Canterbury Research and Theses Environment

Canterbury Christ Church University's repository of research outputs

http://create.canterbury.ac.uk

Please cite this publication as follows:

Spalding, A. (2019) Where next after Coman? European Journal of Migration and Law, 21 (1). ISSN 1388-364X.

Link to official URL (if available):

https://doi.org/10.1163/15718166-12340044

This version is made available in accordance with publishers' policies. All material made available by CReaTE is protected by intellectual property law, including copyright law. Any use made of the contents should comply with the relevant law.

Contact: create.library@canterbury.ac.uk

# Where Next After *Coman*?

**Abstract**

This article considers the impact of the recent judgment of the Court of Justice of the European Union in Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385 in which same-sex marriages where found to fall under the definition of 'spouse' in the Citizenship Directive. In light of recent societal and case law developments in Europe it is possible that *Coman* may come to be an important foundational case which will form part of the groundwork for the CJEU to advance the rights of unmarried couples in the EU migration context. This article examines the current position of unmarried couples (including registered or civil partners) under EU migration legislation as well as recent developments under the European Convention of Human Rights to argue that there are clear indications that EU migration laws need to be adapted to better suit a wider range of relationships than marriage.

**Keywords**

Coman, Banger, Pajic, Unmarried, Family Reunification, Free Movement,

## 1. Introduction

The Court of Justice of the European Union (CJEU) recently decided the *Coman* case[1] in which it ruled that the definition of 'spouse' in the EU Citizenship Directive[2] refers to partners in same-sex marriages as well as heterosexual marriages. The case is a welcome step forward for the rights of same-sex couples. Although the reality of this judgement is that it will only affect a very narrow set of circumstances, it is a case of potentially great importance. When this case and other recent developments are taken in conjunction with the case law emanating from the European Court of Human Rights (ECtHR), there are hints that the legal status of unmarried couples may soon be advanced.[3] In particular there are grounds to argue that the legal conception of 'family' is slowly evolving in such a way that soon EU migration laws may need to change to accommodate relationships outside of heterosexual marriage.

After providing an outline of how the CJEU and the ECtHR interact and can mutually reinforce each other to advance the law this article will briefly discuss the *Coman* case and its impact. This article then goes on to demonstrate that despite significant societal change in the participation and recognition of partnerships outside of marriage, EU legislation on free movement for EU citizens and family reunification for third country nationals provides little robust protection for such relationships. The recent case of *Banger*[4] is highlighted here as

[1] Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385

[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

[3] For an overview of EU family reunification rights and how the CJEUs approach has shifted at various points see Alina Tryfonidou 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15 (5) European Law Journal 634

[4] Case C-89/ 17 *Banger* ECLI:EU:C:2018:570

another example of recent case law which indicates the CJEU may take a more progressive approach to such issues in the future. Given the issues at stake in free movement and family reunification policies, the discussion then turns to the relevant human rights precedents. CJEU case law on diverse families and EU migration legislation has indicated that fundamental rights can play an important role in the evolution of interpretations of such legislation. The ECtHR has made significant strides in recent years in recognising the rights of more diverse families such as a same-sex couples and the case of *Pajic v Croatia*[5] in 2016 suggested that migration laws which do not adequately protect the family life of those outside of traditional marriage relationship is a matter it will take seriously in the future. The future potential of the CJEU to advance this area of law will also be discussed. Finally this article will argue that a failure to adequately protect relationships outside of marriage may also constitute discrimination on the grounds of sexual orientation.

## 2. The CJEU and the ECtHR

The relationship between the CJEU and the ECtHR is somewhat complicated. The European Union and the Council of Europe are two separate organisations. This means that the CJEU and the ECtHR are not institutionally related to one another. Article 6 of the Treaty of the European Union did introduce a provision which would entwine the two systems together more formally as it requires the EU to accede to the European Convention on Human Rights. However, the accession process has been stagnant for years and seems unlikely to occur anytime soon.[6] This means that that ECtHR does not currently have jurisdiction over EU law itself, but this does not mean it has no influence whatsoever. The ECtHR may still rule on

[5] Application No 68453/13 *Pajic v Croatia* Judgment of 23 February 2016
[6] Cathryn Costello *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) p 7-8

national measures introduced by Member States even where that national measure's purpose is to implement requirements under EU law.[7]

Likewise, an informal judicial relationship has developed between the two courts over the years due to their overlapping duty to both interpret human rights.[8] This began in the late sixties when the CJEU found that EU law must be compatible with fundamental rights in order for it to be applicable.[9] This meant that the CJEU had a duty to protect and thus interpret human rights. Soon after, the CJEU began making references to the ECHR in its judgments and accorded rights protected under the ECHR 'special status' in EU law.[10] This duty for the CJEU was given increased impetus when the Charter of Fundamental Rights of the European Union was given full legal effect in 2009.[11] The Charter of Fundamental Rights is an independent human rights document for which the CJEU has sole responsibility for interpretation. However, the Charter is heavily based on the ECHR. This is reflected in Article 52 (3) which provides that where the Charter 'contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention'. Article 53 of the Charter also states that 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised … [in] the European Convention for the Protection of Human Rights and Fundamental Freedoms.' It is also clear, however, that the Charter can provide more

