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# **FAMILY LIFE AND FREEDOM OF MOVEMENT AND RESIDENCE: FOCUS ON LGBT RIGHTS**



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# FAMILY LIFE AND FREEDOM OF MOVEMENT AND RESIDENCE: FOCUS ON LGBT RIGHTS

- Who is a family member?
- Entry and residence of spouses, registered and de facto partners
- The status of non-EU family members
- Children of same-sex couples
- Relevant CJEU and ECtHR case-law

# THE 'GLOBALISATION OF LOVE'

The EU is increasingly diverse and citizens are increasingly mobile

Example: in the Republic of Ireland (RoI), in 2011 census, 17% of the population in 2011 had been born outside the State; 12% were not Irish nationals (CSO 2012)

Biggest EU groups:

- England and Wales, Poland, Northern Ireland, Lithuania, Latvia, Romania



# THE 'GLOBALISATION OF LOVE'

Civil Partnership (CP) statistics in R of Ireland show significant numbers of non-Irish nationals have entered into CPs; approximately 25% of CPs are not Irish nationals

Of the 2606 people who had entered into CP as of January 2014:

- 130 UK, 113 Brazil, 59 US, 47 Poland, 24 Philippines, 21 Australia, 20 Italy, 19 China, 19 France, 15 Mauritius, 14 Malaysia, 12 South Africa, 10 Venezuela, 9 Germany

# C-147/08 *RÖMER V FREIE UND HANSESTADT HAMBURG*

“As a preliminary point, it should be observed that, as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States.”

That said, the EU arguably has an interest and competence where the recognition or non-recognition of a relationship affects the exercise of a right conferred by EU law – such as, prevent of discrimination in employment or free movement

# FAMILY RIGHTS AND RECOGNITION

It has long been recognised that Union citizens are not atomised individuals, but have and form families, and have people who are dependent on them

Free movement rights would be greatly undermined if the EU recognised only the rights of *individuals* exercising free movement rights, and did not make provision for the family members and dependents of those individuals

On the other hand, issues of family recognition have proven to be contentious

The concept of family can differ significantly from member state to member state, depending on deep-seated cultural understandings

There is particular disagreement within the EU over the recognition of same-sex couples and 'rainbow' families

# CONTEXT — CHARTER OF FUNDAMENTAL RIGHTS

**EU Charter of Fundamental Rights** applies to:

- the institutions and bodies of the EU
- the Member States, but only when implementing EU law.

**Article 7** Everyone has the right to respect for his or her private and family life, home and communications.

**Article 9** The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

# CONTEXT — CHARTER OF FUNDAMENTAL RIGHTS

**Article 20** Everyone is equal before the law.

**Article 21(1)** Any discrimination based on any ground **such as** sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age **or sexual orientation** shall be prohibited...

**Article 45 (1)** Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

(2) Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

# CONTEXT — TREATY ON EUROPEAN UNION (TEU)

**Article 3(2) TEU** – “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which **the free movement of persons is ensured** in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”

# CONTEXT – TFEU

**Article 10 TFEU** – “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**.”

**Article 18 TFEU** “...any discrimination on grounds of nationality shall be prohibited...”

**Article 19(1) TFEU** “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or **sexual orientation**. ...”

(See, for instance, the Framework Directive on Equal Treatment in Employment Council Directive 2000/78/EC)

# CONTEXT – TFEU

**Article 20(1) TFEU** “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the **right to move and reside freely within the territory of the Member States**; .... These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.”

