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SAME-SEX SPOUSES' RIGHTS IN THE ECJ'S *COMAN* CASE

ABSTRACT. In its Coman judgment of 5 June 2018 the Grand Chamber of the Court of Justice of the European Union (ECJ or the Court) gave a positive answer to the question whether the same-sex spouse of an EU citizen has a derived right to move and reside in another Member State with the EU citizen.

Firstly, confirming established case-law, the ECJ affirmed that Directive 2004/38/EC applies by analogy to an EU citizen who was settled in another Member State and then returned to his Member State of nationality. Therefore, the right to move and reside freely in the EU under Article 21(1) TFEU entitles the Union citizen to invoke EU free movement law even against the Member State of which he is a national.

Secondly, the ECJ gave a broad interpretation of the term 'spouse' provided for in Article 2(2)(a) of Directive 2004/38 assuming it is a gender-neutral expression, namely a person who is legally married to another. For the sole purposes of EU free movement law, the term 'spouse' entitling to the right of residence in another Member State for a period longer than three months under Article 7(2) of Directive 2004/38 comprehends the same-sex person with whom the EU citizen has contracted a marriage according to a Member State national law.

In conclusion, given the significance of freedom of movement in EU law, Member States are not allowed to deny the right to move and reside for more than three months to the same-sex spouse of an Union citizen for the only reason that the national law of the host Member State does not recognize the homosexual marriage lawfully contracted in another Member State.

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The preliminary ruling delivered on 5 June 2018 in the *Coman* case by the Court of Justice¹ has been welcomed as a further step towards a full recognition of same-sex couples' rights in EU law.

In this case, the ECJ stated the principle that same-sex spouses of EU citizens have the same rights as heterosexual spouses for the purposes of EU free movement law as far as they are legally married under the law of another EU Member State.

There were great expectations regarding this judgment since it was the first time that the ECJ was asked to rule upon same-sex marriages for the purposes of EU free movement law, as pointed out by the Advocate General Wathelet in his Opinion.² In the Court's previous case-law, the 'spouse' of an EU citizen under Directive 2004/38/EC³ was "a person joined to another person by the bonds of marriage."⁴ In its *Coman* judgment the ECJ clarified that the term 'spouse' in Article 2(2)(a) of Directive 2004/38/EC must include the same-sex spouse who is lawfully married to an EU citizen in another Member State, regardless of whether domestic law of the host Member State provides same-sex marriage or not. So, "Although the Member States have the freedom whether or not to auth-

1 Judgment of the Court (Grand Chamber) of 5 June 2018, EU:C:2018:385, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, curia.europa.eu/juris/documents.jsf?num=C-673/16. For other comments on this judgment see also A. COMAN, 'Landmark case from Romania expands possibilities for LGBT rights', 5 March 2019, available at openglobalrights.org/landmark-case-from-romania-expands-possibilities-for-lgbt-rights/; M. FALLON, 'Observations sous CJUE, 5 Juin 2018, gr. ch., Coman, C-673/16, EU:C:2018:385', *Cahiers de l'EDEM*, June 2018; L. GYENEY, 'Same sex couples' right to free movement in light of member states' national identities. The legal analysis of the Coman case', XIV. *Iustum Aequum Salutare* 2018(2), pp. 149-171; S. PENASA, 'Matrimonio tra persone dello stesso sesso e libertà di circolazione dei cittadini europei e dei loro familiari: osservazioni a "cerchi concentrici" sul caso *Coman c. Romania* della Corte di Giustizia', *Diritto, Immigrazione e Cittadinanza* 2018(3); F. BATTAGLIA, 'La definizione di "coniuge" ai sensi della direttiva 38/2004: il caso *Coman e Hamilton*', *Ordine internazionale e diritti umani* 2018, pp. 301-321.

2 Opinion of Advocate General Wathelet delivered on 11 January 2018, EU:C:2018:2, curia.europa.eu/juris/document/document.jsf?text=&docid=198383&doclang=EN, point 2.

3 Directive 2004/38/EC of the European Parliament and of the Council 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0038.

4 ECJ 25 July 2008, EU:C:2008:449, *Metock and Others*, curia.europa.eu/juris/documents.jsf?num=C-127/08, para.98 and 99.

