Edyta Krzysztofik¹

**Gloss to the Judgement of the Court of Justice of the European Union
in Case C 673/16 Relu Adrian Coman, Robert Clabourn Hamilton
v. Inspectoratul General pentru Imigrari (Romania)**

Glosa do wyroku Trybunału Sprawiedliwości Unii Europejskiej w sprawie C 673/16 Relu Adrian Coman, Robert Clabourn Hamilton v. Generalny Inspektorat Imigracji (Rumunia)

Thesis

1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of 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, in a Member State other than that of which he is a national, and, whilst there, has created or strengthened a family life with a third-coun-

¹ ORCID ID: 0000-0001-6160-9600, Ph.D., Department of European Union Law, Faculty of Law, Canon Law and Administration John Paul II Catholic University of Lublin, e-mail: ekrzysztof@kul.lublin.pl.

try national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.

2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that 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. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

I.

The judgement of the Court of Justice in the discussed case addresses a difficult problem of the position of homosexual marriages from the point of view of implementing one of the fundamental freedoms of the internal market – the free movement of citizens. The facts relate directly to a Romanian citizen who married an American citizen in Belgium in accordance with the law of that country and, after two years of joint residence in Brussels, asked the Romanian General Inspectorate for Immigration about the possibility of granting the right of residence to his spouse in his country of origin for a period extending three months with the status of a family member of a migrant citizen. As a result of receiving a negative opinion, R.A. Coman and R. Hamilton filed a complaint to the court of first instance about discrimination on the ground on sexual orientation regarding the exercise of the right to free movement in the Union and appealed for placing an obligation on the Inspector-

ate to end this discrimination and for compensation for harm sustained. In addition, the complainants raised an objection of unconstitutionality of the provisions of the Romanian Civil Code concerning the non-recognition of marriages concluded abroad by Romanian citizens with persons of the same sex, in connection with the provisions of the Constitution protecting the right to intimate, family and private life and the principle of equality. The court referred a legal question concerning the analysed issue to the Constitutional Court, which considered that providing an answer requires the interpretation of EU law, and more specifically the interpretation of certain concepts contained in Directive 2004/38² in the light of the Charter of Fundamental Rights of the European Union³ and the case-law of the Court of Justice and the European Court of Human Rights. Consequently, it requested a preliminary ruling consisting of four specific questions, two of which were not interpreted because of their conditional nature.

Does the term “spouse” in Article 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?

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?

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 “part-

² 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, OJ 2004 L 158/77.

³ Charter of Fundamental Rights of The European Union, OJ 2012 C 326/02.

ner 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?

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?’

II.

The questions referred by the Romanian Constitutional Court refer directly to the provisions of Directive 2004/38, which regulates the rights of the citizens of the European Union to freely leave the territory of the country of origin and to enter and stay in the territory of the host country. The first issue in the analysed facts that requires clarification is the appropriateness of the provisions of the Directive. According to the wording of its provisions, it is used when a national of one Member State moves and intends to stay legally in the territory of another Member State. Consequently, the condition for exercising the indicated rights is fulfilment of the cross-border requirement. A migrant citizen moves to another Member State in order to exercise his citizenship right. The Court of Justice has repeatedly emphasized that it only regulates the conditions of entry and stay in the territory of the host country (other than the country of origin), but it does not apply to purely internal situations⁴.

⁴ CJEU judgement C 256/12 of 12 March 2014 in case *O v Minister voor Immigratie, Integratie en Asiel, Minister voor Immigratie, Integratie en Asiel v B*, CJEU judgement C 133/15 of 10 May 2017 in case *H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others* Request for a preliminary ruling from the Centrale Raad van Beroep, CJEU judgement C 165/16 of 14 November 2017 in case *Toufik Lounes v. Secretary of State for the Home Department*.

