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The Status of Family Member as a Pre-condition of the Free Movement in the EU

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7.1 INTRODUCTION

Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) gives every citizen of the European Union (EU) the right, subject to very few exceptions, to move and reside freely within the territory of the Member States. This freedom of movement means not only that the Member States must not impose direct restrictions in the form of administrative requirements such as visas and residence permits, but also that they must not deter EU citizens from moving by indirect obstacles, including those following from differences of family law. For example, an EU citizen might hesitate to use his/her freedom of movement to another Member State if that State would not recognise his/her marriage or his/her parental relation to his/her adopted children. Similarly, an EU citizen would probably refrain from moving if he/she could not be accompanied by close family members who are not citizens of the EU. Family law is thus of great relevance for the free movement of persons. This applies, in particular, to cross-border family law issues, such as the recognition in the host Member State of a family status created abroad.

This chapter deals with some aspects of the delimitation of the categories of those non-EU citizens who are entitled to move to and reside in an EU Member State in their capacity of family members of an EU citizen (the

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primary right holder).[1] The free movement of such persons is in principle regulated by the EU Directive 2004/38 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.[2] Article 2(2) of the Directive defines family members as the spouse, the partner with whom the EU citizen contracted a registered partnership on the basis of the legislation of a Member State (provided the host Member State treats registered partnerships as equivalent to marriage), direct descendants who are under the age of twenty-one or are dependents, and dependent direct relatives in the ascending line (such as parents and grandparents).

Article 3 declares the listed family members to be indirect beneficiaries of free movement rights, but goes further than that by adding additional categories of persons whose entry and residence, in accordance with the national legislation and subject to an extensive examination of the personal circumstances of the persons concerned, the Member States are obliged to 'facilitate'; these categories comprise certain persons with weaker family ties to the EU citizen concerned, such as 'any other family members' who, in the country from which they have come, are dependents, members of the household, persons requiring personal care by a family member, or partners having a duly attested durable relationship with the EU citizen (the last-mentioned group, comprising mainly *de facto* cohabitees, is in some Member States, such as Sweden,[3] regarded as a legitimate family form regulated by law). However, the right of these persons to have their entry and residence 'facilitated' is much weaker than the entry and residence rights of family members listed in Article 2(2).

As opposed to the criteria of being a dependent, member of household, or a person requiring personal care by the EU citizen, which are basically mere matters of fact, the status of belonging to one of the categories of family members mentioned specifically in Article 2(2) of the Directive (spouse, registered partner, direct descendant, or direct ascendant) is a legal issue, to be answered in principle on the basis of the family law of the host Member State, including its rules of private international law.[4] Only exceptionally there are uniform rules of EU private international law regarding family law status,

[1] This issue is closely related, but not identical, to the right of third-country nationals residing lawfully in the EU to be joined by their family members pursuant to Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

[2] [2004] OJ L158/77.

[3] See the Swedish Cohabitees Act (2003:376).

[4] Persons having a duly attested durable relationship with the EU citizen constitute a borderline category, because different Member States may have different statutory definitions of legally relevant cohabitation that can be duly attested.

such as the provisions on the recognition of divorces and marriage annulments in the EU Regulation 2019/1111 (known as Regulation Brussels IIb).[5] There are presently no EU regulations or directives on the validity of marriages, validity and dissolution of registered partnerships, paternity and other parenthood, and adoptions.[6]

This gives rise to the question whether the Member States have full discretion to deal with these issues or must, to comply with Article 21(1) TFEU and the above-mentioned Directive 2004/38, respect family relationships created abroad pursuant to foreign law. This is of particular interest whenever the family status in question is in the Member State where it is relied on considered reprehensible or is totally unknown.

This question has arisen, and was to some extent answered, in three recent judgments of the Court of Justice of the European Union (CJEU). The importance of the three decisions is underlined by the fact that all of them have been rendered by the Court's Grand Chamber. The purpose of this chapter is to subject the three judgments to a critical analysis, regarding both the conclusions and the reasoning of the CJEU.