[7] Application No 24833/94 *Matthews v United Kingdom* Judgement of 18 February 1999
[8] Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 Common Market Law Review 629; Guy Harpaz, The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' (2009) 46 (1) Common Market Law Review 105; Sonia Morano-Foadi and Lucy Vickers 'A Matter for Two Courts: The Fundamental Rights Question for the EU' in Sonia Morano-Foadi and Lucy Vickers (eds) *Fundamental Rights in the EU: A Matter for Two Courts* (Hart, 2015)
[9] Case C-29/69 *Stauder v City of Ulm* ECLI:EU:C:1969:57
[10] Case C-36/75 *Rutli v Minstre de l'interieur* ECLI-EU:C:1975:137
[11]Article 6(1) Treaty on the European Union

extensive protection than the ECHR and there is reference to rights not contained in the European Convention such as in Article 3, which prohibits cloning and eugenic practices. Furthermore, it has been implied by the CJEU that, where rights in the Charter do not directly correspond to rights in the Convention, they are subject to an independent interpretation.[12] Thus although heavily based on the ECHR, the Charter is an autonomous document.

Over the past decade the rights of same-sex partners have been developed by both the ECtHR and the CJEU. The ECtHR has taken steps in the past decade to expand the right to family life to encompass same-sex relationships. In 2010 the Court, for the first time, recognised that same-sex relationships fall under the concept of 'family life' protected by Article 8 of the Convention.[13] In *Vallianatos and Others v Greece*[14] the Court found that the introduction of an alternative to marriage, a civil union, for different-sex couples only was a discriminatory against same-sex couples and was a violation of Article 14 with Article 8. More recently, the Court has found that the failure to provide same-sex couples with any mechanism for the legal recognition of their relationship is a violation of Article 8[15] and it has recognised that there may be discrimination where same-sex partners do not have access to marriage and thus cannot access certain rights enjoyed by married couples. [16] The CJEU has also taken some steps to increase the recognition of same-sex relationships.[17] For example, in the 2013 case of

[12] Case C-69/10 *Samba Diouf* ECLI:EU:C:2011:524 Advocate General Opinion para 39; Case C-399/11 *Melloni* ECLI:EU:C:2013:107 Advocate General Opinion para 109; Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 Advocate General Opinion para 87; Although this approach has not been explicitly endorsed by the CJEU, the rulings in all of these cases seem to fit with the Advocate General's approach
[13] Application No 30141/04 *Schalk and Kopf v Austria* Judgment of 24 June 2010
[14] Application No 29381/09 and 32684/09 *Vallianatos and Others v Greece* Judgment of 11 July 2013
[15] Application No 18766/11 and 36030/11 *Oliari and Others v Italy* Judgment of 21 July 2015
[16] Application No 51362/09 *Taddeucci and McCall v Italy* Judgement of 30 June 2016
[17] See Jorrit Rijpma and Nelleke Koffeman 'Free Movement Rights for Same-Sex Couples Under EU Law: What Role to Play for the CJEU?' in Daniele Gallo, Luca Paladini and Pietro Pustorino (eds) *Same-Sex Couples before National, Supranational and International Jurisdictions'* (Springer, 2014)

*Frederic Hay*[18], the Court of Justice ruled that where same sex couples have been allowed to enter into civil partnerships, those partnerships should attract the same employment-related benefits given to married couples. The recent *Coman* case is another significant step.

## 3. The Coman Case

The *Coman* case concerned a Romanian citizen, Mr Coman, who had lived in Belgium for a significant period of time and had married another man (who was an American citizen) there. Mr Coman enquired about getting his husband a Romanian residence permit and was informed that he would be refused because a same-sex marriage would not be recognised by the Romanian authorities. If Mr Coman's partner had been a woman then she would have automatically been entitled to a Romanian residence permit. On this basis the couple brought a case before the Romanian courts arguing that this was discrimination on the grounds of sexual orientation and that it was a violation of the EU free movement rights of Mr Coman. The Romanian Constitutional Court referred the question of whether the term 'spouse' in the Citizenship Directive 2004/38[19] included same-sex spouses to the CJEU.

