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The Expanding Concept of EU Citizenship Free Movement Rights and the Potential Positive Impact this has for Same-Sex Couples Relocating Across Borders

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Abstract: *A recent Advocate General's Opinion by Advocate General Melchior Wathelet before the European Court of Justice in the case of C-673/16 Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others ('Coman') argued that expanded citizenship rights should be given to same-sex couples. Although this would not require EU Member States to introduce same-sex marriage or registered partnership, EU Member States would be required to grant permanent residency rights to a non-EU citizen same-sex spouse married in a different EU state. The ECJ now has to determine whether or not they agree with Advocate General Melchior Wathelet's Opinion. The ECJ's judgment is expected to be delivered this Summer. Brexit however means that following the UK's departure from the EU, UK same-sex couples will no longer benefit from the expanding notion of EU citizenship free movement rights.*

Introduction

On 11 January 2018, Advocate General Melchior Wathelet stated in his Advocate General's Opinion in the *Coman* case, that non-EU citizen same-sex spouses should be granted the right of permanent residence if their EU citizen same-sex spouse relocated to a different state in the EU. This would be the case even if the couple relocated to a jurisdiction, which does not allow their own citizens to enter into same-sex marriages, or registered partnerships. The case concerned Mr Coman, a Romanian national, who married his US partner Mr Hamilton in Brussels in 2010. In 2012 they decided to move to Mr Coman's home state of Romania. However, the plan was thwarted. Romania does not allow same-sex marriage on a domestic basis and therefore also refused to recognise a foreign same-sex marriage. Mr Hamilton, not being an EU national himself, was consequently refused a right of permanent residence in Romania. Advocate General Melchior Wathelet ruled against the Romanian authorities and stated that as a matter of EU law, whilst EU Member States can determine whether to introduce same-sex marriage / civil partnership on a domestic level, they must recognise the free movement of EU citizens and their families, and therefore grant permanent residence rights to non-EU spouses of same-sex marriages conducted abroad. If the Advocate General's Opinion is agreed by the European Court of Justice ('ECJ') this would greatly enhance rights for non-EU citizenship spouses. As such, this is another example of expanding citizenship rights granted to family members of EU citizens. After Brexit, UK citizens would not be able to benefit from EU free movement rights, amongst the ever expanding number of rights granted to EU citizens and their family members.

Concept of EU Citizenship

The concept of European citizenship has led to greatly enhanced rights across Europe, for EU citizens and their family members. As part of the expanding concept of citizenship, the EU has increased the level of its human rights protections. These include the right to access human rights protections under Article 7 of the EU Charter of Fundamental Rights, which includes a right to private and family life broadly defined. This provision broadly echoes the protections guaranteed by Article 8 European Court of Human Rights. The EU now has far-reaching protections from discrimination on the basis of sexual orientation. Article 19 of Treaty on the Functioning of the European Union ('TFEU') is the legal basis for the adoption of measures to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. The EU also adopted Article 21 of the Charter of Fundamental Rights which includes 'sexual orientation' as a ground for discrimination. This further expands the grounds for discrimination from those stated in Article 14 of the European Convention on Human Rights ('European Convention'). As the European Convention text was drafted in the 1950s, it noticeably does not include sexual orientation as a ground for discrimination in its stated text. Instead the European Court of Human Rights ('ECtHR') has been required to use its dynamic interpretative techniques to expand protections for GLBT individuals.

Further EU citizenship rights are given to individuals who fall under the definition of family as defined by EU law. Once included within this definition, EU citizens' family members (even if not EU citizens themselves) can access a 'plethora of benefits.' (Please see Helen Stalford, Concepts of Family Under EU Law – Lessons from the ECHR' 16(3) International Journal of Law, Policy and the Family at p427 for further comment). As well as protections based on human rights, EU citizens and their family members are entitled to a whole host of benefits. These include free movement rights between Member States (TFEU art 20(2)), additional rights of residence (TFEU art 14(1)), extensive non-discrimination provisions (TFEU arts 18 and 24 and case law such as *Grzelczyk v Centre Public d'aide Sociale d'Ottignies Louvain-la-Neuve* (Case C-184-99) which greatly extended citizenship non-discrimination rights for non-economically active citizens), rights to take up employment or self-employment (TFEU art 23), access to the member state's social assistance scheme (TFEU art 14(3)) and rights of access to education for children (art 12, Regulation 1612/68 as interpreted by case law further extending educational rights for example *Casagrande v Landeshauptstadt München* (Case C-9/74) and *Baumbast and R v Secretary of State for the Home Department* (Case C-413/99)).

