Introductory note to Relu Adrian Coman and others v. Inspectoratul General Pentru Imigrari and Ministerul Afacerilor Interne

Article

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INTRODUCTORY NOTE TO CASE C-673/16 RELU ADRIAN COMAN AND OTHERS V. INSPECTORATUL GENERAL PENTRU IMIGRARI AND MINISTERUL AFACERILOR INTERNE

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Introduction

On June 5, 2018, the Court of Justice of the EU (ECJ or Court) delivered its judgment in the case of *Coman*.[1] In this important ruling, the Court made it clear that under EU law, the same-sex spouse of an EU citizen can move and reside with the latter in the territory of another EU Member State, just as the opposite-sex spouse of an EU citizen can do. Although the case is very important in that for the first time the Court has recognised that same-sex marriages must be treated in exactly the same way as opposite-sex marriages for a specific legal purpose (family reunification rights of EU citizens who exercise EU free movement rights), it creates a number of new questions and highlights a number of gaps which persist even following its delivery.

Background

The EU has always had as one of its core objectives to ensure that EU Member State nationals – who, since 1993, are, in addition, EU citizens[2] – can move freely between Member States. For this purpose, there are a number of Treaty provisions which prohibit obstacles to the free movement of EU citizens (Articles 21, 45, 49, and 56 TFEU - the free movement provisions).

If EU citizens cannot be joined by close family members when they move between EU Member States, this is likely to inhibit their exercise of free movement rights. Accordingly, EU law requires Member States to accept within their territory the close family members of Union citizens who exercise free movement rights. The rights enjoyed by EU citizens to move together with their close family members are commonly known as "family reunification rights". The source of family reunification rights for Union citizens who move to a Member State *other than that of their nationality* is, currently, Directive 2004/38,[3] whilst Union citizens who *move back to their Member State of nationality* after having exercised free movement rights ("returnees") are covered directly by the free movement provisions,[4] though Directive 2004/38 applies "by analogy".[5]

Directive 2004/38 provides that Union citizens can be joined or accompanied by certain family members in the Member State to which they move. "Family members" are defined in Article 2(2) of the Directive and include "the spouse" of the Union citizen. In the *Coman* case it was, exactly, the interpretation of this provision that was at issue and, in particular, the question

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was whether the term "spouse" includes the *same-sex* spouse of a Union citizen who exercises free movement rights.

The facts from which the reference arose were as follows: Mr Coman (who holds Romanian and US nationality) and Mr Hamilton (who holds US nationality) met in the US in 2002 and lived there together from 2005 to 2009, when Mr Coman took up residence in Brussels. The couple married in Belgium in 2010. They subsequently contacted the Romanian authorities, to enquire whether Mr Hamilton – in his capacity as Mr Coman's spouse – could obtain the right to reside lawfully in Romania on the basis of EU law, together with Mr Coman who wished to return to Romania, his Member State of nationality. The Romanian authorities replied in the negative, noting that Mr Hamilton cannot be recognised as Mr Coman's spouse, as under Romanian law, same-sex marriages are prohibited and same-sex marriages entered into abroad are not recognised. The couple, then, brought an action against that decision, seeking a declaration of discrimination on the ground of sexual orientation as regards the exercise of EU free movement rights. They also argued that the Romanian legislation which does not recognise same-sex marriages entered into abroad is unconstitutional, in that it infringes the provisions of the Romanian Constitution that protect the right to personal life, family life and private life, and the provisions relating to equality. The first instance court hearing the case referred the matter to the Romanian Constitutional Court which, in its turn, decided to stay the proceedings and make a reference for a preliminary ruling to the ECJ, asking, essentially, whether a Union citizen who has exercised free movement rights can enjoy EU family reunification rights with his *same-sex* spouse in the Member State to which he moves.

The ECJ Judgment

The Court began its ruling by explaining that since Mr Coman was a "returnee", a right of residence for Mr Hamilton could not be derived directly from Directive 2004/38, but, rather, from the free movement provisions and, in particular, Article 21 TFEU; the 2004 Directive, however, applied "by analogy".[6] The ECJ, then, recalled that where during the "genuine residence" of a Union citizen in a Member State other than that of which he is a national in accordance with the conditions set out in Directive 2004/38 "family life is created or strengthened", that citizen's family life should continue when he returns to the Member State of which he is a national, otherwise he would be discouraged from exercising his free movement rights.[7] In previous case-law the ECJ held that such "genuine residence" can exist when the Union citizen has settled in another EU Member State for over three months.[8]

The Court then repeated that a person's civil status is a matter that falls within national competence and is, thus, up to the Member States to decide whether or not to allow same-sex marriage within their territory.[9] Nevertheless, when exercising that competence, Member States must comply with EU law and, in particular, with the free movement provisions.[10] The Court explained that the refusal by a Member State to recognise – "for the sole purpose" of granting family reunification rights – an EU citizen's same-sex marriage, concluded in another Member State during the EU citizen's period of genuine residence there, may constitute an obstacle to the right to free movement and residence enjoyed by that person under Article 21 TFEU.[11]

