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A spouse is a spouse

Jorrit Rijpma (Europa Institute Leiden Law School) · Friday, June 8th, 2018

With its judgment of 5 June 2018, the Court of Justice of the European Union has provided much overdue legal certainty for same-sex couples regarding their right of free movement under the EU Treaties. In the *Coman*-case, the Romanian Constitutional Court asked the CJEU whether EU law prevented the Romanian authorities from refusing a right of residence as a spouse to a US citizen man, married under Belgian law to a male Romanian national. Following Advocate General Wathelet's *opinion* of 11 January of this year, the CJEU's answer was a clear yes.

Directive 2004/38 on the free movement of EU citizens ("Citizens Directive") does not apply to nationals in their own Member State. However, it is established case law (*Singh*, *O&B)* that EU citizens that return to their home Member State after having genuinely used their free movement rights, based on Art. 7 of the Directive (*O&B*), are covered by EU law (Art. 21(1) TFEU) and that the conditions of the Directive should be applied by analogy. That Directive allows EU citizens to be joined by their spouse, independent of their nationality (and hence including third country nationals).

In Coman, the Court therefore asked whether, in such situation, 1) a Member State is allowed to refuse a same-sex partner a right of residence on the basis that the Member State in question does not recognize same-sex marriage and 2) if not, whether the Member State in question would be obliged to grant the same-sex partner a right of residence for more than three months.

The Court was quick to point out that the EU has no competence on the marriage laws of the Member States, but recalled that all national law must be in compliance with EU law. It then went on to interpret the word spouse in the Citizens Directive. It argued that, as the term is gender-neutral, it can include a same-sex spouse. Moreover, unlike for registered partnership, the Directive does not refer to the existence of similar legislation in the host Member State. Finally, the Court stressed that the rights of EU citizens covered by EU law cannot vary per Member State, depending on national legislation in force, as this would deprive free movement law of its effectiveness.

The Court was equally clear in rejecting public policy arguments, even in the light of the obligation to respect the Member States' national constitutional traditions (Art. 4(2) TEU). Although the definition of civil marriage as being between a man and a woman was contained only in the Romanian Civil Code, several Member States have a provision to this effect in their Constitution. The Court recalled that a danger to public policy should constitute a genuine and sufficiently serious threat to a fundamental interest of society (*P.I.)*. The obligation to recognize a same-sex

marriage concluded in another Member State could not be considered as such, as it did not change the definition of marriage under the host Member State's national laws, nor would it require any such change. It added that any exceptions would have to be consistent with fundamental rights as protected by the Charter of Fundamental Rights, following the European Court of Human Rights' interpretation of the European Convention of Human Rights, that same-sex relationship are protected under the right to private life and the right to family (Art. 52(3) Charter).

The Court should be applauded for the consistent and non-discriminatory application of its case law on the fundamental freedom to all EU citizens. Its rejection of the public order exception is interesting when contrasted to its rulings in *Sayn Wittgenstein* and *Vardyn*. In those cases, public policy arguments combined with national constitutional identity played out in favour of the Member States invoking them. It could, however, be argued that the Court in those instances, which concerned the use and spelling of EU citizens' family names, was in fact too restrictive. In any case, a similar approach in this particular case would have led not merely to a restriction of free movement rights, but a full negation thereof.

The Court should also be commended for not following the alternative approach suggested by the Advocate General. In his opinion he engaged, admittedly for the sake of completeness, with the possibility that same-sex spouses would, in any case, be covered by Art. 3(2) of the Citizens Directive, facilitating entry and residence of other family members and duly attested, durable partners. Even if that provision would need to be applied without discrimination to same-sex and different-sex couples, it would have considerably weakened the position of rainbow families, in particular also as regards the more limited social rights under that article (*Garcia Nieto*).

A small difference, noted by Peers, is that unlike the Advocate General, the Court merely refers to marriages concluded in another Member State. However, this should not allow Member States to refuse recognition of a same-sex marriage concluded outside the EU, if they would recognised a non-EU marriage concluded between people of the opposite sex.

It is of course possible to launch a more fundamental critique on the way in which EU law deals with non-marital relationships. In its earlier case law (*D and Sweden v Council*) on same-sex partnerships, the CJEU already ruled that these could not be equated with marriage. This was, of course, at a time that none of the EU-Member States had opened civil marriage to same-sex partners. But more generally, the question could be asked if EU law, in particular the provisions relating to registered partnerships and durable non-registered/non-marital relationships, does justice to a societal reality in which people increasingly chose to shape their relationships outside the bond of marriage.

The reason that it took so long for a case to reach the CJEU may lie in the fact that, if a same-sex couple consisted of two EU nationals, each spouse would have had independent rights of free movement. This is however different in the case of third country nationals, who can only derive rights from their status as family member. An additional reason may be the fact that it took a brave individual, Adrian Coman, to come forward, not shying away from the spotlight and even refusing the anonymization of the case name. He did so with the support of the Romanian LBGT interest group Accept, which had successfully brought a case fighting LGBT discrimination before the CJEU before (*Accept*).

This is not the EU's *Obergefell*, the case that opened civil marriage to same sex couples in the United States. Given the division of competence between the EU and the Member States it never

had the potential to be. It is, nonetheless, a defining step forward in the acceptance of LGBT rights in the EU legal order. For further advancements in marriage equality, all eyes should now be on the European Court of Human Rights.

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See in more detail:

Rijpma J.J. & Koffeman N.R. (2014), Free Movement Rights for Same-Sex Couples under EU law: What Role to Play for the European Court of Justice?. In: Gallo D., Paladini L., Pustorino P. (Eds.) Same Sex Couples Before National, Supranational and International Jurisdictions. Berlin: Springer Verlag. 455-491.

Other blogs are The Federal Rainbow Dream: On Free Movement of Gay Spouses under EU Law and Awaiting the ECJ Judgment in Coman: Towards the Cross-Border Legal Recognition of Same-Sex Marriages in the EU?.

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