**Article 21(1) TFEU** “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.” ...

# C-34/09 *ZAMBRANO* [2011] ECR I-1177

Art.20 TFEU prevents an EU citizen being denied “the genuine enjoyment of the substance of the rights conferred by virtue of the status of citizen of the Union” (regardless of free movement)

(Though see C-4343/09 *McCarthy* and C-256/11 *Dereci*)

Non-recognition of same-sex relationships and LGBT families can undermine exercise of free movement rights (Rijpma and Koffeman 2014)

LGBT persons and same-sex couples may be reluctant to go to certain states because of non-recognition or may consciously choose some more liberal states over others

C-415/93 *Bosman* (1995) – national provisions precluding or deterring national from leaving country of origin to exercise free movement restrict the right of free movement (even if they apply equally regardless of nationality)

# ECHR CASE LAW

All EU member states are parties to European Convention on Human Rights (ECHR)

ECHR does not require states to extend marriage to same-sex couples (*Schalk and Kopf v Austria* (2010))...

...but same-sex couples have a right to respect for their private and family life

'Family life' under Article 8 ECHR includes that of LGBT people, same-sex couples and their children

Article 14 ECHR precludes discrimination on the basis of sexual orientation in respect of Convention rights

*Da Silva Mouta v Portugal* (2001) – refusal of custody on basis of sexual orientation of father contravened Article 8 in conjunction with Article 14

See also *EB v France* (2007)

*Vallianatos v Greece* (2013) – confining civil unions to opposite-sex couples infringed Article 14 in conjunction with Article 8

# ECHR CASE LAW

*X v Austria* (2013) – exclusion of same-sex couples from second parent adoption (when opposite-sex unmarried couples could apply for this option) infringed Article 14 in conjunction with Article 8

(but see *Gas and Dubois v France* (2012) – not a breach to treat married and unmarried couples differently)

*Oliari v Italy* (2015) – Italy’s failure to introduce civil unions for same-sex couples infringed Article 8:

- “in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants’ momentous interests as identified above, and in the light of domestic courts’ conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and **failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.**”

# ECHR CASE LAW

*Pajić v Croatia* (2016) – blanket refusal of residence permit to same-sex partner from Bosnia and Herzegovina breached Article 14 ECHR read in conjunction with Article 8. Family reunification denied to same-sex unmarried couples but open to opposite-sex unmarried couples

*Taddeucci and McCall v. Italy* (2016) Italy's refusal to grant residence permit to non-EU same-sex partner of an Italian national infringed Art.14 read with Art. 8. "In deciding to treat homosexual couples in the same way as heterosexual couples without any spousal status, the State had breached the applicants' right not to be subjected to discrimination based on sexual orientation in the enjoyment of their rights under Art. 8..."

**Treating dissimilar situations the same:** Heterosexual couples could marry, whereas gay couples could not and did not (at the time) have access to civil unions, and therefore gay couples alone faced insuperable obstacles to recognition

# FREE MOVEMENT/CITIZENS' DIRECTIVE

**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

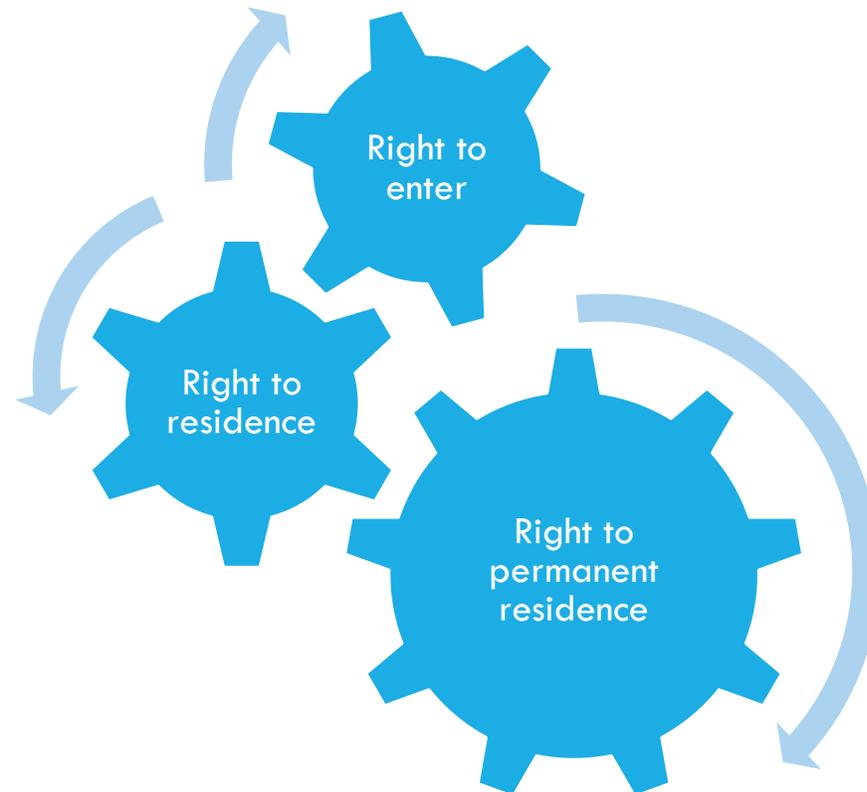
Sometimes called the Citizens' Directive