7.2 THE CASE OF SAME-SEX MARRIAGE

The first judgment, *Coman v Inspectoratul General*, was rendered on 5 June 2018.[7] It concerned two persons of the same sex who had married in Belgium in accordance with Belgian law. One of the members of the couple lived at that time in Belgium and was an EU citizen (he possessed both American and Romanian nationality), while the other held only American citizenship and continued to live in the United States. After some time, the couple wished to move together to Romania, but the Romanian authorities refused to grant the American spouse long-term residence rights on grounds of family reunion pursuant to EU law, because in accordance with Article 227 of the Romanian Civil Code 'marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be

[5] Council Regulation (EU) No 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility and on international child abduction (recast) [2019] OJ L178/1.

[6] On 7 December 2022, the European Commission submitted a proposal for a Council regulation on jurisdiction, applicable law, recognition of decisions, and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final.

[7] Case C-673/16 *Coman and others* EU:C:2018:385. See also Chapter 2 by Alina Tryfonidou and Chapter 9 by Geoffrey Willems.

recognised in Romania'. The applicants argued that this provision was contrary to the Romanian Constitution, so the matter was referred to the Romanian Constitutional Court which, in turn, had doubts about the proper interpretation of the EU Directive 2004/38 and turned to the CJEU for a preliminary ruling.

To start with, it must be noted that the case did not, in fact, fall directly within the scope of application of Directive 2004/38. The CJEU had on several previous occasions interpreted this Directive, in accordance with its wording,[8] as to mean that it governs only those situations where an EU citizen and his family members who are third-country nationals want to enter and reside in a Member State other than that of the EU citizen's nationality. Consequently, it does not confer a derived right of residence on third-country nationals who intend to accompany or join their EU relative in the latter's own Member State.[9] However, the full effect of the freedom of movement granted to EU citizens by Article 21(1) TFEU presupposes that an EU citizen can bring his close family with him also when he returns to his own Member State, since he would otherwise be discouraged from exercising that freedom by leaving his State. The third-country family members of an EU citizen who moves to his own Member State, even though not entitled to a derived right of residence pursuant to Directive 2004/38, can thus be granted such right directly on the basis of Article 21(1) TFEU. The conditions for obtaining such right must not, according to the CJEU, be stricter than those stipulated in Directive 2004/38, which means that the Directive is to be applied by analogy even in the situation dealt with in the *Coman* judgment.

The CJEU went on to admit that a person's marital status is a matter that falls within the competence of the Member States, which are thus free to decide whether or not to allow marriage for persons of the same sex in their domestic law. However, the exercise of that competence must comply with EU law. To permit the Member States to accord or refuse residence rights to third-country nationals who lawfully married an EU citizen in another Member State where the EU citizen genuinely resided at that time, would make the freedom of movement of EU citizens vary from one Member State to another depending on the forum Member State's attitude towards same-sex marriages. Furthermore, a refusal of residence rights could in its consequences

[8] Article 3(1) of Directive 2004/38 (n 2) provides that '[t]his Directive shall apply to all Union citizens who move to or reside in a Member State *other than that of which they are a national* and to their family members. . .' (emphasis added).

[9] See, for example, the Grand Chamber judgment in Case C-457/12 *S v Minister voor Immigratie* EU:C:2014:136.

amount to denying the EU citizen his right to return to his own Member State together with his spouse.

A restriction on the freedom of movement may, nevertheless, be justified if it is based on objective considerations of public interest, is proportionate to its legitimate objective, and does not go beyond what is necessary to attain that objective. Some Member States submitted observations to the CJEU referring to the fundamental nature of the institution of marriage as a bond between a man and a woman and claimed that even if a refusal to accept same-sex marriages might constitute a restriction of the rights under Article 21(1) TFEU, such a restriction is justified on grounds of public policy and national identity protected by Article 4(2) TFEU.