EU citizens who move between EU countries (including those returning to their home EU state from another EU country provided their residence is genuine[20]) are entitled to bring family members with them under the Citizenship Directive 2004/38.[21] Article 2 (2(a)) of the Directive defines the family members who citizens are entitled to bring with them as

[18] Case 267/12 *Frederic Hay v Credit Agricole mutual de Charente-Maritime et des Deux-Sevres* ECLI:EU:C:2013:823

[19] 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

[20] See for example Case C -456/12 *O & B* ECLI: EU:C: 2014:135

[21] 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

including a 'spouse'. However, this term is not expanded on elsewhere in the Directive and it was unclear whether 'spouse' included same-sex spouses. The Court found that the term 'spouse' in the Directive refers to 'a person joined to another person by the bonds of marriage'[22] and is gender-neutral so it also covers same-sex marriage. The Directive does not give Member States any discretion when it comes to the admittance of spouses and the Court found that to allow states to exercise discretion would compromise the unity of the free movement rights of Union citizens.

Several states put forward observations that they should not be required to admit same-sex spouses due to public policy and national identity considerations. Such arguments, particularly by the Latvian government, revolved around the fact that some Member States intend to keep the definition of marriage as a union between a man and woman. The Court was not persuaded by these arguments. It reasoned that public policy considerations can only be used to justify a derogation from a fundamental right when there is a "genuine and sufficiently serious threat to a fundamental interest of society."[23]The Court found that this was not the case here as "the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, 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…"[24] The Court also made reference to the Charter of the Fundamental Rights and case law from the European Court of Human Rights to support its interpretation of the Directive. It indicated that the approach of the Romanian authorities would not be consistent with the right to a

[22]Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385, para 34
[23] Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385, para 44

[24] Case 673/16 *Coman and Others* ECLI:EU:C:2018:385, para 45

private and family life.[25] . Thus, Romania and other Member States which do not allow for same-sex marriage are required to recognise same-sex marriages concluded in other EU states for the purposes of EU citizen free movement rights.

While this case represents a positive step forward in extending the rights of same-sex couples it is important to recognise that this is a very limited step. Firstly, given the fact that the EU does not have competency over family law, the judgment clearly does not establish a requirement for Member States to introduce same-sex marriages for their own nationals. This means that nationals of those Member States that do not allow same-sex marriage and who cannot move to another EU state will continue to not have access to marriage. For same-sex partners, simply going abroad to get married will be insufficient because in order to use the Directive upon returning home, the citizen must have genuine residence in the other state – which means a stay of at least 3 months.[26] Secondly, it is likely that this judgment will really only effect couples where there is one EU citizen who wishes to marry a third country national. This is because another EU national will be entitled to move within the EU via their own EU citizenship. .

It is clear from the above description that the judgment is quite limited in its effect and seems more limited than the Advocate General's Opinion on this case. The Advocate General discussed at length the fact that EU legislation must keep pace with changes in society.[27] The Advocate General also reiterated the limits of Member State discretion in this area. In the event that 'spouse' was not interpreted to include same-sex marriages, the Romanian Constitutional Court had also asked if same-sex marriages would be covered by Article 3(2)

[25] Case 673/16 *Coman and Others* ECLI:EU:C:2018:385, para 47-50
[26] Case C -456/12 *O & B* ECLI: EU:C: 2014:135, paras 54 and 59
[27] Case 673/16 Coman and Others ECLI:EU:C:2018:2, Opinion of Advocate General Wathelet, paras 51 -58

of the Directive. Article 3(2) covers: "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…" and "the partner with whom the Union citizen has a durable relationship, duly attested." The Advocate General explicitly stated that same-sex couples could use this provision but noted that relying on it would be problematic in this case. This is due to the fact that Member States only have facilitate entry for such family members *in accordance with its own legislation* meaning there is a significant level of discretion for Member States under Article 3(2). However, the Advocate General found that this discretion cannot include the ability for Member States to discriminate solely on the basis of sexual orientation as this would be inconsistent with the Charter of Fundamental Rights. Given its interpretation of the term 'spouse' the CJEU,found it unnecessary to consider the question but it is interesting that the Advocate General took the opportunity to reiterate that Member State discretion has to be compatible with EU fundamental rights.

Thus, the *Coman* case appears to offer a very limited step forwards for same-sex marriages and it is welcome that the Court did take the robust stance of insisting that such marriages are covered by the interpretation of 'spouse' in Directive 2004/38. However, *Coman* should also be considered in light of broader trends evident in the case law of both the CJEU and particularly the European Court of Human Rights (ECtHR) ) where there seems to be a shift (albeit not necessarily a linear one) toward recognising that many relationships now fall outside the traditional marriage paradigm. It is possible that this rather limited case could form part of the groundwork for more significant progress in the future when it comes to EU migration law and relationships outside of heterosexual marriage to incorporate a much more diverse range of families.