EU Law Definition of Family Member

It therefore becomes essential to understand which individuals are included within the definition of family member by EU law. This matter is particularly pertinent for same-sex couples where many

countries have introduced varying forms of same-sex marriage, civil partnership and registered unions, with varying degrees of rights granted. Whilst fifteen European nations have recognised same-sex marriage (as of March 2018 this includes Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom (excluding Northern Ireland) with Austria to introduce same-sex marriage from 1 January 2019) and many more recognise civil partnership (Andorra, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Liechtenstein, Slovenia and Switzerland) the position is far from clearly decided across Europe. Within the UK, Northern Ireland has not introduced same-sex marriage. They have civil partnership only. Other European states have introduced no form of legal status for same-sex partners and continue to reserve marriage for opposite sex couples. The *Coman* case concerned Romania. Although in recent years Romania has made great strides in recognising LGBT rights including decriminalising homosexuality, introducing anti-discrimination laws and equalising the age of consent for instance, it still provides no legal status for same-sex partners. Romania's Civil Code determines that marriage must be between persons of the opposite sex (Article 259 Romanian Civil Code).

Up until the Advocate General Melchior Wathelet's Opinion, the EU had always determined that subsidiarity should take precedence and allowed individual EU states to determine whether or not to recognise same-sex marriage or other forms of civil partnership. In EU law there remains a hierarchy or recognised statuses. Spouses are most clearly protected and fall clearly within the definition of family member (Citizenship Directive 2004/38 art.2(2)(a).) Although it could be argued that the word 'spouse' is gender-neutral and so should include same-sex partners (see Dimitri Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' 33(1) *Fordham International Law Review* 156 at 190) EU law has until Advocate General Melchior's recent Advocate General's Opinion not recognised that approach. The commentary on art.9 of the Charter of Fundamental Rights of the European Union provides that '[t]here is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples.' Advocate General Melchior Wathelet's Opinion would therefore reverse years of the subsidiarity approach and represent a further expansion of EU citizenship and the ever-expanding notion of who is a family member and therefore entitled to further EU citizenship rights such as permanent residency.

The traditional EU concept of spouse did therefore not include same-sex couples. Whilst EU law does include registered partnerships under the definition of family member, whether they would be given any EU citizenship rights depended upon whether the EU receiving state would recognise such relationships (Directive 2004/38 Article 2(2)). This again strengthens the concept of subsidiarity. This would also be likely to change, should Advocate General Melchior Wathelet's Opinion be recognised

by the ECJ. Further down the list of protected statuses are co-habitees. This is an important category to consider for same-sex couples living in states which do not allow same-sex marriage or civil partnership, as there could be no opportunity to enter into a more regulated relationship. Within EU law, co-habitees are only included within the definition of family member if they have a relationship 'duly attested' (Citizenship Directive 2004/38 Article 3(2)). No firm guidance is given as to what is meant by a relationship duly attested, but it is likely to mean a relationship of several years duration. It should be pointed out that in relation to same-sex cohabitees, it is unlikely that further citizenship rights would be granted following Advocate General Melchior Wathelet's Opinion, even if enforced by the ECJ. Advocate General Melchior Wathelet does not recommend that any EU country should be forced to introduce same-sex marriage or registered partnership protections. Instead he recommends that all EU countries should be made to grant EU citizenship rights, such as permanent residency to non-EU national spouses of EU citizens who married abroad. Co-habitees who do not fall within any legally protected categories, would not have any firm rights upon which to rely to enforce their union.