Allows Union citizens a right to move to other Member States to seek or take up employment, study, or live self-sufficiently

Addresses right of family members to accompany EU nationals

Rights of family members are connected to exercise of free movement by EU national – not independent or free-standing rights; conditional on exercise by EU national family member

# FREE MOVEMENT DIRECTIVE



# FREE MOVEMENT DIRECTIVE

Art. 5 – right of entry

Art. 6 – right of residence for up to 3 months without conditions

Art. 7 – right of residence for more than 3 months if -

- Union citizen is **a worker or self-employed**; or
- Union citizen is **self-sufficient** (has sufficient resources for themselves and family members), not liable to become a burden on social assistance and has comprehensive sickness insurance or
- Union citizen is **a student**, not liable to become a burden on social assistance and has comprehensive sickness insurance
- Union citizen is a **family member** of any of the above

# FREE MOVEMENT DIRECTIVE

Article 16 – right of **permanent residence** for Union Citizen and family members after 5 years' residence (without conditions such as self-sufficiency)

Article 24 – right to **equal treatment**

Chapter VI – restrictions on right of entry and right of residence (very limited) – the more established a person is, the more difficult it is to remove them from the State

Article 27(2) –public policy measures must be proportionate and based on personal conduct of individual involved

# RIGHTS OF FAMILY MEMBERS

Recital 5 of Free Movement Directive – “The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality. For the purposes of this Directive, the definition of “family member” should also include the registered partner if the legislation of the host Member State treats registered partnership as equivalent to marriage.”

**Some considerable resistance at time of drafting of Directive to recognition of same-sex couples** – Parliament and NGOs pushed for this, but some member states and Commission resisted.

# RIGHTS OF FAMILY MEMBERS

Recital 6 Free Movement Directive – “In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.”

Recital 31 Free Movement Directive – prohibits discrimination in implementation of directive on the basis of (amongst other grounds) **sexual orientation**

# RIGHTS OF FAMILY MEMBERS

Rights of family members are contingent on exercise by Union citizen of his or her right of free movement – non-EU national family member has **no free-standing right** to travel independently of the Union citizen

Purpose is to protect family life of Union citizen

Does not apply where Union citizen is not exercising rights of free movement (remains in home state). In such cases, national law applies. (C-64-65/96 *Uecker and Jacquet* (1997))

Only genuine relationships recognised – safeguards against marriages of convenience and other abuses of rights or fraud in Directive (Article 35) (see also Civil Registration (Amendment) Act 2014)

# CJEU CASE LAW - C-127/08 *METOCK V MINISTER FOR JUSTICE* (2008)

CJEU - Right to be accompanied by family member **is not contingent on family member having been lawfully resident in EU prior to entry** to the host State

Requirement of prior lawful residence in another member state was found to be unlawful

Irrelevant that couple met or married only after non-EU national entered EU (see 2015 Regulations in Ireland – “becomes a family member while in the State...” (Reg.3(1)(b)(iii))