The Directive establishes two types of residence rights: basic – only for migrant citizens, and derived (dependent) – that family members of a migrant citizen have, regardless of their origin. According to the wording of Art. 2 of the aforementioned Directive, family members of a migrant citizen include the spouse; the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, 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 States; the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner (of migrant citizen) and the dependent direct relatives in the ascending line and those of the spouse or partner (of migrant citizen). The indicated entities acquire the derived right of residence, provided that the existence of a particular legal bond between them and the migrant citizen is proven. Consequently, the migrant citizen activates his civil rights, the effects of which extend to accompanying family members. The above remarks indicate that, taking into account the linguistic interpretation in the analysed facts referring to the situation with no cross-border element, the provisions of Directive 2004/38 should not be applied. However, the Court of Justice extended the scope of normative grounds contained in the questions. It recalled its earlier position that even if the referring court had formally limited its questions to the interpretation of a specific provision „such a situation does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating on the cases before it, whether or not that court has specifically referred to them in its questions”⁵. In the discussed case, the Court of Justice recalled an earlier shaped case-law, which is generally applicable, and allows the granting of residence rights to a family member of a citizen who migrates to the territory of the country of origin in reference to Art. 21 TFEU⁶. However, a *sine qua non* condition for obtaining it is to demonstrate the effective stay of a European Union citizen in the territory of the host country in accordance with the provisions of Directive 2004/38 that enabled the development or strengthening of his family life⁷. At the same time, the granting

⁵ Cf.: C 133/15, p. 48.

⁶ Cf.: C 456/12 p. 48.

⁷ Cf.: C 456/12, p. 51.

of the derived right of residence as a result of the application of that rule cannot be more stringent than the conditions provided in the Directive⁸.

III.

Consequently, when a migrant citizen leaves the territory of the host country, where he effectively exercised his right of residence, and moves to his country of origin together with a member of his family, the latter is entitled to a derived right of residence for a period exceeding three months with the status of a family member under the provisions of Directive 2004/38 in connection with Art. 21 TFEU, provided that the family ties have been solidified or strengthened. The above considerations are already a well-established case-law of the Court of Justice. An important problem from the perspective of the analysed facts is the precise definition of the scope of entities constituting “family members” of a migrant citizen. As indicated above, Art. 2 of the Directive indicates four categories of entities. This catalogue was defined in general terms, without specifying their definition. From the perspective of the analysed facts, the first two categories are relevant: the spouse and partner in a registered partnership in accordance with the provisions of the host country. The analysis of the case-law of the Court of Justice indicates a wide interest in the issue of the derived residence right of family members of a migrant citizen. However, its considerations focus on the formal existence of family ties between the relevant entities, not the definitions of “marriage” and “partnership”. In the first case, the Court of Justice referred to the issue of place and time of the marriage⁹, its permanence¹⁰ or separation, which did not mean, however, the formal termination of family ties¹¹. With regard to the “partner-

⁸ Cf.: C 456/12, p. 50.

⁹ CJEU judgement C 127/08 of 25 July 2008 in case *Blaise Baheten Metock v. Minister for Justice, Equality and Law Reform*.

¹⁰ CJEU judgement C 370/90 of 7 July 1992 in case *The Queen v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, CJEU judgement C 109/01 of 23 September 2003 in case *Secretary of State for the Home Department v. Hacene Akrich*.

¹¹ CJEU judgement C 267/83 of 13 February 1985 in case *Aissatou Diatta v. Land Berlin*, ECR 0567.

ship”, it should be emphasized that the Directive clearly states that the partner is entitled to the derived right of residence, provided that such an institution is recognised in the territory of the host country.

