may exist, especially in the light of the judgments in *Mangold*[34] and *Kücükdeveci*.[35] In those judgments, the Court applied the general principle of equal treatment on the ground of age, even before the implementation period of Directive 2000/78[36] had expired, as well as after that deadline had expired, in a horizontal relation. The prohibition on the horizontal application of Directives could have hindered Ms Kücükdeveci in the application of equal

29. See also Editorial comments: "The scope of application of general principles of Union law: An ever expanding Union?", (2010) CML Rev., 1589–1596.

30. Case 5/88, *Wachauf*, [1989] ECR 2609, Joined Cases C-20 & 64/00, *Booker Aquacultur*, ECR I-7411.

31. Case C-112/00, *Schmidberger*, [2003] ECR I-5659, Case C-60/00, *Carpenter*, [2002] ECR I-6279.

32. Opinion of A.G. Sharpston in Case C-427/06, *Bartsch*, [2008] ECR I-7245, para 69; Prechal, "Competence creep and general principles of law", (2010) *REALaw*, 8–9; Dougan, "In defence of Mangold?" in *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing, 2011), pp. 219–245; judgment in *Bartsch*, ibid.

33. Case C-71/02, *Karner*, [2004] ECR I-3025.

34. Case C-144/04, *Mangold*, [2005] ECR I-9981.

35. Case C-555/07, *Kücükdeveci*, [2010] ECR I-365.

36. Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303.

treatment on the ground of her age against her employer. However, according to the Court "it is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings".[37] Hence, the Court directly used the general principle of law to assess the German measure at stake, not the Directive.

Analogous to the judgments in *Mangold* and *Kücükdeveci* the Court could, in the present case, have expressed the existence of a general principle of equal treatment with regard to ethnic grounds.[38] In *Mangold,* the Court referred to Article 1 and to the preamble to Directive 2000/78 in order to argue that the Directive implements a broader, general principle of equal treatment on grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.[39] Directive 2000/43 contains a similar provision, stating that the purpose of the Directive "is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment" (Art. 1). Also the preamble to Directive 2000/43 refers to non-discrimination on the ground of ethnic origin as part of the fundamental rights in the EU and of international human rights (points 2 and 3 of the preamble). In addition, Article 21 of the Charter clearly states that "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". The Charter has now entered into force and has been granted the same legal status as the Treaties (Art. 6(1) TEU).[40] Even though Article 51 of the Charter limits its application to the situation in which Member States are "implementing Union law", it may still support the existence of a general principle of Union law.[41]

37. *Kücükdeveci*, cited *supra* note 35, para 27.

38. See also, De Mol, "The novel approach of the CJEU on the horizontal direct effect of the EU principle of non-discrimination: (Unbridled) expansion of EU law?", (2011) MJ, 123–125.

39. *Mangold*, cited *supra* note 34, paras. 74 and 75, also *Kücükdeveci*, cited *supra* note 35, para 20.

40. See also *Kücükdeveci*, cited *supra* note 354, para 22.

41. See in that respect also Lenaerts and Gutiérrez-Fons, "The constitutional allocation of powers and general principles of EU law", (2010) CML Rev., 1654–1655. See by analogy: Case C-149/10, *Chatzi*, judgment of 16 Sept. 2010, nyr, para 63, in which the Court found that Art. 33(1) of the Charter supported the existence and application of the principle of equal treatment with regard to parental leave.

Article 19 TFEU may also support the existence of such a general principle.[42] Although Article 19 TFEU is a "competence provision", granting the institutions the competence to act in order to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, it also supports the existence of the general principle of non-discrimination on grounds of ethnic origin in the Union. The protection of the rights of members who belong to minority groups, as well as the protection of human rights, belong to the values of the European Union (Art. 2 TEU).

