DIRITTI CIVILI E POLITICI

Some remarks on the relevance of Article 8 of the ECHR to the recognition of family status judicially created abroad

European Court of Human Rights N*egrepontis-Giannisis v. Greece*, application no. 56759/08, judgment of 3 May 2011 (www.echr.coe.int)

In *Negrepontis-Giannisis* v. *Greece*, of 3 May 2011 (application no. 56759/08), a Chamber of the European Court of Human Rights (ECtHR) held that the defendant State, by refusing to recognize an order for adoption entered by a court of Michigan, had violated, *inter alia*, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

In 1984, the applicant, a Greek national, then of a legal age, had become the adoptive son of his uncle, an Orthodox bishop. At that time they were both residing in the United States. Fifteen years later, soon after the adoptive father had died, the applicant sought recognition of the order in Greece, but his application was ultimately rejected on the ground that recognition would be contrary to Greek public policy. The Greek Supreme Court held that *ordre public* should be understood as embodying, in Greece, the rules whereby, under canon law, monks (as the applicant's adoptive father) are prohibited from carrying out secular acts, including adoption. As a result, Mr Negrepontis-Giannisis was prevented from using the family name of his uncle and from successfully claiming his rights in respect of the latter's inheritance.

The ECtHR found that non-recognition of the order amounted to an illegitimate interference with the applicant's right to respect for private and family life, as enshrined in Article 8 of the ECHR. Under this provision, no restriction may be imposed upon the said right, unless it is in accordance with the law, pursues one or more legitimate aims under paragraph 2 and is "necessary in a democratic society" for achieving such aims.

According to the Court, the Greek decision failed to meet the latter requirement. The ECtHR, while conceding that contracting States enjoy a wide margin of appreciation in this field, noted that the Greek decision relied – as regards public policy – on canon law, and more particularly on canons of the seventh and ninth centuries. It further observed that Greek legislation, before the foreign order was entered, had undergone significant changes as regards the (secular) status of monks: rules prohibiting the latter from entering into civil marriage had been suppressed in 1982. The ECtHR equally stressed that the order for adoption had validly created a filial relationship under the law of

Michigan and that the creation of these ties reflected the will of both the adoptive father of the applicant and the applicant himself. It also highlighted that more than twenty years had elapsed since those ties were created when the Greek Supreme Court was called upon to decide the issue of recognition and that the "social reality" of the relationship should therefore have been properly taken into account.

Prior to this judgment, the ECtHR had already examined the rules governing the recognition of foreign judgments in civil matters against the background of Article 8 of the ECHR. Reference is made, in particular, to the decision on admissibility of 6 May 2004, in the case of *Hussin* v. *Belgium* (application no. 70807/01), and to the judgment of 28 June 2007 concerning the case of *Wagner* v. *Luxembourg* (application no. 76240/01). The latter ruling is particularly significant for our purposes. The Court held, *inter alia*, that there had been a violation of Article 8 on account of the failure of the Luxembourg courts to recognize the family ties created by a judgment of full adoption delivered in Peru in respect of a Peruvian girl. The adoptive parent being an unmarried woman, the requirement for recognition (*i.e.* the judgment being in conformity with the law applicable to adoption according to the conflict-of-laws provisions of Luxembourg: in this case, Luxembourg law itself) had not been fulfilled.

The reasoning underlying *Negrepontis-Giannisis*, while being consistent with the key findings of its precedents, helps clarifying in various respects the approach taken by the ECtHR on the said topic.

The purpose of this paper is to set out the main elements of the Court's views as to the relevance of Article 8 to the recognition of foreign judgments in matters of personal status and family relationships, as they emerge from a combined reading of the three rulings. These elements may be summarized as follows.

First, the obligations of a contracting State under Article 8 of the ECHR are not confined to situations created by the operation of that State's law, or already recognized in the latter's legal order. The contrary view, originally expressed by the Commission (see *e.g.* decision of 15 December 1977, *X. and Y.* v. *the United Kingdom*, application no. 7229/75), has been rejected in *Hussin*. The Court conceded, then, that Belgium had restricted the applicant's rights under Article 8 by denying the recognition of a German judgment ascertaining the existence of a filial relationship between a man and his former wife's children and awarding maintenance to the latter. The Court did not go on to verify whether the restriction was justified in the circumstances, since it found the application to be manifestly ill-founded, and accordingly declared it inadmissible.