This reasoning was, however, not accepted by the CJEU, which stated that any restrictions imposed on a fundamental right such as the freedom of movement under Article 21 TFEU must be interpreted strictly and cannot be determined unilaterally by each Member State without control by the EU. The public policy exception may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. The obligation of a Member State to recognise a same-sex marriage 'for the sole purpose of granting a derived right of residence to a third-country national' does not, according to the CJEU, undermine the institution of marriage in that Member State. Neither does it undermine the national identity there or pose a threat to the public policy. Furthermore, any national restrictions on the freedom of movement must be consistent with the fundamental rights protected by the Charter of Fundamental Rights of the EU,[10] including its Article 7 guaranteeing protection of private and family life. That Article must be understood in the same way as the corresponding Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which is interpreted by the European Court of Human Rights (ECtHR) as to apply to both same-sex and opposite-sex couples.[11]

The CJEU concluded, therefore, that Article 21(1) TFEU gives a third-country national of the same sex as his EU spouse, who married in accordance with the law of the Member State where the EU spouse had genuine residence at that time, the right to move to and reside in the Member State of which the EU spouse is a national irrespective of the fact that the marriage

[10] [2007] OJ C303/1.

[11] The attitude of the ECtHR towards same-sex couples is demonstrated, for example, by its judgment in the case *Orlandi and Others v Italy*, Application no 26431/12, where the Court held that States are still free to restrict access to marriage to different-sex couples, but acknowledged that same-sex couples are entitled to such legal recognition and protection that does not leave them in a legal vacuum.

is not recognised there. As mentioned above, this derived right of residence must not be subjected to conditions that are stricter than those stipulated in Directive 2004/38.

While the outcome of the *Coman* case, protecting the right to family life of same-sex married couples, can hardly be objected to, some parts of the reasoning and terminology used by the CJEU seem to be more controversial. It is noteworthy that the Court repeatedly affirms the obligation for a Member State to 'recognise a marriage between persons of the same sex', even though merely for the sole purpose of granting a derived right of residence to a third-country national.[12] This obligation to recognise the marriage is not mentioned in the holding itself and it is almost certainly not meant to imply the duty to consider the couple to be actually married. Considering the same couple to be married for some purposes only creates a situation where the question of whether they are married cannot be answered by a simple 'yes' or 'no'. It is true that limping marriages are a well-known phenomenon in private international law, but they normally concern marriages that are recognised in some countries only, and not marriages that are recognised and unrecognised in the same country depending on the context.

It is interesting that in the *Coman* judgment the CJEU, when applying Article 21(1) TFEU in the light of analogies borrowed from Directive 2004/38, relied on the Directive's Article 2(2) and discussed whether the same-sex marriage could be recognised with the effect that the third-country citizen involved would be considered a 'spouse' for the purposes of a derived right of residence. The Court did not discuss the possibility of analogous application of Article 3(2) of the Directive, that might probably qualify the same-sex spouse as an 'other family member' or at least as a partner with whom the EU citizen had 'a durable relationship, duly attested'. The probable main reason of the Court's choice on this point is that whereas Article 2(2) grants the same-sex spouse an almost automatic right of entry and residence, Article 3(2) would place him in a much weaker position, merely obliging the Member State concerned to undertake an extensive examination of his personal circumstances to conclude whether his family life was of such a kind that would entitle him to family unification pursuant to the national legislation of that Member State. It is true that a decision refusing the right of entry or residence would even in such a case have to provide justification and comply with Article 7 of the Charter of Fundamental Rights of the EU and Article 8 ECHR, but the compulsory extensive examination of personal circumstances

[12] See *Coman and others* (n 7), paras 45 and 46.

could take time and the outcome would be much more uncertain, thus subjecting same-sex couples to discrimination.

One may also question the wisdom of limiting the holding of the *Coman* judgment explicitly to situations where the same-sex marriage has been concluded in an EU Member State pursuant to its law, an additional condition being that the EU citizen concerned must have been a genuine resident there at the time. The arguments used by the CJEU in support of its decision should reasonably carry the same weight even if the same-sex marriage in question had been concluded in the United States pursuant to American law during the EU citizen's short visit there. There are fortunately no reasons to interpret the Court's holding *e contrario* as to mean that under such circumstances the outcome would be different. It is submitted that the CJEU simply chose to limit the holding of its judgment to the circumstances in the case at hand and refrained from expressing an opinion on other situations.