Possible to travel with Union Citizen from outside EU to EU state other than that of the Union Citizen

Venue of marriage irrelevant – not necessary that couple married before exercising free movement rights

(Metock reversed decision in C-109/01 - *Secretary of State for the Home Department v Hacene Akrich* (2003))

# *SINGH* – FAMILY RIGHTS OF RETURNING CITIZENS

*C-370/90 R v Immigration Appeal Tribunal and Surinder Singh (1992)*

“A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, his conditions were not at least equivalent to those which he would enjoy under Community law in the territory of another Member State. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of that State under conditions at least equivalent to those granted by Community law in the territory of another Member State....

Consequently, Article 52 of the Treaty and Directive 73/148 ...must be construed **as requiring a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person** as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered or resided in the territory of another Member State.”

See also *C-456/12 O v The Netherlands*

# *EIND*

C-291/05 *Minister Voor Vreemdelingenzaken en Integratie v Eind* –

- “when a worker returns to the Member State of which he is a national, after being gainfully employed in another Member State, a third-country national who is a member of his family has a right under Art.10(1)(a) of Reg. 1612/68, which applies by analogy, to reside in the Member State of which the worker is a national, even where that worker does not carry on any effective and genuine economic activities. The fact that a third-country national who is a member of a Community worker’s family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national’s right to reside in the latter State.”

# RIGHTS OF FAMILY MEMBERS – 2004 DIRECTIVE

**Article 2(2):** "Family member" under the Directive means:

(a) the spouse;

(b) 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 State;

(c) the **direct descendants who are under the age of 21** or are dependants and those of the spouse or partner as defined in point (b);

(d) the **dependent direct relatives** in the ascending line and those of the spouse or partner as defined in point (b);

**Article 3(2):** more limited provision made for those falling outside Article 2(2) (see below)

# RIGHTS OF FAMILY MEMBERS – 2004 DIRECTIVE

**To what extent are same-sex couples and their families covered by the Directive?**

Issue is complicated by the fact that same-sex unions are not uniformly recognised across the EU

Growing trend towards allowing same-sex unions (including marriage and registered partnership)...

...but there is a significant east-west divide, and a lack of consistency in recognition

# RECOGNITION OF SAME-SEX RELATIONSHIPS

Across the EU, the recognition of same-sex relationships is uneven to say the least

- Same-sex marriage in Belgium, Denmark, Finland (from 2017), France, Ireland, Luxembourg, Netherlands, Portugal, Spain, Sweden (spouses)
- Same-sex marriage in England and Wales, and Scotland (all of UK except NI) (spouses)
- Civil partnerships in Northern Ireland, Austria, Croatia, Cyprus, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Malta, Slovenia and in some of jurisdictions that allow same-sex marriage
- Trend is towards recognition but significant east-west divide; some EU states make no provision for same-sex unions

# RECOGNITION OF SAME-SEX RELATIONSHIPS

Safradin 2015 – Recognition issue is ‘**a legal jungle**’

Same-sex couple who marry in Belgium

Couple moves to Dublin for work – treated as married

Travels to Belfast for a week away – now treated as civil partners

Moves to Poland – relationship not recognised at all (though they may have free movement rights)

Even if couples have a right of entry and residence under Free Movement Directive, non-recognition for other purposes may disadvantage same-sex couples, and dissuade them from exercising free movement



# 1. SPOUSES

Spouse – not defined, but appears to mean the husband or wife of the EU national

Commission view *at time of drafting* – only opposite-sex spouse - but Commission view seems to have evolved since then

One might argue that the term could potentially include a same-sex spouse (term is gender neutral) but **no agreement or consensus on the matter**

- For EU to define autonomously on community-wide basis? Or for individual states to decide?
- Is this a matter for **the host state or home state** to determine?