## 4. Non-Marital Relationships and EU Immigration Law

In the 1980s in the case of *Netherlands v Reed*[28] an unmarried couple argued that the term 'spouse' should be extended to unmarried partners for free movement purposes and the CCJEU found 'In the absence of any indication of a general social development which would justify a broad construction, and in the absence of any indication to the contrary in the regulation, it must be held that the term 'spouse' in Article 10 of the Regulation refers to a marital relationship only.'[29] Since the time of that case there has been significant societal change. It is clear that the number of people choosing to establish families outside of marriage is growing. The proportion of people entering into marriage has declined by about 50% in the 28 EU states since the 1960s and the number of children born outside of marriage has also significantly increased with births outside of marriage outnumbering those within marriage in some Member States.[30] Attitudes towards cohabitation as both a precursor to marriage and as a permanent alternative have relaxed in varying degrees all across Europe in the past two decades.[31] Most EU states now offer some alternative to marriage, at least for same-sex couples, in the form of a civil partnership[32] and various EU Member States including Belgium, Estonia, France, Greece, Malta and Portugal have introduced a form of civil partnership (alternative to marriage) for heterosexual couples as well as homosexual couples.[33] The UK Supreme Court has just found

---

[28] Case C-59/85 *Netherlands v Reed* ECLI:EU:C:1986:157
[29] Case C-59/85 *Netherlands v Reed* ECLI:EU:C:1986:157, para 15
[30] Eurostat 'Marriage and divorce statistics' June 2015 http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics#Fewer_marriages.2C_more_divorces
[31] Judith Treas, Jonathan Lui, and Zoya Gubernskaya 'Attitudes on marriage and new relationships: Cross-national evidence on the deinstitutionalization of marriage' (2014) 30 (54) Demographic Research 1495; Zuzana Zilincikova and Nicole Hienkel 'Transition from Cohabitation to Marriage: The Role of Marital Attitudes in FSeven Western and Eastern European Countries' (2018) 43 Comparative Population Studies 3
[32] Only Bulgaria, Italy, Latvia, Lithuania, Poland, Romania and Slovakia do not, see 'Registered Partnerships' 03 February 2016 http://europa.eu/youreurope/citizens/family/couple/registered-partners/index_en.htm
[33] 'Where in Europe a man and woman can get a civil partnership' (BBC News 22 February 2017 >https://www.bbc.co.uk/news/uk-39039954 < accessed 28 August 2018

that the failure to allow different sex couples to enter a civil partnership is discriminatory.[34] Scotland and Ireland have also taken a further step and explicitly recognised the rights of stable couples who do not have any formalised relationship.[35]

Despite these significant societal developments, EU migration legislation continues to prioritise the marital bond far above any other type of relationship.[36] For example, Directive 2004/38 does make provision for non-marriage partnerships but says that they only need to be recognised if the host member state treats such partnerships as equivalent to marriage.[37] Likewise as noted above, Article 3(2) of the Directive provides that Member States will 'facilitate entry and residence for … the partner with whom the Union citizen has a durable relationship, duly attested' but this only needs to be done in accordance with national legislation.[38] Thus in both cases, the Member States retain discretion over whether or not such persons are admitted or granted residence, a discretion which does not exist for married couples. However, if a Member State does refuse to admit an unmarried partner of an EU citizen under Article 3(2) they must show they have undertaken an 'extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.'[39]

In the recent case of *Banger*[40] the CJEU, with many references to the *Coman* case, reiterated that Member States are required to 'facilitate' the entry of unregistered long-term partners

[34] R (on the application of Steinfeld and Keidan) (Appellants) *v* Secretary of State for International Development [2018] UKSC 32
[35] See for example Scotland: The Family Law (Scotland) Act 2006 and Ireland: The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010
[36] Clare McGlynn 'Family Reunion and the Free Movement of Persons in European Union Law' (2005) 7 International Law Forum du droit International 159
[37] Article 2 (2(b)) Directive 2004/38
[38] Article 3(2)b Directive 2004/38/EC on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States
[39] Ibid
[40] Case C-89/ 17 *Banger* ECLI:EU:C:2018:570

and that a refusal of a residence permit must only be after the applicants personal circumstances have been properly considered and any refusal must be justified with reasons.[41] However as the Court noted 'in the light both of the absence of more specific rules in Directive 2004/38 and of the use of the words 'in accordance with its national legislation' in Article 3(2) of that directive, each Member State has a wide discretion as regards the selection of the factors to be taken into account.'[42] The Court in *Banger* did reference the case of *Rahman*[43] in which personal factors such as 'the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join'[44] were cited as various factors which should be taken into account in such decisions. It is worth noting again here that the Court in *Coman*, unlike the Advocate General, did not address the question of how this state discretion over unmarried partners works in relation to issues such as same-sex couples. *Banger* also established that there must be some procedure through which applicants can appeal decisions on residence cards. Overall, although it is clear that Member States still retain a significant degree of discretion, the acknowledgement by the CJEU in *Banger* that unmarried partners to EU nationals seeking residence do have rights under EU law represents another recent small step towards a more inclusive immigration policy for those in a non-marital relationship.