It follows clearly from the wording of the *Coman* judgment that the CJEU did not intend to oblige the Member States to give same-sex marriages concluded in another Member State full effects under private law, for example as to maintenance, marital property regime, or inheritance. This remains an open question though, since even differences between Member States regarding such issues may conceivably discourage a couple from making use of the freedom of movement within the EU, especially in view of the increasing application of the law of the country of habitual residence.[13] Theoretically, it is also possible that a refusal to recognise the married status as such might in some cases be deemed to constitute an unlawful restriction on free movement, for example, if the refusal by a Member State to recognise same-sex couples as married carries such a social stigma that it deters such couples from moving there.

7.3 THE CASE OF ISLAMIC *KAFALA*

The second judgment, *SM v Entry Clearance Officer*, was rendered on 26 March 2019.[14] It differs from the *Coman* case in two very important aspects. First, the disputed family member status was created in and pursuant to the law of a non-Member State, and second, the status itself was of a kind

[13] It is noteworthy that the CJEU has held that the mere fact of having different surnames in different Member States could create serious inconveniences constituting an obstacle to free movement. See, for example, Case C-353/06 *Grunkin-Paul* EU:C:2008:559.

[14] Case C-129/18 *SM* EU:C:2019:248.

unknown in the law of the Member State to which the third-country citizen intended to move.

The judgment involved a French married couple residing in the UK, which at the relevant time was an EU Member State. An Algerian court assigned to them the parental responsibility for an abandoned child under the Algerian *kafala* system. This institution, based on Islamic law, gave the couple parental authority and responsibility which was in some respects similar to adoption. The couple undertook, *inter alia*, to give the child an Islamic education, keep her fit morally and physically, supply her needs, look after her teaching, treat her like natural parents, protect her, defend her before judicial instances, and assume civil liability for her detrimental acts. They were also authorised to receive family allowances, subsidies, and other benefits; to sign any administrative and travel documents; and to take the child out of Algeria. Furthermore, the child's surname was officially changed to that of the couple.[15]

If deemed to be an adopted child of the French couple, the Algerian child would be classified as their direct descendant and, as such, would enjoy the right of entry and residence in the UK as their family member pursuant to Article 2(2) of Directive 2004/38.[16] Nevertheless, the British authorities refused to clear the child for entry to the UK as an adopted child, on the ground that *kafala* was not recognised as adoption under UK law.

After the matter was referred to the CJEU, the Court pointed out that Article 2(2) does not designate the law determining the meaning and scope of the concept of 'direct descendant' and that under such circumstances the need for a uniform application of EU law and the principle of equality require that the concept must normally be given an independent and uniform interpretation throughout the EU. According to the CJEU, the concept of 'direct descendant' commonly refers to the existence of a direct parent–child relationship between the two persons concerned. The concept must be construed broadly, so that it includes both the biological and the adopted children, since it is established that adoption creates a legal parent–child relationship. Where there is no parent–child relationship, the child cannot, according to the Court, be described as a direct descendant for the purposes of the Directive.

The Court examined the legal effects of *kafala* and noted, *inter alia*, that unlike adoption, which is forbidden by Algerian law, the placing of a child under a *kafala* guardianship does not mean that the child becomes the guardian's heir. Furthermore, a *kafala* relationship comes to an end when

[15] See ibid, paras 27 and 28.

[16] In this case, as opposed to the *Coman* judgment, Directive 2004/38 was directly applicable, since the UK was not the Member State of the couple's nationality.

the child attains the age of maturity and may even be revoked at the request of the biological parents or of the guardian. The Court concluded that as opposed to adoption, *kafala* does not create such a parent–child relationship between the child and its guardian that would qualify the child as direct descendant in the sense of Article 2(2) of Directive 2004/38.