*orise marriage between persons of the same sex, they may not obstruct the freedom of residence of an EU citizen by refusing to grant his same-sex spouse, a national of a country that is not an EU Member State, a derived right of residence in their territory.*⁵

Such an interpretation is in line with the case-law of the European Court of Human Rights (ECtHR) that has held several times that the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' protected by Article 8 ECHR (European Convention on Human Rights)⁶ in the same way as the relationship of a heterosexual couple in the same situation.⁷

The ECJ statement was anticipated by Advocate General Wathelet's Opinion on 11 January 2018 that also stood for a broad interpretation of the term 'spouse' within the meaning of EU free movement law. However, there are certain subtle differences between Wathelet's Opinion and the ECJ's reasoning.

1. The facts of the case

Mr Relu Adrian Coman, a Romanian and an American citizen, and Mr Robert Clabourn Hamilton, an American citizen, got married in Brussels in 2010, where Mr Coman lived and worked as a parliamentary assistant in the European Parliament. After living separated from each other for some years due to employment reasons, the two married men decided to move together to Romania, the EU Member State of which Mr Coman is a national. Thus, they invoked the right of Mr Hamilton to reside for

5 Court of Justice of the European Union, *The term 'spouse' within the meaning of the provisions of EU law on freedom of residence for EU citizens and their family members includes spouses of the same sex*, Press release n. 80/18, Luxembourg, 5 June 2018, Judgment in case C-673/16 Relu Adrian Coman and Others v. *Inspectoratul General pentru Imigrări* and Others, curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/cp180080en.pdf.

6 Article 8 ECHR provides: «*Right to respect for private and family life*. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others».

7 ECtHR 7 November 2013, 29381/09 and 32684/09, *Vallianatos and Others v. Greece*, hudoc.echr.coe.int/eng?i=001-128294, CE:ECHR:2013:1107JUD002938109, § 73; ECtHR 14 December 2017, 26431/12, 26742/12, 44057/12, and 60088/12, *Orlandi and Others v. Italy*, hudoc.echr.coe.int/eng?i=001-179547, CE:ECHR:2017:1214JUD002643112, § 143.

more than three months in a Member State as a family member of an EU citizen under Article 7(2) Directive 2004/38/EC.

Nonetheless, the Romanian authorities refused to grant Mr Coman's husband the permission to reside in Romania, given the fact that Romanian law did not allow same-sex marriage. In fact, Articles 277(2) and (4) of the *Codul Civil* (the Romanian Civil Code) prohibit homosexual marriage as far as the recognition of such a marriage celebrated abroad.⁸ According to Articles 259(1) and (2) of the *Codul Civil*, marriage is the union of a man and a woman with a view to founding a family.⁹

As a consequence, the national authorities refused to recognise Mr Hamilton as the legal spouse of Mr Coman. Therefore, Mr Hamilton, a non-EU citizen and not a family member of an EU citizen, was only granted a permission to stay for a period no longer than three months. Moreover, the Romanian authorities denied an extension of Mr Hamilton's right of temporary residence in Romania on grounds of family reunion.

In 2013 Coman and others seized the *Judecătoria Sectorului 5 București* (Court of First Instance, District 5, Bucharest, Romania) because of the alleged violation of their freedom of movement.

During the procedure, the *Curtea Constituțională* (the Romanian Constitutional Court) was asked whether the prohibition to celebrate and recognize same-sex marriages under Article 277(2) and (4) of the *Codul Civil* integrated a violation of the constitutional right to intimate, family and private life as far as equality where it lead to deny a permission of residence to the same-sex spouse.

Given the fact that the question involved the right to family life and freedom of movement in the EU, which is a matter of EU law under Directive 2004/38/EC, the *Curtea Constituțională* seized the ECJ¹⁰ for a preliminary ruling.

8 Articles 277(1), (2) and (4) of the *Codul Civil* state as follows: «1. Marriage between persons of the same sex shall be prohibited. 2. Marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania. [...] 4. The legal provisions relating to freedom of movement on Romanian territory by citizens of the Member States of the European Union and the European Economic Area shall be applicable».

9 Articles 259(1) and (2) of the *Codul Civil* state as follows: «1. Marriage is the union freely consented to of a man and a woman, entered into in accordance with the conditions laid down by law. 2. Men and women shall have the right to marry with a view to founding a family».