The situation for non-EU nationals seeking to bring in an unmarried partner, however, is much more complicated. Non- EU nationals do not benefit from this requirement to provide reasons or engage in an extensive examination of the circumstances at all under EU migration laws. The Family Reunification Directive[45] is an EU measure which aims to set down

[41] Case C-89/ 17 *Banger* ECLI:EU:C:2018:570, para 41
[42] Case C-89/ 17 *Banger* ECLI:EU:C:2018:570, para 40
[43] Case C-89/ 17 *Banger* ECLI:EU:C:2018:570, para 38 -40
[44] Case C-83/11 *Rahman and others* EU:C:2012:519, para 23
[45] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

common rules for the conditions under which non-EU nationals may exercise the right to family reunification. The Directive defines family reunification as 'the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry.'[46] Article 4(1) of this Directive provides that Member States shall authorise the entry and stay of the spouse of the third country national, provided they meet certain conditions set out by the Directive. It is important to note that *Coman* does not establish that 'spouse' in this Directive refers to same-sex spouses. Thus same-sex spouses may not necessarily be covered by this provision. Like the Citizenship Directive however, the CJEU has found that Article 4(1) does not give Member States any discretion if the spouse meets the relevant criteria:

> '[Article 4(1)] imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States, since it requires them, in the cases determined by the Directive, to authorise family reunification of certain members of the sponsor's family, without being left a margin of appreciation.'[47]

However, Member States do retain a large margin of appreciation over the extension of family reunification rights to family members other than a spouse and children such as an unmarried partner.[48] Article 4(3) of the Directive provides:

> 'The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the

[46] Art 2(d) Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification
[47] Case C-540/03, European Parliament v Council of the European Union, 27 June 2006, para 60.
[48] The latest Commission Guidance on the Family Reunification Directive confirms this: 'Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification' Brussels, 3.4.2014 COM(2014) 210 final April 2014 p. 6

> sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2).'

Thus, it is *optional* for Member States to grant family reunification rights to unmarried couples. Currently eleven Member States do not extend family reunification rights to unmarried partners at all.[49]

It is possible, however, that the current position of unmarried partners in EU migration law will become problematic from a human rights perspective The EU does not have any competence as such over family law but many of the rights conferred by EU law in areas like employment and particularly migration depend on how the CJEU interprets private relationships and can fundamentally have a significant impact on national systems of family law.[50] Fundamental rights often have an important role in these developments and the CJEU frequently looks to the ECtHR [51]for guidance in this area. One example where the CJEU has significantly affected national family law systems with reference to developments under the European Convention of Human Rights is the case of *K.B.*[52]In *K.B*[53]*,*the CJEU found that the UKs system of refusing to allow transsexuals the ability to marry a partner of their original sex was unlawful, with reference to case law from the European Court of Human Rights. [54]

---

[49] European Union Agency for Fundamental Rights 'Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU Comparative legal analysis Update 2015'December 2015, 89

[50] Helen Stalford ' Concepts of Family Under EU Law – Lessons From the ECHR' (2002) 1 International Journal of Law, Policy and Family 410

[51] Mark Bell 'Shifting Conceptions of Sexual Discrimination at the Court of Justice : from *P v S* to *Grant v SWT*' (1999) 5(1) European Law Journal 63. However the two courts do not always necessarily align in their conceptions of family see Helen Stalford ' Concepts of Family Under EU Law – Lessons From the ECHR' (2002) 1 International Journal of Law, Policy and Family 410

[52] Case C -117/01 K.B. ECLI:EU:C:2004:7

[53] Ibid

[54] Case C -117/01 K.B. ECLI:EU:C:2004:7, para 33-34

There is some precedent for this in a migration context. The CJEU has previously ruled on the family reunification of unmarried couples who are not EU citizens in the case of *Eyup*[55] in 2000. The ruling here was based on the very specific circumstances of the case which concerned a couple who got divorced and remarried and the Court ruled that the period when the couple where divorced but still living together as a couple counted towards the necessary qualification period under the EEC-Turkey Association Agreement. More interesting though, is the Advocate General Opinion in this case in which the interpretation of the right to a family life was discussed extensively and refers to the fact that to exclude Mrs Eyup from the interpretation of 'family members' might constitute a violation of her fundamental rights.[56] Both the Advocate General and the CJEU in *Coman* made reference to Article 7 of the Charter of Fundamental Rights which protects the right to a private and family life as important to the question of family migration. Both also noted that the rights contained in Article 7 of the Charter correspond to the meaning and scope of Article 8 of the European Convention of Human Rights (which also protects private and family life), on which the Charter is based. Likewise in *Banger* which concerned unmarried partners the Advocate General stated 'It ought to be acknowledged that social perceptions are changing and that there is a range of forms of cohabitation today' and made reference to the case law of the European Court of Human Rights.[57] It is thus instructive to examine the case law of the European Court of Human Rights (ECtHR) on the rights of unmarried couples in order to better understand how it's conception of 'family' has developed over time and how this may come to influence CJEU case law.

