

reason why they have discriminated, it becomes unclear why they would need to rely on a GOR to justify such discrimination.

The Supreme Court went on to find that the criteria of “indissociability” may be met in this context because the message may be a proxy for Mr. Lee’s sexual orientation. However, upon consideration of Articles 9 and 10 of the ECHR, Baroness Hale considered that the legislation should not be construed so as to require providers of goods and services “to express a message with which they disagree” unless that could be justified (at [56]). Here there was no justification.

This is a very vexed area, but broadly the judgment represents a careful balancing exercise between protection from discrimination and the rights of religious people not to be compelled to act against their conscience.

The decision of the Supreme Court constitutes a vital affirmation of the fundamental importance of freedom of conscience and of speech. While many would disagree with the stance of the McArthurs, the judgment represents an important waymark in the equality project, achieving a difficult balance between protecting minority groups from discrimination and ensuring religious freedom. This balance is essential if we are to live in a truly plural and diverse society.

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#### CITIZENSHIP AND INCREMENTAL CONVERGENCE WITH FUNDAMENTAL RIGHTS?

AN EU citizen’s lawful marriage must be recognised in all Member States and EU rights granted, even in Member States that do not allow same-sex marriage. The Court of Justice of the EU held in *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case C-673/16, ECLI:EU:C:2018:385, that the term “spouse” in Article 2(2)(a) of Directive 2004/38 on the rights of citizens of the Union and their family members to move freely and reside within the territory of the Member States includes spouses in same-sex marriages.

Adrian Coman, a Romanian citizen established in Belgium, married Robert Claibourne Hamilton, a US Citizen, in 2010 in Brussels. In 2012 the couple decided to move to Romania. Mr. Hamilton was refused a long-term residence permit by Romania, however, because the Romanian Civil Code does not recognise same-sex marriage. The challenge of this decision led to a reference to the CJEU under Article 267 TFEU from the Romanian Constitutional Court, its first ever. This was predominantly concerned with the protection afforded by Articles 7, 9, 21 and 45 of the Charter of

Fundamental Rights of the European Union (“the Charter”) and their impact on the interpretation of relevant provisions of Directive 2004/38.

Given that Mr. Coman was returning to his home Member State, it is unsurprising that both the CJEU and Advocate General Wathelet found that the dispute fell outside the scope of Directive 2004/38. Article 3(1) of Directive 2004/38 refers to a right of EU citizens to move or reside “in a Member State *other than that of which they are a national*” (emphasis added). However, both the Advocate General and the CJEU acknowledged established case law to the effect EU nationals in this situation are protected by Article 21 TFEU on the right of EU citizens to free movement, and Directive 2004/38 applies “by analogy”. They both took the view that the conditions under which a derived right of residence might be granted under Article 21 TFEU must not be stricter than those laid down by Directive 2004/38.

However, the approach of the Advocate General and the CJEU differed considerably with respect to the scale of relevance of fundamental rights. These, and the case law of the European Court of Human Rights under Articles 8 and 14 ECHR, featured throughout the reasoning of the Advocate General. While the Advocate General acknowledged the importance of “human dignity” in determining the meaning of “spouse”, the CJEU adhered fairly strictly to a technical line of reasoning, and was more concerned with determining the meaning of “spouse” from this perspective, placing Article 21 TFEU at the heart of its reasoning.

The Court of Justice held that Mr. Hamilton was Mr. Coman’s “spouse” within the meaning of Article 2(2)(a) of Directive 2004/38 first because the term “spouse” in that provision “refers to a person joined to another person by the bonds of marriage” (at [34]). Second, because the term “spouse” under Directive 2004/38 is “gender neutral and may therefore cover the same-sex spouse of the Union citizen concerned” (at [35]). Third, because Article 2(2)(a), unlike Article (2)(b) on registered partnerships, contains no reference to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside. Thus a Member State “cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state” (at [36]). While “a person’s status, which is relevant to the rules on marriage, . . . falls within the competence of the Member States”, so that Member States are free to decide whether to allow marriage of persons of the same sex, at [37], it was nonetheless “well established” that, in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on free movement. Finally, the court observed that there was no legitimate public interest objective for Romania to protect in order to justify the

restriction on Mr. Coman's rights. Neither Member State laws confining marriage as a Union between a man and a woman nor public policy and national identity as referred to in Article 4(2) TEU justified the restriction in issue. Member States remained competent to define marriage, but were obliged to recognise marriages concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling citizens to exercise the rights they enjoy under EU law.