The Court then considered whether such a refusal can be justified by public-interest considerations, specifically, public policy and respect of national identity.[12] It concluded that the obligation for an EU Member State to recognise a same-sex marriage concluded in another Member State *for the "sole purpose"* of granting family reunification rights in a situation involving a Union citizen who has exercised free movement rights "does not undermine the national identity or pose a threat to the public policy of the Member State concerned".[13] Accordingly, it is not justified and, as such, constitutes an obstacle to free movement which is in breach of Article 21 TFEU.

Conclusion

The ruling is hugely important not merely from a symbolic point of view but, also, for a number of practical reasons. The judgment provides much-needed clarity and legal certainty for same-sex couples who conclude a marriage in an EU Member State and who wish to exercise EU free movement rights. Moreover, although the ruling offers an interpretation of the term "spouse" solely for the purpose of family reunification in situations when a Union citizen exercises free movement rights, it is likely to have wider implications: once a Member State accepts – for the purpose of EU family reunification – that a same-sex married couple are "spouses", it would appear anomalous to strip them of this status for other legal purposes (e.g. taxation, pensions, inheritance, hospital visitation rights). Accordingly, even if the EU itself will be reluctant to take the additional step of requiring Member States to recognise same-sex marriages contracted in other EU Member States for purposes other than family reunification, the Member States themselves may feel the need to proceed with such a step, simply because it will be impracticable not to do so.

At the same time, while the ruling should be applauded for its boldness, it does not "conclude" the matter of same-sex marriage from the point of view of EU law but, rather, creates a number of new questions and highlights a number of gaps which persist even following its delivery.

First, the Court made repeated references to marriages that were concluded in an EU Member State – does this mean that if Mr Hamilton and Mr Coman happened to have married in the US instead of Belgium, the ECJ would rule that Romania was not obliged to recognise them as spouses?

Second, it is only when a Union citizen has taken-up *genuine* residence in the territory of another Member State (meaning, lawful residence of over three months) *and* during that period of genuine residence has established and strengthened family life, that she can claim family reunification rights on her return to her Member State of nationality. This can put to rest fears that the ruling can lead to "marriage tourism" as the above condition ensures that EU citizens who reside in a EU Member State that has not opened marriage to same-sex couples cannot side-step its laws by moving with their partner to another EU Member State solely in order to marry and then immediately return to that State, claiming the right to be recognised as a married couple on the basis of *Coman*.

Third, the case is concerned only with *Union citizens* and the free movement rights they derive from EU law: it does not provide an answer to the question of whether the term "spouse" includes a same-sex spouse when used in the context of the Family Reunification Rights Directive,[14] which governs the family reunification rights of *non-EU* nationals.

Finally, the ruling only applies in situations that fall within the scope of EU free movement law and thus cannot help married same-sex couples who are in a situation which has no connection with EU free movement law. This highlights the (reverse) discrimination suffered by same-sex couples who have not moved between EU Member States. For instance, if Mr Coman had merely moved from Romania to the US, married Mr Hamilton in the US, and returned to Romania directly from the US, the situation would fall outside the scope of EU free movement law and, thus, family reunification rights would not be available under EU law.

Given that the delicate nature of the issue of the legal recognition of same-sex unions means that it is unlikely that political action at EU level will be taken to fill-in the above persisting gaps and clarify the issues that remain unresolved, it can only be hoped that the ECJ will be given the opportunity to do so in the near future.

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[1] Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociaţia Accept v. Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, Preliminary Ruling (June 5, 2018) ECLI:EU:C:2018:385 [hereinafter judgment or ruling], http://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10011315.

[2] Article 20 TFEU.

[3] Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (2004) Official Journal L158, p. 77.

[4] Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh*, Preliminary Ruling (July 7, 1992) EU:C:1992:296 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0370; Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind*, Preliminary Ruling (December 11, 2007) EU:C:2007:771 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62005CJ0291.

[5] Case C-456/12, *O. and B. v. Minister voor Immigratie, Integratie en Asiel*, Preliminary Ruling (March 12, 2014) EU:C:2014:135, para. 50 http://curia.europa.eu/juris/document/document.jsf?text=&docid=149082&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=127675.

[6] *Coman supra* note 1, paras. 18-23 and 25.

[7] *Id*. at 24.

[8] *O. and B. supra* note 5, para. 59.

[9] *Coman supra* note 1, para. 37.

[10] *Id*. para. 38.

[11] *Id*. para 40.

[12] *Id*. paras 41-50.

[13] *Id*. paras 45-46.

[14] Directive 2003/86 on the right to family reunification (2003) Official Journal L251, p. 12, Art. 4.