In the analysed case, the problem directly affects the derived right of the spouse, but unlike in the previously cited judgements, the marriage was concluded between persons of the same sex. Therefore, the key element of the interpretation is to clarify the concept of ‘spouse’ in the context of the provisions of Art. 2 of Directive 2004/38. The Court of Justice emphasized that it “is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned.” The host state is obligated to recognise a marriage contracted in another Member State because the Directive does not make the spouse’s right of residence conditional on the solutions adopted in its legal system, unlike the norms applicable to civil partnership. There is no doubt, however, that marital status and consequently the concept of marriage are the exclusive competence of the Member States. In its judgements relating to the problem of surnames, The Court of Justice formed the theory that these competences cannot be exercised in violation of EU law, and more specifically those states “must none the less, when exercising that competence, comply with European Union law, and in particular with the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States”¹². The Member States exercise the indicated competences, provided that this does not cause serious inconvenience that would hinder or limit the effectiveness of the implementation of the free movement of persons¹³. The Court of Justice recognised that the exclusion of the residence right for a spouse of a same-sex citizen in the territory of his country of origin is a serious impediment and a condition discouraging him from exercising his freedom.

IV.

Another element of the case that should be emphasized are legal solutions relating to same-sex marriages. In accordance with the provisions of the

¹² CJUE Judgment C-391/09 of 12 May 2011 in case *Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*.

¹³ CJEU judgement C 148/02 of 2 October 2003 in case *Carlos Garcia Avello v. Belgium*; CJEU judgement C 353/06 of 14 October 2008 in case *Stefan Grunkin, Dorothee Regina Paul*.

Romanian Civil Code¹⁴ marriage is defined as „the union freely consented to of a man and a woman, entered into in accordance with the conditions laid down by law” and “Men and women shall have the right to marry with a view to founding a family”. Moreover, „marriage between persons of the same sex shall be prohibited”. Similarly, “marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania”. The Romanian Civil Code explicitly states that the abovementioned provisions also apply to European Union citizens entering the territory of that state. The amendment to the Civil Code, which included the introduction of the abovementioned provisions, took place in 2011, i.e. after the country’s accession to the EU. It should be assumed that such a precise normalisation of the definition of marriage and the introduction of a clear prohibition of the recognition of same-sex relationships is explicitly the recognition of marriage as a relationship between a man and a woman as a particularly protected value in that country. With this assumption, it seems justified to refer to the doctrine of imperative requirements, which allows the Member States to restrict the application of EU law on the grounds of general interest, while respecting the principle of proportionality. The Court of Justice has repeatedly emphasized that respect for public order is a premise justifying a restriction on one of the freedoms of the internal market¹⁵. In addition, one of the basic principles of EU law is respect for the national identity of the Member States, which also includes respect for the constitutional identity of these countries. When analysing the solutions adopted in the Romanian Civil Code, it should be assumed that marriage as a relationship between a man and a woman is a particularly protected value. Similar views were also expressed by governments intervening in the proceedings. Referring to this principle, the Court of Justice retained its position that “public order” is a premise justifying the restriction of the freedoms of the internal market, provided that there is a real and sufficiently serious threat to one of the basic social interests¹⁶. In addition,

¹⁴ Art. 259 par. 1 and 2 as well as Art. 227 par. 1, 2 and 4 of the Civil Code.

¹⁵ Cf.: CJEU judgement C 36/02 of 14 Oct. 2004 in the case *Omega Spielhallen – und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* 1.

¹⁶ E. Krzysztofik, *Gwarancja porządku i bezpieczeństwa publicznego jako przesłanka ograniczająca swobodę przemieszczania się obywateli UE*, [in:] *Prawno-historyczne uwarunko-*

this concept should be interpreted restrictively, just like any other derogation clause. In the case in question, according to the Court of Justice, there is no real and sufficiently serious threat because a Member State is only obligated to recognise same-sex marriage „for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and, [...], falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law”¹⁷. In addition, the Court of Justice notes the relationship between the possibility of exemption and the implementation of the fundamental rights of a migrant citizen in this particular case, i.e. the right to respect for family life. According to the explanations to Art. 7 CFR, this concept should be interpreted in the light of the case-law of the European Court of Human Rights. It emphasizes that the concept of “family life” should be interpreted dynamically because the traditional presentation of marriage as a relationship between a man and a woman having children does not quite correspond to the current realities of social life. The factual situation is an important element and it depends on the practical existence of close interpersonal relationships¹⁸. Furthermore, in the opinion of the ECtHR, the issue of validity of marriage is related to the legal order of the country of the marriage and not the country of residence of the spouses¹⁹. However, it also emphasized that the provisions of Art. 8 ECHR do not obligate States Parties to change their national regulations regarding the definition of marriage²⁰.

wania migracji Polaków po II wojnie światowej, w okresie solidarnościowym i po akcesji do Unii Europejskiej, eds. E. Krzysztofik, R.M. Pal, Lublin 2016, pp. 93–96.