10 The questions referred to the ECJ for a preliminary ruling were: «(1) Does the term "spouse" in Article

2. The reasoning of the Court

2.1. The applicability of EU free movement law

In its *Coman* ruling, the Court points out some fundamental principles of EU free movement law.

First of all, the Court firmly affirms the importance of ensuring a high standard of protection to EU citizens being the citizenship of the Union “*the fundamental status of nationals of the Member States.*”¹¹ In the Court’s view, the need to grant EU citizens free movement allows a broad interpretation of Directive 2004/38.

The Court ruled that EU free movement law does not apply directly to a Romanian citizen and his family member in Romania, since Directive 2004/38 only applies to Union citizens moving to a Member State other than the one of which they are nationals. The ECJ confirmed its case-law under which “*it follows from a literal, contextual and teleological interpretation of Directive 2004/38 that the directive governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on third-*

2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, 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 in accordance with the law of a Member State other than the host Member State?

(2) If the answer [to the first question] is in the affirmative, do Articles 3(1) and 7([2]) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a citizen of the European Union?

(3) If the answer to [the first question] is in the negative, can the same-sex spouse, from a State which is not a Member State of the Union, of the Union citizen to whom he or she is lawfully married, in accordance with the law of a Member State other than the host State, be classified as “any other family member” within the meaning of Article 3(2)(a) of Directive 2004/38 or a “partner with whom the Union citizen has a durable relationship, duly attested”, within the meaning of Article 3(2)(b) of that directive, with the corresponding obligation for the host Member State to facilitate entry and residence for that spouse, even if that State does not recognise marriages between persons of the same sex and provides no alternative form of legal recognition, such as registered partnership?

(4) If the answer to [the third question] is in the affirmative, do Articles 3(2) and 7(2) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory for a period of longer than three months to the same-sex spouse of a Union citizen?”

11 Para. 30; see also ECJ 20 September 2001, EU:C:2001:458, *Grzelczyk*, curia.europa.eu/juris/documents.jsf?num=C-184/99, para. 31; ECJ 8 March 2011, EU:C:2011:124, *Ruiz Zambrano*, curia.europa.eu/juris/documents.jsf?num=C-34/09, para. 41; and ECJ 2 June 2016, EU:C:2016:401, *Bogendorff von Wolfersdorff*, curia.europa.eu/juris/documents.jsf?num=C-438/14, para. 29.

*country nationals who are family members of a Union citizen in the Member State of which that citizen is a national.*¹²

Nonetheless, the Court found a ground to apply the Directive by analogy to Mr Coman's case since he had moved to another Member State (Belgium) and then returned to his Member State of nationality (Romania).

The reasoning of the Court represents an application of the *effet utile* doctrine,¹³ that leads to find whether the effectiveness of the right of any Union citizen to move and reside freely within the territory of the Member States under Article 21(1) TFEU requires that a derived right of residence must be granted to the third-country national who has a familiar bond with an Union citizen exercising his right to free movement.¹⁴ The family life that the EU citizen has created or strengthened during his "*genuine residence*"¹⁵ in a Member State other than that of which he is a national may continue when he returns to his Member State of origin (para. 24). Otherwise the Union citizen could

12 See, to that effect, ECJ 12 March 2014, EU:C:2014:135, *O. and B.*, curia.europa.eu/juris/documents.jsf?num=C-456/12, para. 37; ECJ 10 May 2017, EU:C:2017:354, *Chavez-Vilchez and Others*, curia.europa.eu/juris/documents.jsf?num=C-133/15, para. 53; ECJ 14 November 2017, EU:C:2017:862, *Lounes*, curia.europa.eu/juris/documents.jsf?num=C-165/16, para. 33.