However, the Court did not stop there but went on to point out that the child, even though not a direct descendant under Article 2(2), could, depending on its personal circumstances in the individual case, be entitled to a privileged treatment pursuant to Article 3(2), that is, to have its entry 'facilitated'. Recital 6 of Directive 2004/38 mentions that to maintain the unity of the family 'in a broader sense', the situation of persons who do not enjoy an automatic right of entry and residence since they are not family members should be examined by the Member State concerned on the basis of its own national legislation, taking into consideration their relationship with the EU citizen and any other relevant circumstances, such as their financial or physical dependence on the same. The examination should be extensive and, in the event of a negative decision, provide justification by stating the reasons for the refusal. The CJEU confirmed that the Member States have a wide discretion as regards the selection of the factors to be taken into account at this examination, but stressed that in accordance with Recital 31 of Directive 2004/38, their discretion must be exercised in the light of and in line with the provisions of the Charter of Fundamental Rights of the EU, whose Article 7, recognising the right to respect for private and family life, has the same meaning and scope as Article 8 ECHR.

The CJEU found it apparent that the actual relationship between a child placed under the *kafala* system and its guardians may, depending on all the current and relevant circumstances of the case, constitute a family tie falling within the definition of family life protected by these provisions. According to the CJEU, the assessment by the authorities of the Member State concerned must be balanced and reasonable and take into consideration, *inter alia*, the age at which the child was placed under the *kafala* system, whether the child has lived with its guardians since its placement, the closeness of the personal relationship between them, and the extent to which the child is legally and financially dependent on its guardians. The risk that the child will become a victim of abuse, exploitation, or trafficking must also be taken into account, but if it is established that the child and its *kafala* guardians will lead a genuine family life, the best interests of the child demand, in principle, that it be granted the rights of entry and residence to live with its guardians in the Member State where they reside.

It might seem close at hand to understand the CJEU judgment as to mean that the Court, while refusing to equal *kafala* to adoption,[17] has recognised it as a valid family-law status *sui generis*, with legal consequences of its own. Such interpretation would, however, be incorrect. It is true that the Court considered the child to belong to the category of 'any other family members' under Article 3(2) of Directive 2004/38, but this is a very wide and vague category with no family law effects at all. Belonging to this 'extended family' gives no automatic right of entry or residence, unless the third-state national in question fulfils additional conditions such as being a dependent or a household member.

There is, of course, nothing preventing Member States from equalling *kafala* to adoption in their domestic family law and/or in their private international law for purposes other than the interpretation of the EU Directive 2004/38. The recognition of *kafala*, as an institution intended to protect orphans and abandoned children, could as such hardly be considered to violate the public policy of the host Member State.[18] In this respect, *kafala* differs not only from a same-sex marriage but also from, for example, polygamous marriages.

A polygamous marriage appears, in fact, to be a particularly problematic example, since it questions the whole concept of spouse and family life prevailing in practically all EU Member States. It is very doubtful whether a Member State, even if recognising, in principle, the validity of polygamous marriages concluded abroad,[19] must or can treat the parties to such marriages as spouses under Article 2(2) of Directive 2004/38 or as partners with a duly attested durable relationship under Article 3(2) of the same. In any case, Article 27 of the Directive allows Member States to restrict the freedom of movement and residence on grounds of public policy. Regarding the possibility of direct application of Article 21(1) TFEU, it is submitted that its interpretation should be based on an analogous application of Article 4(4) of Directive 2003/86 on the right to family reunification,[20] which provides that in the event of a polygamous marriage, where the third-country national

[17] It is worth mentioning that Article 4(b) of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, ratified or acceded to by all EU Member States, excludes adoption from the Convention's scope of application, whereas its Article 3(e) covers explicitly 'provision of care by *kafala* or an analogous institution'.

[18] This does not necessarily apply to all of *kafala*'s purported legal effects, such as the obligation of the guardians to give the child an Islamic education.

[19] This was the position of Sweden prior to 1 July 2021, provided that at the time of the conclusion of the marriage none of the parties was a Swedish citizen or habitual resident.

[20] See n 1.

residing in the EU already has a spouse living with him, the Member State concerned 'shall not authorise the family reunification of a further spouse'. There are no reasons to treat, in this respect, the right to reunification with an EU citizen more generously than reunification with a third-country national residing lawfully in the EU.