If the EU national has a same-sex spouse under the law of his or her home state, but the host state does not recognise such a marriage what happens? Nothing in EU law or under ECHR requiring states to permit or recognise same-sex marriage (See *Schalk and Kopf v Austria* (ECHR, 2010))

Issue of private international law – but may have a bearing on free movement of EU nationals

# SPOUSES — EARLIER CASES

*Netherlands v Reed* [1986] ECR 1283 – unmarried partner in a stable relationship is not a spouse – but “a member state which permits the unmarried companions of its nationals, who are not themselves nationals of that member state, to reside in its territory cannot refuse to grant the same advantage to migrant workers who are nationals of other member states.” (Principle of equal treatment)

*Grant v South-West Trains* [1998] ECR I-621 – stable relationships between couples of the same sex not recognised as equivalent to marriage or stable heterosexual unions.

T-264/97 *D v Sweden and Council* [1999] ECH II-1: “Community notions of marriage and partnership exclusively address a relationship founded on civil marriage in the traditional sense of the term.” – Marriage is an opposite sex union [28] (See also T-58/08 *Roodhuijzen* [2009] ECR II-3797)

# SPOUSES - DIRECTIVE

The definition of family was the subject of some considerable debate at the time of the negotiation of the Free Movement Directive

Reluctance among member states and Commission to adopt a broad, unified approach to family and spouse

Directive represents something of a compromise between Parliament and Council

Unclear whether status of 'spouse' is to be determined by **host state or home state**

- Some argue that there should be mutual recognition (Rijpma and Koffeman 2014)
- Others maintain it is for the host state to determine whether someone is a spouse – matter of public policy (Safradin 2015 – “power lies implicitly in hands of host MS”)

Uncertainty leads to a potentially uneven application of citizens' rights and may interfere with free movement decisions – LGBT couples less likely to move to certain states

# SPOUSES - DIRECTIVE

*Coman/Hamilton Case* (Romania) C-673/16 (pending) – referred the question as to whether a same-sex couple are spouses or other family members to CJEU

Several Italian decisions in which Italian courts have recognised same-sex marriages celebrated in other States for the purpose of the Directive (even though such marriages are not recognised in Italy as marriages for general purposes)

This may lead to reverse discrimination (but that is for member state to resolve; not an issue in EU law)

ECtHR - *Hämäläinen v. Finland* [GC] - 37359/09 (2014) – for contracting states to define marriage

# SPOUSES - DIRECTIVE

Formation and recognition of marriage generally a matter for member states but...

...may have to be read in light of non-discrimination provisions (cf *Pajić*)

Discrimination on the basis of sexual orientation not permitted

Bell (2005) – “Marriage is a status granted by national law; therefore the EU should not distinguish between legally contracted marriages within the member states.”

See also *Windsor v New York* 570 U.S. \_\_\_\_ (2013) – US Supreme Court found federal non-recognition of same-sex marriages recognised by states to be unconstitutional (breach of 5<sup>th</sup> Amendment)

Safradin (2015) – points to a number of cases where the Italian courts have recognised foreign same-sex marriages and civil partnerships for the purpose of the Directive, citing free movement rights

# SPOUSES - DIRECTIVE

Commission COM(2010) 747 final Green Paper

“The legal status acquired by the citizen in the first Member State should not be questioned by the authorities of the second Member State since this would constitute a hindrance and source of objective problems hampering the exercise of the citizens’ rights.”

# SPOUSES - DIRECTIVE

If same-sex spouses are recognised as spouses for free movement purposes, do they have to be recognised for other social purposes?

Can a state simply be required to recognise for purpose of entry and residence, but then deny recognition as spouses for purposes of e.g. tax law, social security, family law?

These latter areas are matters within Member states' jurisdiction but denial of general recognition may also deter or fetter free movement (though general recognition may give rise to reverse discrimination)

Cf Brussels II bis – Council Regulation 2201/2003/EC – might member states be obliged to recognise foreign divorces of same-sex couples?