Nevertheless, the idea that decisions regarding the recognition of foreign judgments might affect the rights enshrined in Article 8 of the ECHR has since been taken for granted. *Wagner* and *Negrepontis-Giannisis* rest precisely on that assumption and may be seen as a development thereof.

Second, although Article 8 of the ECHR equally applies, as we have just seen, to purely domestic and to transnational situations, the Court has made clear that pecu-

liar issues are raised by family relationships featuring a foreign element. *Wagner* and *Negrepontis-Giannisis* show, in particular, that, when a transnational situation arises, Article 8 requires the contracting States to pursue, *inter alia*, the "cross-border continuity" of the relevant personal status and family ties (see generally on this subject, F. Rigaux, "Les situations juridiques individuelles dans un système de relativité générale", in *Recueil des cours de l'Academie de la Haye de droit international* 1989, vol. 213, p. 94 *et seq.*, and C. Charles, "La continuité du traitement des situations juridiques internationales : vers une rupture méthodologique", in *La notion de continuité, des faits au droit*, G. Koubi *et alii* (eds.), Paris, 2011, p. 79 *et seq.*): respect for private and family life implies that 'limping' situations – *i.e.* situations where a personal status is recognized under the law of State X but not under the law of State Y – should be avoided to the largest possible extent.

Two remarks must be made in this regard.

On one side, a need for "continuity" arises under Article 8 only in respect of situations that have been *effectively created* and *actually exist* within the legal order of a given country. For this condition to be met, both formal and substantial standards may have to be looked at. In *Wagner* and in *Negrepontis-Giannisis* the ECtHR referred to the fact that the foreign judgments at issue had *validly* created a family relationship in the country of origin (*Wagner*, par. 133: *Negrepontis-Giannisis*, par. 74), and to the fact that each of these relationships had since become a *social reality* (*Wagner*, par. 132 *et seq.*: *Negrepontis-Giannisis*, par. 56). While the interplay of formal and substantial factors in this respect remains open to debate (see further P. Pirrone, "Limiti e 'controlimiti' alla circolazione dei giudicati nella giurisprudenza della Corte europea dei diritti umani: il caso *Wagner*", in *Diritti umani e diritto internazionale* 2009, p. 156), it is submitted that the formal validity of the situation in question according to the law of the country of origin is a necessary condition for Article 8 to come into play (see, however, the Court's statement in *Wagner*, par. 117), while the "social reality" of the ensuing relationship (as evidenced, *inter alia*, by the duration of the undisturbed enjoyment of the status in question: see *e.g. Negrepontis-Giannisis*, par. 75) is one of the standards whereby one may assess the *degree* of protection that the situation at stake specifically deserves. Other standards relevant to the latter aspect include: the nature of the interests at stake (in *Wagner*, for example, the Court recalled that whenever recognition is sought in respect of the adoption of a child, the "best interests" of the latter must be duly taken into account: par. 133); the "intensity" of the family ties affected by non-recognition (in *Negrepontis-Giannisis*, for example, the ECtHR underlined that the filial relationship at issue had been created by the firm will of two adults, conscious of the legal implications of their act: par. 56); the risk of frustration of the reasonable expectations of the persons concerned, *e.g.* in light of a sudden change in the latter's practice (see *Wagner*, par. 130), or in light of the fact that the State in question has previously expressed a *favor* for situations similar to the one created abroad (see *Negrepontis-Giannisis*, par. 72, on the amendments made to the Greek Civil Code as re-

gards the monks' right to marry).

On the other side, whenever a need for "continuity" arises, the positive obligations imposed on contracting States under Article 8 of the ECHR imply that the concerned individuals should be allowed to enjoy the situation at stake *as of law*. The State whose authorities have denied the recognition of a foreign judgment might in fact be willing to provide *some* protection to the family ties corresponding thereto, *e.g.* treating them as a *de facto* family relationship, but this would not prevent the State from violating Article 8 (see *Wagner*, par. 116 and par. 132).

Third, the said goal of "continuity", while being *pursued* by Article 8 of the ECHR, is not *effected* by the latter. Private international law rules – be they national rules or rules resulting from international cooperation (either at a bilateral, multilateral or regional level) – are still needed to achieve that goal.

Some scholars have wondered whether the Court paved the way, in *Wagner*, to an autonomous method of recognition, based on Article 8 of the ECHR itself and operating as a "substitute" to the "traditional" rules of private international law (see on the whole subject, for further references, L. D'Avout, "Droits fondamentaux et coordination des ordres juridiques en droit privé", in *Les droits fondamentaux: charnières entre ordres et systèmes juridiques*, E. Dubout, S. Touzé (eds.), Paris, 2010, p. 170 *et seq.*).