Fundamental rights and ECHR case law became relevant for the CJEU only at this juncture. Member State restrictions on free movement must comply with the fundamental rights guaranteed by the Charter and, pursuant to Article 52(3) of the Charter and the Charter Explanations, Article 7 of the Charter has the same meaning and scope as Article 8 ECHR. It was apparent from the case law of the European Court of Human Rights that the relationship of a homosexual couple may fall within the notion of "private life" and "family life" in the same way as the relationship of a heterosexual couple in the same situation (referring to *Vallianatos and Others v Greece* [2013] ECHR 1110; *Orlandi and Others v Italy* [2017] ECHR 389).

Therefore, Mr. Hamilton had a derived right of residence in Romania under Article 21 TFEU due to the same-sex-inclusive definition of "spouse" in Article 2(2)(a) of Directive 2004/38. That derived right of residence could not be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

The relative absence of discussion of fundamental rights and Articles 7 and 21 of the Charter in the reasoning of the CJEU is significant. The dispute arose because Mr. Coman was married to a man. Thus, the case at its heart concerned the right not be discriminated against on grounds of sexual orientation provided in Article 21(1) of the Charter. Yet, despite this being central in the reference from the Romanian Constitutional Court, neither Advocate General Wathelet nor the CJEU analysed Article 21(1). It is understandable that the reference was approached as a "citizenship case" under Article 21 TFEU; it is unfortunate that the CJEU did not also give full consideration to it as a "Charter case".

*Coman* also afforded an opportunity to provide Member State courts with fuller guidance on the operational rules of the Charter in Title VII. However, Advocate General Wathelet made no reference to whether the restriction on Mr. Coman's free movement rights was justifiable, nor did the CJEU explain why this was to be governed by its case law on objective justification rather than justified limitations as provided for under Article 52(1) of the Charter (for a discussion, see e.g. A. Ward, "The Impact of the EU Charter of Fundamental Rights on Anti-Discrimination Law: More a Whimper than a Bang?" (2018) 20 C.Y.E.L.S. 1, at 25–29).

In addition, recourse to fundamental rights under the Charter might have put some jurisprudential flesh on the bones of the CJEU's case law on rights of EU citizens inherent in Articles 20 and 21 TFEU, which are not

dependent on the existence of EU legislation. The CJEU's reasoning in this field has been described as "cryptic and apoditic" (J.H.H. Weiler, "Epilogue: Judging the Judges – Apology and Critique" in M. Adams et al. (eds.), *Judging Europe's Judges* (Oxford 2013), 250). If the CJEU is reluctant to rely on the Charter to strengthen the jurisprudential foundations of its case law under Articles 20 and 21 TFEU for fear of criticism that recourse has been made to the Charter to expand EU competence, which is forbidden under Article 6 TEU and Article 51(1) of the Charter, would not an open analysis of the boundary set by Article 6 TEU and Article 51(1) of the Charter be helpful to those tasked with applying the Charter? (Cf. E. Spaventa, "Family Rights for Circular Migrants and Frontier Workers: *O and B* and *S and G*" (2015) 52 CML Rev. 753, at 773–74.)

Finally, the European Court of Human Rights has already held that states parties to the ECHR breach Article 14 when read in conjunction with Article 8 if they discriminate against people in same-sex relationships in the issue of residence permits (*Pajić v Croatia* [2016] ECHR 202). While this important development was mentioned by Advocate General Wathelet (at [65], [98]), the court did not discuss where it fitted with EU law.

The *Coman* ruling can therefore be taken as a welcome clarification of the scope of the rights of EU citizens under Article 21 TFEU with respect to their right to marry and found a family under Article 9 of the Charter, and protection from discrimination on the basis of sexual orientation under Article 21(1) of the Charter. The absence of the development of legal doctrine explaining the link between Article 21 TFEU and relevant provisions of the Charter might be taken as a missed opportunity.

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