## 5. Human Rights and Unmarried Couples

[55] Case C-65/98 *Eyup* ECLI:EU::C:2000:336
[56]Case C-65/98 *Eyup* ECLI:EU:C:1999:561, Opinion of Advocate General La Pergola,, para 24
[57] Case C-89/17 Banger ECLI:EU:C:2018:225 Opinion of Advocate General Bobek, para 37

### *5.1.The Concept of Family Life*

The European Court of Human Rights has long found that unmarried different-sex couples can be covered by the concept of 'family life' in Article 8 of the Convention. In the 1980s the case of *Johnston and Others v Ireland* [58] concerned an unmarried couple who could not marry and thus legitimise their daughter because one of them was still married. The married applicant had been separated from his wife for a number of years but they did not divorce because it was not permitted under the Irish Constitution. The Court found that the unmarried couple could claim to have a 'family life': 'in the present case, it is clear that the applicants, the first and second of whom have lived together for some fifteen years, constitute a "family" for the purposes of Article 8 (art. 8). They are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage.'[59] The fact that the right to family life may apply to unmarried couples has been reiterated by the Court many times over the years.[60]

The right to family life has most recently been expanded in the context of same-sex relationships. In doing so, the Court has relied on the precedent of *Johnston and Others* as evidence that 'the notion of "family" under this provision is not confined to marriage-based relationships and may encompass other *de facto* "family" ties where the parties are living

[58] Application No 96977/82 *Johnston and Others v Ireland* Judgment of 18 December 1986 para 56, confirmed by Application No 16969/90 *Keegan v Ireland* Judgment of 26 May1994

[59] Ibid para 56

[60] See for example: Application No 16969/90 *Keegan v Ireland* Judgment of26 May 1994 para 44; Application No 18535/91 *Kroon and Others v the Netherlands* Judgment of 27 October 1994 para 30; Application No 25735/94 *Elsholz v Germany* Judgment of 13 July 2000 para 43; Application No 30943/96 *Sahin v Germany* 11 October 2001 para 34; Application No 45582/99 *L v the Netherlands* Judgment of 1 June 2004 para 35; Application No 39051/03 *Emonet and Others v Switzerland* Judgment of 13 December 2007 para 34; Application No 22028/04 *Zaunegger v Germany* Judgment of 3 December 2009 para 37; Application No 20578/07 *Anayo v Germany* Judgment of 21 December 2010 para 55; Application No 35637/03 *Sporer v Austria* Judgment of 3 February 2011 para 69; Application No 17080/07 *Schneider v Germany* Judgment of 15 December 2011 para 79

together out of wedlock'.[61] Thus the right to a family life does apply to unmarried couples and such couples can also argue that they have been discriminated against on the basis of their marital status.

### *5.2.Marital status as a ground of discrimination*

There is a prohibition on discrimination contained in Article 14 ECHR. It provides: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Article 14 allows the Court to find discrimination has occurred on the grounds of 'other status.' Marital status was confirmed to be a ground of discrimination under Article 14 in *Petrov v Bulgaria.*[62] The case concerned the practice in Bulgarian prisons of allowing married inmates to telephone their spouse twice per week but not giving this right to unmarried partners. The Court stated that marriage has a special status in society[63] and that 'the Contracting States may be allowed a certain margin of appreciation to treat differently married and unmarried couples in the fields of, for instance, taxation, social security or social policy'[64] but it ultimately found a violation of Article 14 with Article 8 because 'it is not readily apparent why married and unmarried partners who have an established family life are to be given disparate treatment as regards the possibility to maintain contact by telephone while one of them is in custody.'[65]

[61] Application No 30141/04 *Schalk and Kopf v Austria* Judgment of 24 June 2010 para 91 and Application No 18984/02 *P.B. and J.S. v Austria* Judgment of 22 July 2010 para 27
[62] Application No 15197/02 *Petrov v Bulgaria* Judgment of 22 August 2008
[63]Application No 15197/02 *Petrov v Bulgaria* Judgment of 22 August 2008, para 53
[64] Application No 15197/02 *Petrov v Bulgaria* Judgment of 22 August 2008, para 55
[65] Application No 15197/02 *Petrov v Bulgaria* Judgment of 22 August 2008, para 55

Thus marital status is a ground of discrimination and unmarried couples are capable of being discriminated against in breach of Article 14 with Article 8 under the ECHR.

### *5.3.The Future Development of Unmarried Couples Rights*

Given the Court's remarkable progress on the rights of same-sex couples in recent years (as discussed in section 2), it is possible that a similar development will be seen in cases concerning discrimination against unmarried couples (of both same and different sex). Some of the principles which have come out of the Court's caselaw on same-sex couples should also apply to different-sex unmarried couples. For example, the Court has recently reiterated that cohabitation is not necessary for a stable relationship to fall under the right to family life in case law concerning same-sex couples.[66] Moreover in *Oliari and Others* the Court stated:

> '..in the globalised world of today various couples, married or in a registered partnership, experience periods during which they conduct their relationship at long distance, needing to maintain residence in different countries, for professional or other reasons. The Court considers that that fact in itself has no bearing on the existence of a stable committed relationship and the need for it to be protected'[67]

Such a sentiment seems likely to apply to those seeking to bring an unmarried partner. Thus, it is possible that the Court is progressing towards a much more inclusive idea of 'family life' that is in line with the different sorts of relationships that exist today.

