



Case Note: Coman and Others: Free Movement and the Right of Residence of Same-Sex Couples in the EU

Introduction

On 5 June 2018, the Court of Justice of the EU (CJEU) rendered a judgement in the case of *Coman and others v. Romania* by way of a preliminary reference procedure. The case relates to the free movement of EU citizens between EU member states under Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004. The issue was whether the Directive could be enforced in such a way as to mandate Member States who define marriage as the union between one man and one woman to give legal effect to a same-sex marriage concluded in another EU member state.

The case dates back to 2010, when Romanian citizen Adrian Coman and his partner, US citizen Robert Claibourn Hamilton, obtained a marriage certificate in Belgium. When Romania, in line with its national law, refused to consider them a married couple in Romania, they sued the government. The couple argued that their right to freedom of movement within the EU had been violated. In 2016, the Romanian Constitutional Court referred questions of interpretation to the CJEU.

The four following questions were asked to the CJEU:

- 1. Does the term ‘spouse’ in Article 2(2)(a) of Directive 2004/38/[EC], in conjunction with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married under the law of a Member State other than the host Member State?***
- 2. If the answer to Question 1 is in the affirmative, do Articles 3(1) and 7(1) of Directive 2004/38/[EC], in conjunction with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, require the host Member State to confer the right of residence in its territory or for a period of longer than three months on the same-sex spouse of a citizen of the European Union?***
- 3. If the answer to Question 1 is in the negative, can the same-sex spouse, from a State which is not a Member State of the European Union, of a European Union citizen, to whom the citizen concerned is lawfully married under the law of a Member State other than the host Member State, be classified as ‘any other family member’ within the meaning of Article 3(2)(a) of Directive 2004/38/[EC] or ‘partner with whom the Union citizen has a durable relationship, duly attested’ within the meaning of Article 3(2)(b) of Directive 2004/38/[EC], with the corresponding obligation for the host Member State to facilitate entry and residence for him, even though the host State does not recognise marriages between members of the same sex or provide for an alternative form of legal recognition, such as registered partnerships?***
- 4. If the answer to Question 3 is in the affirmative, do Articles 3(2) and 7(2) of Directive 2004/38/[EC], in conjunction with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, require the Member State to confer the right of residence***

in its territory or for a period of longer than three months on the same-sex spouse of a citizen of the European Union?

Though the case is framed in terms of free movement, ultimately, the question at the heart of this case is whether EU Member States acting as host States are under an obligation to give legal effect to civil acts concluded under the conditions and legal order of another Member State, despite the fact that such an act could not be legally and validly concluded under the internal legal rules of the host State.

The CJEU Judgment in *Coman and others*

Marriage falls within national competence

The CJEU upheld its well-established jurisprudence, according to which **‘a person’s status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States and EU law does not detract from that competence.’**¹ Consequently, Member States are free to decide whether or not to allow marriage for persons of the same sex.

Definition of ‘spouses’

The CJEU was cautious in stating that the term ‘spouse’ within the meaning of Directive 2004/38 is gender-neutral and *may* therefore cover the same-sex spouse of the Union citizen concerned.²

The free movement of same-sex couples

The CJEU found that, in the case of a same sex marriage legally concluded in an EU Member State between an EU and a non-EU citizens who then seek to reside in another EU Member State (host State), the host State should allow entrance and residence. The CJEU stated there is an ‘obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national.’³ **But the CJEU also clarified ‘such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex.’**⁴

The right of residence

The CJEU focused on the right of residence of Mr Hamilton, as a non-EU citizen married to an EU citizen on the territory of an EU Member State. However, it must be stated that Mr Coman and Mr Hamilton did benefit from the right of residence in accordance with Romanian law even before the CJEU judgment was handed down,

¹ *Coman and others*, C-673/16 (5 June 2018), para 37.

² *Id.*, para 35.

³ *Id.*, para 45.

⁴ *Ibid.*

as the case dealt with a wrongful application of the law and not with a lack of legal provisions.

Public policy

The CJEU gave a narrow interpretation of the competence Member States have to invoke public policy as a ground for a refusal to recognise same-sex marriage. The CJEU held that ‘an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.’⁵

What is the legal situation in the area of marriage?

Explicit protections for marriage and family are contained in international and European human rights conventions, such as Article 12 of the European Convention on Human Rights (ECHR), Article 16 of the Universal Declaration of Human Rights (UDHR), Article 23 of the International Covenant on Civil and Political Rights (ICCPR), Article 23 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 9 of the Charter of Fundamental Rights of the European Union (EU Charter).