¹⁷ CJEU judgement C 673/16 of 5 June 2018 in case *Relu Adrian Coman, Robert Clabourn Hamilton v. Inspectoratul General pentru Imigrari*, p. 45.

¹⁸ J. Sobczak, *komentarz do art. 7 KPP*, [in:] *Karta Praw Podstawowych Unii Europejskiej, Komentarz*, ed. A. Wróbel, Warsaw 2013, p. 247.

¹⁹ ECHR Judgement of 28 May 1985 in case 9214/80, 9473/81, 9474/81 *Abdulaziz, Cabales and Balkandali v. The UK*.

²⁰ ECHR Judgement of 20 June 2010 in case 30141/04 *Schalk and Kopf v. Austria*.

V.

The position of the Court of Justice may raise doubts. The recognition of same-sex marriage for residence purposes means that a given person is treated on the territory of the host country on an equal basis with its own citizens²¹. It should be emphasized, however, that the Court of Justice expressly used the term “for residence purposes”. It seems that it partially limits the scope of his rights. It should be assumed that it excludes applying for other rights granted to marriages within the meaning of national law, including, e.g. family and guardianship claims. The residence purposes should be limited only to the right of residence on the territory of the host country for a period exceeding three months and rights related to the implementation of the economic sphere, which fall within the competence of the EU.

Another problematic element is the abuse of the interpretation of the Court of Justice. The granting of the right of residence in the discussed case may be used by nationals of those Member States in which homosexual relationships are prohibited or which lack regulation in this respect. Although the Court of Justice emphasizes the element of relationship stability, it is a vague concept that can be interpreted differently by courts. The rejection of the possibility of a Member State invoking the doctrine of imperative requirements also seems controversial. The recognition of the definition of marriage as a relationship between a man and a woman may constitute a particularly protected value expressing the national identity of a state²². It also seems that the solutions adopted in the Romanian Civil Code clearly give it such character. There is also no doubt that the application of a restriction of freedom based on the premise of protection of public order and security will negatively affect the exercise of the right to respect for family life.

In the discussed situation, there is a conflict between the traditional concept of marriage found in the Civil Code and the constitutional right to respect for family life. In addition, this right is also protected on the basis of the CFR (and consequently the entire *acquis* of the ECtHR), which binds the

²¹ Art. 24 directive 2004/38.

²² Cf.: M. Dobrowolski, *Rodzina jako wartość konstytucyjna w orzecznictwie TK (1996–2007)*, [in:] *Rodzina jako podmiot prawa*, eds. P. Czarnek, M. Dobrowolski, Zamość 2012, pp. 9–28.

Member States within the competence of the European Union²³. The possibility of invoking the doctrine of imperative requirements only exists when the protected good has a special value in terms of tradition, history, culture, but also in the normative aspect²⁴. In the analysed case, this is not sufficiently demonstrated. It seems, however, that the interpretation of the Court of Justice used in this judgement may be different for countries that have a constitutionally standardised definition of marriage.

²³ Cf.: art. 51 par. 2 Chapter. See also: E. Krzysztofik, *The applicability of The Charter of Fundamental Rights in Poland, Law and Politics*, "Facta Universitatis. University of Nis" 2018, vol. 17, No 2.

²⁴ Cf.: E. Krzysztofik, *Poszanowanie wartości narodowych przesłanką uzasadniającą ograniczenie swobód rynku wewnętrznego*, [in:] *Unia Europejska, zjednoczeni w różnorodności*, ed. C. Mik, Warsaw 2012, pp. 446–449.