This reading is not convincing. Neither *Wagner* nor *Negrepontis-Giannisis* appear to be concerned with the "mechanics" of recognition, *i.e.* the devices whereby a foreign judgment is entitled to produce some effects outside the country of origin (the Convention, by the way, displays more generally a rather "neutral" attitude towards the methods by which contracting States ensure the coordination between their own legal order and other States' legal orders, in situations with a foreign aspect: see F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme*, Bruxelles, 2007, p. 304 *et seq.*). In both rulings, the focus of the ECtHR was, rather, on whether the national courts, acting under the relevant (national) rules, had properly assessed the need for "continuity" inherent to the concerned situations.

In this respect, *Negrepontis-Giannisis* is somehow clearer than its precedent. In *Wagner*, the Court deemed it useful to give a detailed account of the method employed by the Luxembourg courts as regards the recognition of foreign judgments. In *Negrepontis-Giannisis*, on the contrary, the Court attached little or no importance to the methodological options underlying the relevant Greek rules and went straight to examine the device – the public policy exception – whereby the *outcome* of those rules had been disregarded.

Considered together, the two rulings suggests that Article 8 of the ECHR does not prevent contracting States from resorting to *any* particular technique for the recognition of foreign judgments, provided that the *overall operation* of the relevant rules does not lead to a *result* inconsistent with the rights enshrined in the Convention. Article 8, to put it otherwise, should merely rectify the functioning of the relevant private international law rules, whenever the latter bring about an il-

legitimate restriction on a person's right to respect for private and family life (see P. Kinsch, "Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law", in *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, K. Boele Woelki *et alii* (eds.), The Hague, 2010, p. 272 *et seq.*).

Fourth, under Article 8 of the ECHR, contracting States are not obliged to *systematically* grant recognition to foreign judgments regarding personal status or family relationships (see, for further developments and in a different perspective, O. Lopes Pegna "L'incidenza dell'art. 6 della Convenzione europea dei diritti dell'uomo rispetto all'esecuzione di decisioni straniere", in *Rivista di diritto internazionale* 2011, p. 54 *et seq.*). Recognition may (and actually *should*) be denied in some circumstances. In *Wagner*, the Court acknowledged that it would not be unreasonable for the authorities of a contracting State to display prudence when dealing with foreign judgments relating to adoption (par. 126). More generally, respect for private and family life may, at times, be *adversely* affected by a foreign judgment: should this happen, the contracting State where recognition is sought would incur, for the very fact of recognizing the judgment, in a violation of Article 8. The situation would be similar, *mutatis mutandis*, to the one examined by the ECtHR in the judgment, mentioned above, concerning the case of *Pellegrini* v. *Italy*. The Court held, then, that there had been a violation of Article 6 of the ECHR, in that the Italian courts had failed to ensure that the applicant had had a fair hearing in ecclesiastical proceedings concerning the nullity of her marriage, before declaring the ensuing judgment of the Tribunal of the Roman Rota enforceable in Italy.

The rules governing the recognition of foreign judgments (and establishing the cases where a judgment cannot be recognized), may well pursue legitimate aims, and may therefore comply, in this respect, with Article 8 (see *Negrepontis-Giannisis*, par. 67). A violation of Article 8 may occur where those rules, because of their design or because of the way in which they are applied, either pursue an aim other than a legitimate one, or fail to strike a fair balance between the interests at stake.

Two remarks may be made in light of the foregoing. On one side, the contracting States enjoy a wide margin of appreciation as regards the recognition of foreign judgments in the field of family relationships (see *Wagner*, par. 128; *Negrepontis-Giannisis*, par. 69): the aims pursued, it is submitted, may vary from one country to the other, provided they are *legitimate* aims, and there may be different ways to balance competing interests, as long as a *fair* balance is ultimately ensured according to the standards of a "democratic society". On the other side, while Article 8 allows contracting State to deny recognition only "in accordance with the law", *i.e.* under private international law rules featuring sufficient clarity and allowing reasonably predictable outcomes (see the judgment of the ECtHR of 15 November 1996 in the case of *Calogero Diana* v. *Italy*, application no. 15211/89, par. 32, as regards the notion of 'law' under Article 8; see also *Negrepontis-Giannisis*, par. 66 *et seq.*), a certain degree of flexibility may be needed in the operation of the relevant rules in order to properly carry out the said balance *in concreto*.