It is important to note, however, that the progression of unmarried couples rights under the ECHR has not been linear. As mentioned above, in *Petrov,* the Court was at pains to point out the special status of marriage and that there are many areas of policy where discrimination on

[66] Application No 29381/09 and 32684/09 *Vallianatos and Others v Greece* Judgment of 11 July 2013 para 73, confirmed in Application No 18766/11 and 36030/11 *Oliari and Others v Italy* Judgment of 21 July 2015 para 169; Application No 68453/13 *Pajic v Croatia* Judgment of 23 February 2016 para 65

[67] Application No 18766/11 and 36030/11 *Oliari and Others v Italy* Judgment of 21 July 2015 para 169

the grounds of marital status would be justified. The 'special status' of marriage and thus the legitimate discrimination between unmarried and married couples has been emphasised by the Court in previous cases.[68]

This 'special status' has also been stressed in several fairly recent cases. In *Gas and Dubois v France*[69] an unmarried lesbian couple argued that they were unfairly discriminated against in their enjoyment of the right to family life because the first applicant had been refused a simple adoption order for the second applicant's child. This simple adoption order was only available to married couples, unmarried different-sex couples could not get one either. The Court found that the applicants were not in a similar situation to married couples because 'marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences.'[70] Thus there was no violation of the Convention.

Likewise, in *X and others v Austria*[71] the Court found that an unmarried same-sex couple were not in a comparable situation to that of a married couple because 'the Court has repeatedly held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences.'[72] In *Van der Heijden v the Netherlands*[73] compelling a woman to testify against her partner of 18 years on the grounds that they were not married was found not to be a violation

[68] Application No 11089/84 *Lindsay v the United Kingdom* Decision of 11 November 1986; Application No 27110/95 *Nylund v Finland* Decision of 29 June 1999; Application no 45851/99 *Shackell v the United Kingdom* Decision of 27 April 2000; Application No 13378/05 *Burden v the United Kingdom* Judgment of 29 April 2008

[69] Application No 25951/07 *Gas and Dubois v France* Judgment of 15 March 2012

[70] Application No 25951/07 *Gas and Dubois v France* Judgment of 15 March 2012, para 68

[71] Application No 19010/07 *X and Others v Austria* Judgment of 19 February 2013

[72] Application No 19010/07 *X and Others v Austria* Judgment of 19 February 2013, para 106

[73] Application No 42857/05 *Van Der Heijden v the Netherlands* Judgment of 3 April 2012. It is worth noting that this case split the Court with significant number of Judges dissenting on the Article 14 point see Joint Dissenting Opinion of Judge Tulkens, Vajic, Spielmann, Zupancic and Laffranque

of Article 8 with Article 14. The Court again stressed the 'special status' of marriage[74] and noted that the applicant could have avoided this consequence by getting married. [75]

### *5.4.Pajic v Croatia*

Despite the above case law, the ECtHR has recently indicated that when it comes to migration and family reunification it may take issue with marital status discrimination. The 2016 case of *Pajic v Croatia*[76] concerned Croatia's denial of a residence permit for family reunification purposes to a same-sex couple on the grounds that same-sex couples were not defined as a 'family' under Croatian law. The applicant argued that her relationship should be considered 'family life' under Article 8 of the Convention and that denying reunification to same-sex couples while allowing unmarried different sex couples to reunite was directly discriminatory and thus a violation of Article 14 together with Article 8.

The ECtHR agreed with the applicant. It reiterated that in recent years it had extended the right to family life beyond different-sex married-based relationships. It found that allowing different-sex unmarried couples to reunite but not same-sex couples was directly discriminatory. Furthermore, it stated that Croatia's argument that states retain a large margin of discretion in immigration policy matters was an insufficiently weighty reason to justify discrimination on the grounds of sexual orientation. In deciding whether or not there had been discrimination the Court hinted that it was possible that the applicants could be considered to be in a 'similar situation' to that of *married* couples:

[74] Application No 42857/05 *Van Der Heijden v the Netherlands* Judgment of 3 April 2012, para 68
[75] Application No 42857/05 *Van Der Heijden v the Netherlands* Judgment of 3 April 2012, para 76
[76] Application No 68453/13 *Pajic v Croatia* Judgment of 23 February