13 In EU law, *effet utile* refers to the effectiveness of a rule of law (D. CHALMERS, G. DAVIES & G. MONTI, *European Union Law. Text and materials* (Cambridge: Cambridge University Press, 2nd edn 2010), p. 1015 n. 3). The principle of effectiveness has been recognized as a general principle by the Court. Its origins lie in the interpretative techniques of the Court as it is not based directly on the laws of the Member States but derives from the distinct characteristics of EU law, primacy and direct effect (T. TRIDIMAS, *The General Principles of EU law* (Oxford: Oxford University Press, 2nd edn 2006), pp. 418-476). On the principle of *effet utile* in EU law and its declinations see K. LENAERTS-P. VAN NUFFEL, *Constitutional Law of the European Union* (London: Sweet & Maxwell, 2nd edn 2005), para. 5-040, 5-051, 5-054, 11-011, 14-050, 17-010; see also C. BARNARD-S. PEERS, *European Union Law* (Oxford: Oxford University Press, 2014), pp. 167 and 199-200. On the application of the *effet utile* principle to the third country spouse see P. CRAIG-G. DE BÚRCA, *EU Law. Text, Cases and Materials* (Oxford: Oxford University Press, 2nd edn 2011), p. 539; see also D. CHALMERS, G. DAVIES & G. MONTI, *European Union Law* (Cambridge: Cambridge University Press, 3rd edn 2014), pp. 503-506; K. LENAERTS-P. VAN NUFFEL, *Constitutional Law of the European Union* (London: Sweet & Maxwell, 2nd edn 2005), para. 5-127.

14 See, to that effect, ECJ 12 March 2014, EU:C:2014:135, *O. and B.*, curia.europa.eu/juris/documents.jsf?num=C-456/12, para. 50 and 61; ECJ 10 May 2017, EU:C:2017:354, *Chavez-Vilchez and Others*, curia.europa.eu/juris/documents.jsf?num=C-133/15, para. 54-55; ECJ 14 November 2017, EU:C:2017: 862, *Lounes*, curia.europa.eu/juris/documents.jsf?num=C-165/16, para. 46 and 61.

15 With this expression the Court refers to a period of residence in a Member State different from that of origin led pursuant to and in conformity with the conditions set out in Directive 2004/38.

be discouraged from leaving the Member State of which he is a national in the first place, because he would be uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened in the host Member State. Hence, the exercise of the right to move and reside freely in the EU would be impaired.

To that effect, the Court invokes Article 21(1) TFEU and it states that Directive 2004/38 must be applied, by analogy, to an Union citizen who has moved to another Member State due to his right to free movement and then returned to his Member State of origin, as it had been previously stated in 2014 in the *O. and B.* case¹⁶ (para. 25).

In conclusion, an EU citizen can exercise the rights provided for in Article 21(1) TFEU, such as the right to lead a normal family life, together with their family members (para. 32),¹⁷ even against the Member State of which he is a national (para. 31).¹⁸

2.2. The interpretation of the term 'spouse'

In its preliminary ruling the ECJ answered the question whether Mr Coman's husband could be considered a 'spouse' under Directive 2004/38.

According to Article 7 of the above-mentioned Directive, 'family members' accompanying or rejoining an EU citizen in a Member State of the EU are granted a derived right of residence for more than three months. Article 2(2)(a) of the Directive states that the 'spouse' of an EU citizen must be considered a 'family member' for the purposes of the Directive.

Firstly, the ECJ interprets the term 'spouse' as gender-neutral identifying a person who is legally married to an EU citizen (see para. 35).

16 ECJ 12 March 2014, EU:C:2014:135, *O. and B.*, curia.europa.eu/juris/documents.jsf?num=C-456/12, para.50 and 61.

17 See, to that effect, ECJ 7 July 1992, EU:C:1992:296, *Singh*, curia.europa.eu/juris/documents.jsf?num=C-370/90, para. 21 and 23; ECJ 14 November 2017, EU:C:2017:862, *Lounes*, curia.europa.eu/juris/documents.jsf?num=C-165/16, para. 52.

18 See, to that effect, ECJ 23 October 2007, EU:C:2007:626, *Morgan and Bucher*, curia.europa.eu/juris/documents.jsf?num=C-11/06 and C-12/06, para.22; ECJ 18 July 2013, EU:C:2013:524, *Prinz and Seeberger*, curia.europa.eu/juris/documents.jsf?num=C-523/11 and curia.europa.eu/juris/documents.jsf?num=C-165/14C-585/11, para. 23; ECJ 14 November 2017, EU:C:2017:862, *Lounes*, curia.europa.eu/juris/documents.jsf?num=C-165/16, para. 51.

Secondly, the Court finds that Directive 2004/38 does not refer to the legislation of the host Member State in order to qualify who can be considered the ‘spouse’ of an EU citizen. It is worthy to underline that this is a crucial point of the ECJ’s reasoning. In fact, it marks a difference in the treatment of ‘registered partnerships’ and marriage, since the former is in the scope of the Directive only “*if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State*” according to Article 2(2)(b).