These international instruments outline that ‘men and women of marriageable age have the right to marry and to found a family,’⁶ and that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’⁷

According to the established case-law of the ECtHR, Article 12 [the right to marry] ‘enshrines the traditional concept of marriage as being between *one man and one woman*.’⁸

Furthermore, ‘States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition’ of same-sex relationships, and its differences concerning the rights and obligations conferred by marriage.’⁹

The regulation of marriage falls within the competence of the Member States, according to the jurisprudence of the CJEU in *Maruko v. Germany*, *Römer v. Germany* and *David L. Parris v. Trinity College Dublin*,¹⁰ and the jurisprudence of the European Court of Human Rights (ECtHR) in *Schalk and Kopf v. Austria*, *Gas and Dubois v. France*, *Chapin and Charpentier v. France*.

⁵ *Id.*, para 46.

⁶ Article 12 ECHR; see also Article 23 (2) ICESCR and Article 16 (1).

⁷ Article 16 (3) UDHR, Article 23 ICCPR.

⁸ *Hämäläinen v. Finland*, no. 37359/09 (16 July 2014), paras 71 and 96, referred to also in *Chapin and Charpentier v. France*, no. 40183/07 (9 June 2016), para 37 (emphasis added).

⁹ *Hämäläinen v. Finland*, no. 37359/09 (16 July 2014), paras 71 and 96, referred to also in *Chapin and Charpentier v. France*, no. 40183/07 (9 June 2016), para 37 (emphasis added).

¹⁰ *David L. Parris v. Trinity College Dublin*, C-443/15 (24 November 2016), para 59.

Additionally, the ECtHR has consistently held that the ECHR does not guarantee a right to, and a corresponding obligation on, Member States to introduce same-sex civil partnerships or same-sex marriage. In *Hämäläinen v. Finland*, the Grand Chamber of the ECtHR ruled that neither Article 8 protecting private and family life, nor Article 12 guaranteeing the right to marry, can be understood ‘as imposing an obligation on Contracting States to grant same-sex couples access to marriage.’¹¹ This interpretation was consolidated by the recent judgment in *Chapin and Charpentier v. France*. Therein, recalling *Hämäläinen v. Finland* and *Oliari and Others v. Italy*, the ECtHR unanimously confirmed the non-existence of a right to same-sex marriage.¹²

What are the obligations for Member States following *Coman and others*?

- In case of **an EU and a non-EU citizen who get legally married in one EU Member State**, then the application of *Coman and others* should focus on the right of residence based on *family life*, not on the status of spouses. If rights of residence are already in domestic law, that would make the recognition of the status of ‘spouses’ unnecessary.
- In case of **two EU citizens of the same sex who get legally married in one EU Member State**, the host Member State is not obliged to act in any way. Since EU citizens have the right to reside everywhere in the EU, and *Coman and others* is limited to the recognition only for the purpose of residence, there is no need for recognition of their status of spouses.
- In case of **an EU and a non-EU citizen of the same sex who get legally married outside the EU**, *Coman and others* might not be applicable, given that the marriage is contracted under the rules of a non EU Member. This is primarily because of the scope of the Directive on Free Movement and the more considerable slippery slope this theory might produce.

Recommendations for Member States

Ensure that domestic legislation provides for rights of residence

Member States should revise or amend national laws, so as to allow for a right of residence to same sex couples who get married abroad. The basis for such a right of residence should be family life, and not marriage or the status of ‘spouses’, to ensure that domestic protections are not undermined by cross-border understandings of marriage.

Do not introduce mechanisms of recognition of the status of ‘cross-border’ same sex couples

Member States should avoid putting in place a process by which the partners are recognised as spouses (before the notary or a public service), because that would

¹¹ *Hämäläinen v. Finland*, no. 37359/09 (16 July 2014), para 71.

¹² *Chapin and Charpentier v. France*, no. 40183/07 (9 June 2016), para 39.

create two categories and definitions of marriage: a domestic and a cross—border one. This would lead to a normative chaos that would even amount to the overriding of national Constitutions.

Communicate the limits of the obligations following Coman and others

Inform Members of Parliament, Government officials, representatives of EU Permanent Representation and Members of the European Parliament about the limited scope of implementation of the *Coman and others* judgment.

Organize a hearing or an event to present the narrow judgment in Coman and others

Organize a hearing or an event at your national parliament together with Members of the Parliament, to present the limited scope of the CJEU judgment in *Coman and others*.