# SPOUSES - DIRECTIVE

Ireland permits and recognises marriage of same-sex couples

**Art.41.4 of the Constitution** – “Marriage may be contracted in accordance with law by two persons without distinction as to their sex”

Ireland recognises a marriage entered into in a foreign state between a couple of the same-sex, as a marriage in Ireland:

**S.12.(1), Marriage Act 2015** – “A marriage under the law of a place other than the State shall not be precluded from being recognised as a marriage by reason of the sex of the parties to the marriage.”

No public policy reasons for not recognising a foreign same-sex marriage in Ireland  
– See also Art.18TFEU – ban on discrimination based on nationality

## 2. REGISTERED PARTNERS

Registered partnership contracted on basis of legislation of a Member State is recognised - **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;

Two conditions

- host state must recognise registered partnerships and
- host state must recognise registered partnerships as equivalent to marriage

Some states may have registered partnership, but not recognise it as equivalent to marriage (strong v weak forms of registered partnership)

Ireland treats civil partners and spouses equally for immigration purposes – see SI 548/2015 European Communities (Free Movement of Persons) Regulations 2015

# *MARUKO, RÖMER, HAY*

Framework Directive on Employment Equality 2000/78/EC

*Maruko* (2008) “... the combined provisions of Articles 1 and 2 of Directive 2000/78 preclude legislation ... under which, after the death of his life partner, the surviving partner does not receive a survivor’s benefit equivalent to that granted to a surviving spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor’s benefit.”

Direct discrimination on basis of sexual orientation

Based on comparability of union with marriage in relation to specific matter at hand

*Hay* (2012) – French PaCS comparable – marriage leave and bonus

# CIVIL PARTNERSHIP RECOGNITION IN IRELAND

Civil partnerships available to same-sex couples from January 2011 to November 2015 – similar in most respects to marriage

Civil partnerships **closed to new entrants as of 16 November 2015** (with some very rare exceptions) (See Marriage Act 2015)

Existing civil partnerships still recognised

Section 5 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 - Minister for Justice and Equality may designate classes of relationship between same-sex couples from other jurisdictions as civil partnerships in Ireland **provided they were entered into before 16 May 2016 (Marriage Act 2015)**

Not all foreign civil partnerships/registered partnership/civil unions are recognised in Ireland

# CIVIL PARTNERSHIP RECOGNITION IN IRELAND

Conditions for recognition: CPCROC Act 2010:

- “S.5.- (1) The Minister may, by order, declare that a class of legal relationship entered into by **two parties of the same sex** is entitled to be recognised as a civil partnership if under the law of the jurisdiction in which the legal relationship was entered into-
  - (a) the relationship is **exclusive** in nature,
  - (b) the relationship is **permanent unless the parties dissolve it through the courts,**
  - (c) the relationship has been **registered** under the law of that jurisdiction, and
  - (d) the rights and obligations attendant on the relationship are, in the opinion of the Minister, sufficient to indicate that the relationship would be **treated comparably to a civil partnership.**”

# CIVIL PARTNERSHIP RECOGNITION IN IRELAND

## To be recognised as civil partners in Ireland:

- Couple must be **of the same sex** – opposite-sex civil partnerships or similar registered partnerships are not recognised (opposite-sex marriage treated as marriage)
- Couple will **not be recognised** as civil partners if they are **within the prohibited degrees of relationship** for civil partnership, as laid down in Irish law
- Union must be **dissolvable only by court order** – thus French registered partnerships are not recognised in Ireland
- Conditional on ministerial order recognising the class of relationship
- Registered partnership must have been **entered into before 16 May 2016 (Marriage Act 2015)**

# CIVIL PARTNERSHIP RECOGNITION IN IRELAND

Several classes of foreign legal relationships entered into abroad before 16 May 2016 are recognised as civil partnerships in Ireland

Same-sex civil unions from Austria, Croatia, Finland, Germany, Malta, Sweden, UK (amongst others) are all recognised as civil partnerships