Consequently, the Court states that the recognition of a same-sex marriage lawfully celebrated in another Member State for the sole purpose of granting a derived right of residence to a third-country national family member of an EU citizen is mandatory for Member States. If not, the refusal of the host Member State to grant such a permission to the EU citizen’s spouse may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU (see para. 40). Hence, the Directive would be deprived of its effectiveness if the residence permit of the same-sex spouse of an EU citizen depended on national family law of the host Member State.

Clearly, the sensitive nature of the issue forced the ECJ to make clear that such an obligation does not imply that Member States are forced to include same-sex marriages in their national legislation, since they remain free to decide whether or not to allow them. In this respect, the restraint showed by the ECJ was understandable. In fact, it is commonly known that the regulation of family law is an exclusive competence of the Member States.

With regards to the possible justification for the restriction of EU free movement law, the ECJ excludes that Member States can invoke ‘national identity’ or ‘public policy’ reasons. In fact, according to the Court’s established case-law, the concept of public policy must be interpreted strictly, hence public policy may be relied upon only in case of “*a genuine and sufficiently serious threat to a fundamental interest of society*.”¹⁹ Threat that can-

19 See, to that effect, ECJ 13 July 2017, EU:C:2017:542, *E*, curia.europa.eu/juris/documents.jsf?num=C-193/16, para.18; ECJ 13 September 2016, EU:C:2016:675, *Rendón Marín*, curia.europa.eu/juris/documents.jsf?num=C-165/14, para. 58; ECJ 2 June 2016, EU:C:2016:401, *Bogendorff von Wolffersdorff*, curia.europa.eu/juris/documents.jsf?num=C-438/14, para.67; ECJ 29 April 2004, EU:C:2004:262 and ECLI:EU:C:2004:262, *Orfano-*

not be found in this case, since granting a derived right of residence to the same-sex spouse does not require Member States to provide for the institution of marriage between persons of the same sex in their national law, as pointed out above (para. 45).

Finally, the ECJ highlights that national measures restricting the exercise of freedom of movement for persons can be justified only in so far as they comply with EU fundamental rights law (para. 47-51).²⁰ On this point, the ECJ recalls the fundamental right to respect for private and family life guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'),²¹ which has the same meaning and the same scope as those guaranteed by Article 8 of the ECHR.

In fact, the ECtHR ruling on Article 8 ECHR has made clear that the relationship between homosexual people may fall within the notion of 'private life' and that of 'family life' in the same way as the one between heterosexual people in the same situation.²² In the landmark decision *Schalk and Kopf v. Austria*, the ECtHR gave birth to a broad interpretation of Article 12 ECHR in light of Article 9 of the Charter and it stated that same-sex spouses were entitled to the same protection as any other married couple. Nonetheless, the ECtHR showed some restraint since it did not deny that the traditional definition of marriage involved the union of a man and a woman, therefore it reserved to the State the option between allowing same-sex marriage in their own domestic law or not. Thus, the ECtHR case-law is coherent with the one of the ECJ where it excludes that there is any breach of the non-discrimination rule on the grounds of

poulos and Oliveri, curia.europa.eu/juris/liste.jsf?num=C-482/01 and curia.europa.eu/juris/documents.jsf?num=C-493/01, para.65; ECJ 27 October 1977, EU:C:1977:172, *Bouchereau*, curia.europa.eu/juris/documents.jsf?num=C-30/77, para. 33; ECJ 4 December 1974, EU:C:1974:133, *van Duyn*, curia.europa.eu/juris/documents.jsf?num=C-41/74, para. 18.

20 See, by analogy, ECJ 13 September 2016, EU:C:2016:675, *Rendón Marín*, curia.europa.eu/juris/documents.jsf?num=C-165/14, para.66.

21 Article 7 of the Charter, entitled «Respect for private and family life», provides: «*Everyone has the right to respect for his or her private and family life, home and communications*».