Impact of Advocate General Melchior Wathelet's Opinion

The traditional position in EU law, which emphasised subsidiarity concerns above all else, clearly made it harder for same-sex families to relocate across Europe and has been described as a 'failure for the notion of free movement' (See Stalford's article above at p419). It can also be seen as a system which favours heterosexuals due to subsidiarity concerns. Dimitri Kochenov refers to heterosexual's rights as being 'at the top of the pyramid' (See Kochenov's article above at p201). This position would be greatly improved if Advocate General Melchior Wathelet's Opinion is agreed by the ECJ. Advocate General Melchior Wathelet supports a gender neutral interpretation of the word spouse and describes that word as being 'neutral as to the sex of the persons concerned and indifferent as the place where the marriage was contracted' (See Advocate General's Opinion in *Coman*). He further backs up his arguments by reference to the 'general evolution' of Member States of the EU in their treatment of same-sex couples. He goes on to refer to human rights arguments whereby same-sex couples now fall within the definition of family life (See *Schalk and Kopf v Austria* (2011) 53 EHRR 20). In *Schalk and Kopf v Austria* the ECtHR finally recognised that a 'cohabiting same-sex couple living in a stable partnership, fell within the notion of 'family life', just as the relationship of different-sex couple in the same situation would' (*Schalk and Kopf v Austria* para 94). This statement has been described as a 'landmark' in the evolution of ECtHR case law concerning the GLBT community (See Conor O'Mahoney, 'Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-Traditional Families' (2012) 26(1) International Journal of Law Policy and the Family 31 at page 38). Ultimately however the ECtHR has stopped short of recognising same-sex marriage due to concerns about the 'deep rooted social and cultural connotations' (*Schalk and Kopf v Austria* para 62). This in turn leads to a wider

margin of appreciation, otherwise known as area of discretion, being granted to EU Member States (See *Schalk and Kopf v Austria* para 105). To this date the ECHR system does not recognise same-sex marriage.

Advocate General Wathelet also draws upon further ECtHR case law which he states has 'provided that there should be a right to some level of legal protection for same-sex couples' who should be provided with some form of civil partnership / registered partnership (See *Coman* referring to *Oliari v Italy* App Nos 18766/11 and 36030/11 (ECtHR, 31 July 2015)). He further relies upon case law from the ECtHR which has extensively interpreted the European Convention to prevent discrimination against GLBT individuals (See *Coman* referring to decisions of the ECtHR such as *Karner v Austria* App No 40016/98 (ECtHR 24 July 2003)). Whilst this progressive approach by Advocate General Melchior Wathelet is to be welcomed by pro LGBT activists, this would actually go further than what is currently provided by the ECtHR. In the *Oliari v Italy* case, the ECtHR sought to confine the decision to require Member States to provide some level of civil partnership to countries, such as Italy (which the case concerned) who are socially accepting of same-sex couples. (For comment see Helen Fenwick and Andy Hayward, 'Rejecting Asymmetry of Access to Formal Relationship Statuses for Same and Different-Sex Couples at Strasbourg and Domestically' 2017 (6) European Human Rights Law Review 545). A new claim is now being brought by a Russian couple, to test whether the ECtHR decision in *Oliari v Italy*, which required Italy to introduce a civil partnership law, would be extended to a country such as Russia, which is far less socially accepting to the GLBT community (see *Irina Borisovna Fedotova and Irina Vladimironova Shipitko v Russia*, Communicated to the ECtHR on 2 May 2016, Application No. 40792/10). In any event Advocate General Melchior Wathelet's opinion, even if agreed by the ECJ would not oblige EU Member States to introduce any level of civil partnership / same-sex marriage. Instead, they only be obliged to recognise same-sex marriages (and likely civil partnerships) conducted abroad and provide the non EU national same-sex spouse with citizenship rights such as that of permanent residency.

Conclusion

It should be noted that the Advocate General Melchior Wathelet's Opinion is not binding on the ECJ. However, such opinions are highly influential and a Cambridge Law Research paper reported statistics that the 'received wisdom is that the Court follows the Advocate General in about 70 per cent of cases' (Carlos Arrebola and Ana Julia Mauricio, Cambridge Journal of Comparative and International Law, Vol. 5(1), University of Cambridge Faculty of Law Research Paper No. 3/2016). The judges are now in the middle of their deliberations and will give their judgments at a later date, which is expected to be this Summer. If the ECJ follows the Advocate General's opinion this will form part of the general overall approach of the EU which has developed from an international economic agreement guaranteeing the right to freedom of movement of goods, services, persons and capital, to one of ever-increasing public citizenship rights. EU citizenship leads to a much more extensive array of rights than those justified by economic concerns alone and is one of the driving forces behind the expanding definition of family member as interpreted by the ECJ. Brexit means however that the UK citizens will not be able to benefit from any expanding free movement provisions to include non-EU national same-sex spouses within the definition of family member. Without the benefit of the protections of EU law, UK citizens in same-sex relationships will have to continue to rely on whatever rights their country of destination sees fit to grant them.