But some not are recognised as CPs in Ireland- French PaCS not recognised because it can be dissolved without a court order (Greece, Cyprus, Italy, Slovenia, Estonian civil unions not recognised as civil partnerships in Ireland)

# 3. POSITION OF DE FACTO PARTNERS

## Article 3(2), Free Movement Directive

“Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State **shall**, in accordance with its national legislation, **facilitate entry and residence** for the following persons:

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are **dependants or members of the household of the Union citizen** having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen; [See C-1/05 *Jia* - ‘not in position to support themselves’

(b) the partner with whom the Union citizen **has a durable relationship, duly attested.**

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.”

# CASE C-83/11, *RAHMAN*, [2012] ECR I-0000, PAR. 21

‘Whilst it is therefore apparent that Article 3(2) of Directive 2004/38 **does not oblige the Member States to accord a right of entry and residence** to persons who are family members, in the broad sense, dependent on a Union citizen, the fact remains, as is clear from the use of the words ‘shall facilitate’ in Article 3(2), that that provision **imposes an obligation on the Member States to confer a certain advantage**, compared with applications for entry and residence of other nationals of third States, on applications submitted by persons who have a relationship of particular dependence with a Union citizen.’

Court found that Art.3(2) was imprecise and gave states a ‘wide discretion’ as regards factors to be taken into account; not required to grant every application

**However, criteria cannot render Art.3(2) ineffective**

# CASE C-83/11, *RAHMAN*, [2012] ECR I-0000, PAR. 21

“1. On a proper construction of Article 3(2) of Directive 2004/38/EC ...:

- the Member States are **not required to grant every application for entry or residence** submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of that directive, even if they show, in accordance with Article 10(2) thereof, that they are dependants of that citizen;
- it is, however, incumbent upon the Member States to ensure that their **legislation contains criteria which enable those persons to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons;**
- the Member States have a **wide discretion when selecting those criteria**, but the criteria must be consistent with the normal meaning of the term ‘facilitate’ and of the words relating to dependence used in Article 3(2) and must not deprive that provision of its effectiveness; and
- every applicant is entitled to a judicial review of whether the national legislation and its application satisfy those conditions.”

# CASE C-83/11, *RAHMAN*, [2012] ECR I-0000, PAR. 21

“2. In order to fall within the category, referred to in Article 3(2) of Directive 2004/38, of family members who are ‘dependants’ of a Union citizen, the **situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependent.**

3. On a proper construction of Article 3(2) of Directive 2004/38, the Member States may, in the exercise of their discretion, impose particular requirements relating to the nature and duration of dependence, provided that those requirements are consistent with the normal meaning of the words relating to the dependence referred to in Article 3(2)(a) of the directive and do not deprive that provision of its effectiveness....”

# POSITION OF DE FACTO PARTNERS

A much less concrete position – shall, in accordance with its national legislation, **facilitate** entry and residence; not required to grant every application (*Rahman*)

Not an automatic right, but appears to require examination of the circumstances

Relationship must be durable, and duly attested

Must be evidence of relationship

Clear reasons needed to justify refusal

Bell (2005) – “cannot have a total ban on admission of unmarried partners”

Article 21 Charter and Recital 31 of Directive – **cannot discriminate on the basis of sexual orientation**

# POSITION OF DE FACTO PARTNERS

Couples and children who do not fall within 'family members' definition may qualify under Art.3(2), but position is more precarious

If registered union or marriage not recognised, arguably, it may still provide sufficient evidence of a durable relationship – Rijpma and Koffeman (2014) –

- “It is submitted that a host Member State that does not provide for any form of legal recognition of same-sex relationships, must accept that the condition that the relationship is duly attested is fulfilled in [cases where] the partners have entered into a registered partnership or marriage in another State”.  
[475]

Non-recognition would potentially impede free movement rights

## 4. CHILDREN

If Union citizen is a legal parent of child, e.g. child is a biological child or adopted child of citizen, and is under 21 or is a dependant – child is a family member