22 ECtHR 7 November 2013, 29381/09 and 32684/09, *Vallianatos and Others v. Greece*, hudoc.echr.coe.int/eng?i=001-128294,CE:ECHR:2013:1107JUD002938109, § 73; ECtHR 23 February 2016, 68453/13, *Pajić v. Croatia*, hudoc.echr.coe.int/eng?i=001-161061, CE:ECHR:2016:0223JUD006 845313, § 73; ECtHR 14 December 2017, 26431/12; 26742/12; 44057/12 and 60088/12, *Orlandi and Others v. Italy*, hudoc.echr.coe.int/eng?i=001-179547,CE:ECHR:2017:1214JUD002643112, § 143.

sexual orientation when a State does not provide for marriage between two people of the same sex.²³

After pointing out the meaning of the term ‘spouse’ in light of EU free movement law, the ECJ answers positively to the question whether the right to move and reside freely in the EU under Article 21(1) TFEU means that a third-country national of the same sex as a Union citizen whose marriage was lawfully concluded in another Member State has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months (see para. 52-56).

As for the fact that the host Member State is the same State of which the Union citizen is a national, it has already been clarified that Article 21(1) TFEU entitles the Union citizen with some rights even against his Member State of origin.

As for the derived right of residence of a third-country national, it appears from the letter of Article 7(2) of Directive 2004/38 that family members who are third-country nationals fall within the scope of the Directive and shall be granted the derived right of residence provided for when accompanying or joining an Union citizen in the host Member State.

3. Comments

After the ECJ decision, the Romanian Constitutional Court did not repeal the civil code provisions, but it clarified that these provisions need to be applied in light of the *Coman* ruling.²⁴ In addition, the Romanian Constitutional Court recognized that same-sex couples have the same right to private and family life as heterosexual couples in Romania, quoting decisions from the European Court of Human Rights and a deci-

23 See ECtHR 24 June 2010, 30141/04, *Schalk and Kopf v. Austria*, hudoc.echr.coe.int/eng?i=001-99605, CE:ECHR:2010:0624JUD003014104; see also to that effect ECtHR 21 July 2015, 18766/11 and 36030/11, *Oliari and others v. Italy*, hudoc.echr.coe.int/eng?i=001-156265, CE:ECHR:2015: 0721JUD001876611; ECtHR 16 July 2014, 37359/09, *Hämäläinen v. Finland*, hudoc.echr.coe.int/eng?i=001-145768, CE:ECHR:2014:0716JUD003735909; ECtHR 11 July 2002, 25680/94 and 28957/95, *I. v. the United Kingdom* and *Christine Goodwin v. the United Kingdom*, hudoc.echr.coe.int/eng?i=001-60595 and hudoc.echr.coe.int/eng?i=001-60596, CE:ECHR:2002:0711JUD002568094 and CE:ECHR:2002: 0711JUD002895795.

24 A. COMAN, ‘Landmark case from Romania expands possibilities for LGBT rights’, 5 March 2019, available at www.openglobalrights.org/landmark-case-from-romania-expands-possibilities-for-lgbt-rights/.

sion from the Italian Constitutional Court (*ordinanza* n. 4/2011).²⁵

With regards to the reference to the Italian Constitutional Court made by the Romanian Constitutional Court two remarks can be done. First, it could be seen as an example of the use of the comparative law method in domestic disputes.²⁶ Second, it could be related to the influence that the Italian constitutional justice system played in the creation of the Romanian Constitutional Court in its actual configuration.²⁷

The *Coman* ruling has a big symbolic value pushing towards a higher standard of protection of same-sex couples under EU free movement law. Among the Member States, the configuration of same-sex couples' rights is extremely varied, therefore it was not straightforward for the ECJ to give a gender-neutral definition of the term 'spouse'.

The last Member States to admit same-sex marriage were Austria, due to a decision of the Austrian Constitutional Court,²⁸ Malta²⁹ and Germany.³⁰

In the previous year,³¹ the Member States allowing same-sex marriage were Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Portugal and Spain. Norway provided for same-sex marriage too. Other Member States have chosen to give same-sex couples access to a registered partnership,

25 *Decizia nr. 534 din 18 iulie 2018 referitoare la excepția de neconstituționalitate a dispozițiilor art. 277 alin.(2) și (4) din Codul civil.*

26 On this point see T. GROPPi & M.-C. PONTHEOREAU, *The Use of Foreign Precedents by Constitutional Judges* (Oxford; Portland: Hart Publishing, 2013); J. M. SMITS, 'Comparative Law and its influence on national legal systems', in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), pp. 513-538.