Nevertheless, the present case differs in an important respect from the case law on age discrimination. In *Kücükdeveci* and *Mangold* the Court closely followed the material scope of the Directive and was therefore in line with the will of the legislature.[43] The material scope of the Directive was therefore not extended by the Court, only its application. In the present case such an interpretation of the equality principle in the light of the material scope of the Directive is not possible, since the material scope of the Directive is not triggered. On the contrary, the European legislature even explicitly adopted a narrow material scope of Directive 2000/43.

The judgments in *Mangold* and *Kücükdeveci* have met with some resistance,[44] so the Court might be cautious in formulating new general principles of EU law. One of the important criticisms of those judgments is the fact that by the application of a general principle of Union law, secondary law is circumvented. Since general principles of law are part of primary EU law, a wide interpretation of the general principles of Union law, outside the material scope of secondary law, may cause tension between the Court and the EU legislator.[45] Another difficulty in applying such a general principle is that what exactly constitutes discrimination on the ground of ethnic origin remains undefined, since the Directive does not provide for a definition of ethnic origin. Whether such a principle would have direct effect and how national courts should give effect to this principle is therefore also an important, and difficult, question at the moment.[46]

42. See also the Opinion of A.G. Sharpston on the relation between the general principle of non-discrimination on grounds of age and Art. 19 TFEU in *Bartsch*, cited *supra* note 32, paras. 52–59.

43. Prechal, op. cit. *supra* note 32, p. 58.

44. See e.g. Editorial Comments: "Horizontal effects – A Law of diminishing coherence?", (2006) CML Rev., 1–8 and Thüsing and Horler, Case Note on *Kücükdeveci*, (2010) CML Rev., 1161–1172, and the Opinion of A.G. Mazák in Case C-411/05, *Palacios de la Villa*, [2007] ECR I-8531 and A.G. Geelhoed in Case C-13/05, *Chacón Navas*, [2006] ECR I-6467.

45. Also A.G. Geelhoed in *Chacón Navas* against the application of a general principle of EU law in the context of Art. 19 TFEU.

46. See also the arguments of A.G. Trstenjak in Case C-282/10, *Dominguez*, judgment of 24 Jan. 2012, nyr, with regard to the application of a general principle of the right to paid annual leave, paras. 141 and 157–158. Also Dougan, op. cit. *supra* note 32, p. 241.

Moreover, the Court could have had the opportunity to decide the case in favour of the couple on the basis of European citizenship and the prohibition of discrimination on the ground of nationality, or autonomously within the context of Article 21 TFEU. The Court found that the restrictions caused by the Lithuanian way of spelling entries did not cause an inconvenience which was "too serious" for the couple – or left it up to the national court to decide. In that context, the Court may have felt that it was not necessary to assess a possible application of a general principle of non-discrimination on the grounds of ethnic origin.

Hence, although there are good arguments to argue that a general principle of non-discrimination on the ground of ethnic origin should have been applied by the Court, there are even more convincing reasons why the Court did not take that opportunity to do so.

6. Conclusion

In the perspective of earlier case law on the regulation of names, the present case shows the limits of what constitutes a "serious inconvenience". The Court has created a kind of *de minimis* test for the free movement of Union citizens in this case law: only if serious problems arise because of the difference in registration are Union citizens possibly restricted in their free movement rights. In the present judgment the outer limits of what is a restriction on free movement become clearer. It is at least the first time that the Court has found that the refusal to adjust entries in civil documents does not constitute a restriction at all.

The judgment is significant for the silence of the Court on various issues. The Court took a "hands-off approach" and left it to the national court to decide whether there is a restriction or not. Its silence on Article 18 TFEU is remarkable, especially in the view of the preliminary questions of the Lithuanian court and the Opinion of the Advocate General, and the lack of a reference to the protection of members of minority groups and to the existence of a general principle of non-discrimination on grounds of ethnic origin is significant. Nevertheless, in the light of this sensitive area, respect for national identities and the division of competences, as well as the institutional balance, this approach may be understandable.

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