If Union citizen's spouse or registered partner is a legal parent of child, e.g. child is a biological child or adopted child of spouse or registered partner, and is under 21 or is a dependant – child is a family member

What happens if Union citizen is a social parent, but not a legal parent **and** marriage/registered partnership not recognised in host state – relationship with child might not be recognised

Union citizen would have to fall back on “other family members” provision (Art. 3(2)) – dependants or members of the household of the Union citizen

But rights in such cases are not automatic and much more precarious

# RIGHTS OF FAMILY MEMBERS

Right to accompany Union Citizen – rights are dependent on Union citizen's rights

Right to a residence card – Articles 9-11

Article 12 – death or departure of Union citizen – no effect on rights of family members who are nationals of a member state

- Non-EU national family members are not affected by death of Union citizen if family member has been living in state for **at least one year** before Union citizen's death (but must have a job or sufficient resources)

# RIGHTS OF FAMILY MEMBERS

Article 13 – divorce, annulment, termination of registered partnership - no effect on rights of family members who are nationals of a member state

- Non-EU national family members are not affected by divorce from a Union citizen provided (but must have a job, be self-employed or have sufficient resources)
  - marriage had **lasted at least 3 years**, including **one year in the host state**, or
  - non-EU national has custody of Union citizen's children; or
  - difficult circumstances (e.g. domestic violence) warrant allowing non-EU national to remain; or
  - non-EU national has right of access to child in the host state

# RIGHTS OF FAMILY MEMBERS

Permanent Residence after 5 continuous years' residence alongside Union citizen (See Article 16)

Right of permanent residence also extends to family members who are not EU nationals who have legally resided with the Union citizen in the host state for a continuous period of 5 years

Exemptions for retired and incapacitated workers and their families (Article 17)

Once acquired, right of permanent residence can generally be lost only through absence exceeding two consecutive years

# FREE MOVEMENT DIRECTIVE IN IRELAND

Transposition - 2006 Regulations (SI No. 656 of 2006), amended in 2008 now replaced by SI No 548/2015 European Communities (Free Movement of Persons) Regulations 2015

Divides family members into

- 'qualifying family members' – spouses, civil partners and descendants ('family members' as defined by the Directive) and
- 'permitted family members' – including partners with whom the citizen has a durable relationship, duly attested

Civil partners and spouses now treated the same – **but** civil partnership defined as a civil partnership recognised in Ireland under s.5 of CPACROC Act 2010 – some registered partnership excluded from recognition

# FREE MOVEMENT DIRECTIVE IN IRELAND

Qualifying Family Members – automatically recognised once they produce documentary evidence of relationship

Permitted Family Members – have to provide evidence of relationship and satisfy Minister that they are entitled to be treated as a permitted family member – a much more rigorous examination of their circumstances applies

# FREE MOVEMENT DIRECTIVE IN IRELAND

## **Permitted Family Members (Reg.5 of 2015 Regulations)**

May apply to Minister for decision that he or she should be treated as permitted family member

Evidence required that he or she is a member of the Union citizen Family. In particular: “documentary evidence of the existence of a durable relationship with the Union citizen”

Minister “shall cause extensive examination of the personal circumstances of the applicant” to be carried out in order to decide whether person should be treated as a permitted family member

Looks to nature and duration of relationship; ability of Union citizen to support applicant

# OTHER MATTERS

Safeguards against Marriages of Convenience and Civil Partnerships of Convenience (see also Civil Registration (Amendment) Act 2014)

Transgender people – recognition varies from State to State but see *Goodwin v UK* (ECHR 2002) – refusal to recognise preferred gender of transgender person breached Articles 8 and 12 ECHR (See Gender Recognition Act 2015)

Family Reunification Directive 2003/86/EC – not applicable in Ireland – spouse and minor children; *may* authorise entry and residence of registered partners and unmarried partners

**THANK YOU!**