27 The Romanian Constitutional Court has been defined as "a 'hybrid' institution, with elements grafted from the French Constitutional Council as regards the Court's structure and from the Italian Constitutional Court as regards its powers and jurisdiction" (B. SELEJAN-GUȚAN, *The Constitution of Romania. A Contextual Analysis* (Portland: Hart Publishing, 2016), p. 166).

28 The Austrian Constitutional Court (VfGH) with its decision of 4 December 2017 (G258-259 /2017-9) repealed the law forbidding same-sex marriage with effect starting from 31 December 2018.

29 The Maltese Parliament approved the *Conversion of Civil Unions into Marriage Regulations* with a sole dissenting vote and it was published in S.L. 530.02 of 1 September 2017, *Legal notice 382 of 2017*.

30 The law authorizing same-sex marriage (*Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts*) of 20 July 2017 was published in *BGBL*, I, 28 July 2017, 2787.

31 ILGA - Rainbow Europe Index 2018, available at ilga-europe.org/sites/default/files/Attachments/index_2018_small.pdf.

with similar or limited rights as compared to those conferred to spouses: Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy³² and Slovenia. In the end, there are six EU Member State who have not ruled at all on same-sex couples' rights: Bulgaria, Slovakia, Poland, Latvia, Lithuania and Romania.

Hence, it can be useful to point out some differences between the ECJ ruling and the Advocate General Wathelet Opinion.

The Advocate General gave relevance to “*the existence of a proven stable relationship*” so his approach was more focused on the facts of the case.

The ECJ linked the right to the preservation of family relationships to the high standard of protection that EU citizens are granted under Article 21 TFEU. Whereas, the Advocate General did not invoke Article 21 TFEU. In fact, he relied only on Directive 2004/38 which applied by analogy to the case. Apart from the legal technicalities, the different approach led to relevant different consequences in terms of future applications of the rule. While the ECJ stressed the fact that the marriage was contracted in a Member State of the EU where the EU citizen was living as an exercise of the freedom of movement ensured by Article 21 TFEU, the Advocate General held that “*the place where the marriage was entered into is irrelevant.*”³³ Therefore, the ECJ added a requisite to the derived right of residence of the same-sex spouse of an EU citizen.

The reason is that the Advocate General had no tribute to pay to Article 21 TFEU since he relied only on the Directive. Firstly, he recalled the *Metock* ruling, in which the Court held that Article 3(1) of Directive 2004/38 must be interpreted as meaning that the third-country national who is the spouse of a EU citizen residing in a Member State whose nationality he does not possess benefits from the provisions of that Directive, irrespective of when and where their marriage took place.³⁴ Secondly, he marked the difference between the provision about marriage in Article 2(2)(a) of the Directive and the one about registered partnership in Article 2(2)(b) and in particular

32 Law of 20 May 2016 n. 76 (*Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze*), published in *GU Serie Generale*, 21 May 2016, n. 118.

33 See points from 48 to 53 of the Opinion.

34 ECJ 25 July 2008, EU:C:2008:449, *Metock and Others*, curia.europa.eu/juris/documents.jsf?num=C-127/08.

to the Union legislature's decision to make express reference to the law of the host Member State in the case of a registered partnership.

Moreover, the Advocate General clearly sustained an updating of the traditional definition of marriage: "*the solution adopted by the Court in the judgment of 31 May 2001, D and Sweden v. Council (C-122/99 P and C-125/99 P, EU:C:2001:304), by which 'according to the definition generally accepted by the Member States, the term marriage means a union between persons of the opposite sex', now seems to me outdated*" (point 57 of the Opinion). However, the ECJ did not follow this suggestion and stayed focused on the purposes of EU free movement law.

From this comparison it is evident that the ECJ showed a certain restraint in its judgment.

In conclusion, the solution given by the Court and its choice to limit the effects of its preliminary ruling for the sole purposes of EU free movement law seems to be fair because of the sensitive nature of the issue, which involves political choices that do not belong to the judiciary power.

The only aspect that seems problematic is the requirement of a marriage contracted in a Member State, since it leaves several doubts as to the possibility of a third-country national, who is the spouse of an EU citizen due to a marriage contracted in a State which is not a part of the EU, to be granted a derived right of residence under Article 2(2)(a) of Directive 2004/38.