Fifth, flexibility may be achieved in different ways within the process of recognition of foreign judgments. One of the relevant devices is represented by the public policy exception. *Ordre public* is not, by its nature, a hard-edged concept. As such, it may help national authorities in weighing different considerations one against the other, and accommodating the different needs connected to the situation at stake, including the needs relevant to Article 8 of the ECHR. The key issue in *Negrepontis-Giannisis* was precisely whether the public policy exception had been properly resorted to as a ground for denying the recognition of the order for adoption.

It is worth noticing at the outset that in *Negrepontis-Giannisis* public policy has not been considered by the ECtHR as being inconsistent *as such* with Article 8 of the Convention. As a matter of fact, the point was not *whether*, in principle, a foreign judgment could be denied recognition on grounds of public policy, but rather *how* the public policy exception should be understood and employed without violating Article 8.

Ordre public is traditionally conceived as a safeguard to *national* policies, *i.e.* as a means by which the operation of private international law rules may be limited whenever they (designate a foreign law or) allow the recognition of a foreign judgment being irretrievably incompatible with the basic values *of the forum*. The ECtHR seems to accept this as a starting point of its reasoning: the "national" aims pursued through the public policy exception may indeed be legitimate aims, and the weight they are given *vis-à-vis* of other aims may reflect, in the circumstances, a fair balance between the conflicting policies at stake (see *Negrepontis-Giannisis*, par. 67).

That said, the Court's view is arguably that – for the purposes of Article 8 – the public policy of a contracting State cannot be understood as being made *solely* of national values. Rather, public policy represents for the ECtHR a sort of playfield where national values and supra-national imperatives meet and merge: *ordre public*, in order to properly play a role in respect of the recognition of foreign judgments in matters of personal status and family relationships, should be treated as the result of a dynamic process of osmosis between local and regional policies.

In reality, the idea that public policy should comprise more than principles of a national origin is not new. The emergence of a "truly international" public policy (M. Forteau, "L'ordre public 'transnational' ou 'réellement international': l'ordre public international face à l'enchevêtrement croissant du droit international privé et du droit international public", in *Journal du droit international* 2011, p. 3 *et seq.*), has been nurturing for years both the case law of State courts and the debate among scholars (see *e.g.*, J. Foyer, "L'ordre public international est-il toujours français?", in *Justices et droit du procès: du légalisme procédural à l'humanisme processuel – Mélanges en l'honneur de Serge Guinchard*, Paris, 2010, p. 274 *et seq.*). Yet, seen from the standpoint of Article 8 of the ECHR, the shift towards "transnationality" in public policy is not just a cultural option, or a strategy that States are free to decide whether to implement, or not: it rather reflects the increasingly complex perspective from which private international law issues must be dealt with in Europe, *i.e.* a perspective where the point of view of

the forum is no longer a merely "national" one, but embodies that State's international undertakings concerning, *inter alia*, the protection of human rights.

This further suggests two developments. In the first place, it is worth observing that the osmosis process at issue is affected by a number of factors and may vary from time to time and according to the circumstances. As a general rule, in order to determine the extent to which national values may actually play a role in the framework of the public policy exception, a relevant standard is represented by the existence of a common ground between the laws of the contracting States regarding the issue at stake. The Court's reasoning in *Wagner* (par. 128 *et seq.*) and *Negrepontis-Giannisis* (par. 69 *et seq.*) is particularly telling in this respect. The attitude of Greek law towards situations involving a religious element is peculiar, if compared with the attitude of the majority of the European countries: this peculiarity appeared to be especially vivid in the case at hand, since the Greek Supreme Court – as we have seen – had construed public policy by making reference to canon law texts of the seventh and ninth century. In an area of law where consensus among States is very limited, if not lacking at all, the use of public policy should be extremely cautious.

Secondly, it should be noted that by blending national and supra-national considerations into public policy, the clause at hand is *de facto* allowed perform a *double* purpose as regards personal status and family ties. On one side, it may function as a bar (typically, a bar of last resort) to the recognition of foreign judgments, whenever the latter fail to ensure the minimum standard of protection of private and family life, as required by Article 8 of the ECHR. On the other hand, whenever local rules or practices fall short of European standards, as they result from Article 8, public policy – once it is construed as a merger of national and supra-national factors – prevents local courts from relying on local (inadequate) standards of protection, thus implicitly promoting an evolution of domestic law.

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