

THE RELEVANCE OF FAMILY STATUS CREATED ABROAD FOR THE FREEDOM OF MOVEMENT IN THE EU

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Abstract: Article 21 TFEU gives EU citizens the right, subject to very few exceptions, to move and reside freely within the territory of the Member States, which are not allowed to obstruct the exercise of this right by imposing direct and indirect obstacles. An EU citizen might hesitate to move to another Member State if he/she could not be accompanied by his/her closest family members who are not EU citizens. Certain family members, such as a spouse or direct descendants, enjoy therefore a derived right of free movement pursuant to Directive 2004/38. This may give rise to complications when the family relationship in question is not recognized in the Member State to which the family wishes to move. This paper discusses two recent judgments where the CJEU had to deal with this issue, in particular regarding a same-sex marriage (*Coman*, C-673/16) and the adoption-like Islamic *kafala* (*SM v. Entry Clearance Officer*, C-129/18).

Keywords: family members; freedom of movement; Islamic *kafala*; same-sex marriage; recognition of family status

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1. INTRODUCTION

Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) gives every citizen of the 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 with 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 recognize 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 family status created abroad.

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This paper deals with some aspects of the delimitation of those non-EU citizens who are entitled to move to and reside in an EU Member State in their capacity as family members of an EU citizen (the primary right holder).¹ The free movement of such persons is in principle regulated by 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 21 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 beneficiaries of free movement, but goes further than that by adding additional categories of persons whose entry and residence the Member States, in accordance with their national legislation and subject to an extensive examination of the personal circumstances of the persons concerned, are obliged to “facilitate”; these categories comprise certain persons with weaker family-law 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 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* cohabitants, is in some Member States, such as Sweden,³ regarded as a legitimate family form regulated by law). However, the right of entry and residence of these persons is much weaker than that 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 are there uniform rules of EU private international law regarding family-law status, such as the provisions on the recognition of divorces and marriage annulments in EU Regulation 2201/2003 (known as Regulation Brussels II).⁵ There are no EU regulations or directives on the validity of marriages, validity and dissolution of registered partnerships, paternity and other parenthood, and adoptions. This gives rise to the question whether the Member States have full discretion to deal with these issues or must, in order to comply with Article 21(1) TFEU and the above-mentioned Directive 2004/38,

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 EU Directive 2003/86 of 22 September 2003 “on the right to family reunification”, OJ 2003 L 251 p. 12.

² OJ 2004 L 158 p. 77.

³ See the Swedish Cohabitants 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”.

⁵ OJ 2003 L 338 p. 1. On 1 August 2022, this Regulation will be replaced by a recast Regulation 2019/1111, OJ 2019 L 178 p. 1.

respect family relationships created abroad. 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 two recent judgments of the EU Court of Justice (CJEU). The importance of the two decisions is underlined by the fact that both of them have been rendered by the Court's Grand Chamber. The purpose of this paper is to subject the two judgments to a critical analysis, regarding both the conclusions and the reasoning of the CJEU.

2. THE CASE OF SAME-SEX MARRIAGE

The first judgment, *Coman v. Inspectoratul General* was rendered on 5 June 2018.⁶ It concerned two persons of the same sex who had married in Belgium in accordance with Belgian law. At that time, one of the couple lived 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 right on grounds of family reunion, because pursuant to 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 recognized 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 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,⁷ 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.⁸ 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 condi-

⁶ Case C-673/16; ECLI:EU:C:2018:385.

⁷ Article 3(1) of the Directive 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...” (italics added).

⁸ See, for example, the Grand Chamber of the CJEU on 14 March 2014 in the case of *S v. Minister voor Immigratie*, case C-457/12, ECLI:EU:C:2014:136.

tions 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. 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 right could in its consequences 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 have 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 upon only if there is a genuine and sufficiently serious threat to a fundamental interest of society. The obligation of a Member State to recognize 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 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,⁹ 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, which is interpreted by the European Court of Human Rights to apply to both homosexual and heterosexual couples.¹⁰

The Court 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

⁹ OJ 2007 C 303 p. 1.

¹⁰ The attitude of the European Court of Human Rights towards same-sex couples is demonstrated, for example, by its judgment in the case of *Orlandi and others v. Italy*, applications nos 26431/12 *et al.*, decided on 14 December 2017, 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.

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 is not recognized 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.

3. THE CASE OF ISLAMIC *KAFALA*

The second judgment, *SM v. Entry Clearance Officer*, was rendered on 26 March 2019.¹¹ It differs from the *Coman* case in two very important aspects, because the disputed family member status was created in a non-Member State and the status itself was of a kind 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 United Kingdom, who travelled to Algeria where 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 them parental authority and responsibility similar, in some respects, 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 authorized to receive family allowance, 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.¹²

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 2004/38.¹³ 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 recognized 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 a "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 adopted children, since

¹¹ Case C-129/18; ECLI:EU:C:2019:248.

¹² See Recitals 27 and 28 of the judgment.

¹³ 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.

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 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), i.e., to have its entry “facilitated”. Recital 6 of Directive 2004/38 mentions that in order 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 wide discretion as regards the selection of the factors to be taken into account in 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, recognizing the right to respect for private and family life, has the same meaning and scope as Article 8 of the European Human Rights Convention.

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. 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 the 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 in order to live with its guardians in the Member State where they reside.

4. CONCLUDING REMARKS

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 controversial. It is noteworthy that the Court repeatedly affirms “the obligation for a Member State to recognize 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”.¹⁴ This obligation to recognize 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 simple 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 recognized in some countries only, and not marriages that are recognized and unrecognized in the same country depending on the context. It is, therefore, preferable to disconnect, in this case, the issue of family status as such from the specific consequences of that status.

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 recognized 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 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 in order 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 of the European Human Rights Convention, but the compulsory extensive examination of personal circumstances 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

¹⁴ See paras. 45 and 46 of the judgment.

during the EU citizen's short visit there. There are fortunately no reasons to interpret the Court's holding *a contrario* 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. It is theoretically also possible that a refusal to recognize 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 recognize same-sex couples as married carries such a social stigma that it deters such couples from moving there.

Turning to *kafala*, it might seem close at hand to understand the CJEU judgment to mean that the Court, while refusing to equate *kafala* to adoption,¹⁵ has recognized 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 right of entry or residence, unless the third-state national in question fulfills additional conditions (e.g., be a dependent or household member etc.).

There is, of course, nothing preventing Member States from equating *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.¹⁶ 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 particularly problematic, since it questions the entire concept of spouse and family life that prevails in practically all EU Member States. It is very doubtful whether a Member State, even if recognizing, in principle, the validity of polygamous marriages concluded abroad,¹⁷ must or can

¹⁵ 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 the "provision of care by *kafala* or an analogous institution".

¹⁶ 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.

¹⁷ This is presently the case of Sweden, provided that at the time of the conclusion of the marriage none of the parties was a Swedish citizen or habitual resident. A legislative Bill proposing stricter rules is, however, expected to be submitted by the Swedish Government under 2020.

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,¹⁸ which provides that in the event of a polygamous marriage, where the third-country national residing in the EU already has a spouse living with him, the Member State concerned “shall not authorize 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.

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¹⁸ See footnote 1 *supra*.