7.4 THE CASE OF SAME-SEX PARENTHOOD

The third judgment, *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, was rendered on 14 December 2021.[21] The case concerned a child of a married same-sex couple, consisting of a British and a Bulgarian citizen. The child was born and resided in Spain and its Spanish birth certificate listed both parents as 'Mothers'. The Bulgarian parent applied to Bulgarian authorities for a Bulgarian birth certificate, such certificate being necessary for obtaining a Bulgarian identity card and a Bulgarian passport. The application was rejected because the applicant refused to provide information about the identity of the child's biological mother and the fact that the recording of two mothers on a birth certificate was contrary to the public policy of Bulgaria. Besides, the Bulgarian birth certificate form did not provide for the option of two mothers. On the other hand, the Bulgarian court requiring a CJEU preliminary ruling seems to have assumed that the child was in fact a citizen of Bulgaria (and thereby also of EU), probably because under the Bulgarian Constitution, a child is a Bulgarian citizen if at least one of the parents is a Bulgarian national.

The CJEU noted that an identity card or a passport were necessary to enable the child to exercise the right to move and reside within the territory of the Member States guaranteed by Article 21(1) TFEU.[22] The Court confirmed that a person's status, such as parentage, is a matter within the competence of the Member States, which are thus free to decide whether or not to allow joint parenthood for persons of the same sex under their national law. However, in exercising that competence, each Member State must comply with EU law, including the obligation to recognise the parent–child relationship between the child and each of the same-sex parents in the context of the child's exercise of its rights under Article 21(1) TFEU. The CJEU

[21] Case C-490/20 *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* EU:C:2021:1008. The same issues were dealt with by the CJEU in Case C-2/21 *Rzecznik Praw Obywatelskich* EU:C:2022:502, which was decided on 24 June 2022 by a mere order instead of a judgment, since the ruling could be clearly deduced from the existing case law, namely the *V.M.A.* judgment. See also Chapter 2 by Alina Tryfonidou and Chapter 9 by Geoffrey Willems.

[22] In fact, Article 4(3) of Directive 2004/38 (n 2) obliges the Member States to issue to their own nationals an identity card or passport stating their nationality.

added that this does not pose a threat to the public policy of the Member States, which are not required to recognise the child–parent relationship for purposes other than the exercise of the rights derived from EU law, such as for claims to inheritance or maintenance. The judgment followed much of CJEU's reasoning in the *Coman* case, which need not be repeated here.

The situation in the *Pancharevo* case differs from that in the other two judgments above, because in *Pancharevo* it was common ground that the child in question was an EU citizen and, as such, a primary (as opposed to derivative) holder of the right to free movement within the EU. Nevertheless, the effective exercise of this right depended on the possession of an identity card or a passport issued by the Member State of the child's nationality. The refusal of that State to provide such documents due to its refusal to recognise joint parenthood of a same-sex couple would deprive the child of its rights under EU law. This was understandably found unacceptable by the CJEU. On the other hand, an official document confirming the joint parenthood without indicating that this is for the sole purpose of free movement may be abused, for example, if it is used abroad for the purpose of claiming inheritance or other such right.

7.5 CONCLUSION

The discussed judgments can be understood as to mean that the nationals of the EU Member States have not merely both national and EU citizenship but even a double personal status, namely one for the enjoyment of rights under EU law and another for purposes governed by national law such as maintenance or inheritance. This may create some confusion, since neither the national legal systems nor the perception of the law by the populations of the Member States reckon with situations where the same person is at the same time both married and single, or both a parent and a stranger in relation to the same child.

It would, therefore, be preferable to leave the recognition of family status as such to national law (including its private international law rules to the extent that they have not been unified by the EU) and disconnect, in these cases, the issue of family status from the specific consequences of that status. By doing so, even officially unrecognised and invalid status can be given selected substantive effects, for example, regarding the right to free movement pursuant to EU law. In the meantime, the risk of confusion could, at least in theory, be avoided by requesting the Member States to produce model document forms indicating whether the status stated therein is limited to certain purposes only.