> '…the initial question to be addressed by the Court is whether the applicant's situation is comparable to that of unmarried different-sex couples applying for a residence permit for family reunification in Croatia. In making this assessment, the Court will bear in mind that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see, for example, *Schalk and Kopf*, cited above, § 103). Having said so, and in view of the applicant's specific complaint, the Court considers *that there is no need for it to examine whether the applicant was in a situation which is relevantly similar to that of a spouse in a married different-sex couple applying for family reunification.*'[77]

This mention in *Pajic* that the Court would not be considering whether the applicants where in a similar situation to married couples is reminiscent of the passage from *Schalk* it cites:

> 'The Court reiterates in this connection that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see *F. v. Switzerland*, cited above, § 31). Given that at present it is open to the applicants to enter into a registered partnership, the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if it still obtained today.'[78]

The Court did then later find that the lack of any mechanism for legal recognition of same-sex relationships was a violation of Article 8.[79] Furthermore, unlike the above statement in *Schalk*, the statement in *Pajic* was completely unprompted as neither the applicant nor the Croatian Government made any argument that the applicant's situation should be compared to that of a

[77] Application No 68453/13 *Pajic v Croatia* Judgment of 23 February 2016 para 71
[78] Application No 30141/04 *Schalk and Kopf v Austria* Judgment of 24 June 2010 para 103
[79] Application No 18766/11 and 36030/11 *Oliari and Others v Italy* Judgment of 21 July 2015

married couple. It could be inferred that this reference to paragraph 103 of *Schalk* is a warning for Member States that the Court will rule on this issue in the future. Shortly after this ruling in the case of *Taddeuci*[80] the ECtHR appeared to agree as it found discrimination where an unmarried same-sex couple where denied the same rights as married couples but it based its reasoning heavily on the fact that same-sex couples had no access to marriage. However, it seems odd to find that stable unmarried same-sex couples are comparable to married couples and not, at least partly, extend this reasoning to unmarried heterosexual couples.[81]

The stumbling block for unmarried couples in the family reunification context is that it is an immigration issue. The ECtHR has often emphasised the fact that states have a wide margin of appreciation when it comes to immigration policy.[82] This was argued by the Croatian government in *Pajic* and the Court agreed, reiterating that 'a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country.'[83]The test for discrimination on the grounds of marital status is not particularly rigorous: there must merely be a reasonable and objective justification for the difference in such treatment.[84] Given that in *Petrov* the Court suggested that a wide range of policy matters could justify discrimination on the grounds of marital status, it seems likely that despite what it indicated in *Pajic,* the highly contentious subject of immigration policy could be an acceptable area of discrimination for the ECtHR. However, it is important to note that in *Pajic*, the ground of discrimination that decided the

[80] Application No 51362/09 *Taddeucci and McCall v Italy* Judgement of 30 June 2016
[81] This point was discussed at length in the Dissenting Opinion of Judge Sicilianos para 13-14, Application No 51362/09 *Taddeucci and McCall v Italy* Judgement of 30 June 2016

[82] See Costello, C. (2016). *The Human Rights of Migrants and Refugees in European Law.* Oxford University Press, Oxford, UK. See also Dembour, M-B. (2015). *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint.* Oxford University Press, Oxford, UK.
[83] Application No 68453/13 *Pajic v Croatia* Judgment of 23 February 2016 para 58
[84] Application No 15197/02 *Petrov v Bulgaria* Judgment of 22 August 2008 para 54

case was sexual orientation which requires ‘very weighty and convincing reasons’[85] to justify it and the ECtHR found that the immigration policy considerations were insufficient to establish such a justification.

## 6. Turning to the CJEU?

When it comes to issues of family reunification there are reasons to think that the CJEU would be a better venue for expanding this right. The idea of the CJEU as a human rights court is not uncontroversial. The fact that the interpretation of human rights is not the only priority of CJEU means that the CJEU sometimes makes decisions which seem to prioritise other concerns over human rights. The CJEU approach in cases such as *Viking*[86] and *Laval*[87] which concerned rights to collective action have been criticised as demonstrating that other EU principles are sometimes given undue precedence over human rights concerns.[88] However there are some areas where the CJEU appears in many respects appears to uphold a higher standard of rights protection than the ECtHR and this includes migration issues generally. This is not to say that the CJEU case law on migration issues is without fault but its approach does tend to be more favourable to migrants than the ECtHRs. Two recent state-of-the-art studies into the ECtHR’s approach to migration issues has found that the Court tends to give primacy to the legal principle that states have the right to control immigration over human rights considerations. Marie Dembour refers to this as the ‘Strasbourg reversal’

[85] Application No 19010/07 *X and Others v Austria* Judgment of 19 February 2013 para 99; Application No 40016/98 *Karner v Austria* Judgment of 24 July 2003 para 37; Application No 33985/96 and 33986/96 *Smith and Grady v the United Kingdom* Judgment of 27 September 1999 para 90

[86] Case C-438/05 *The International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* ECLI:EU:C:2007:772

[87] Case 341/05 *Laval un Partneri Ltd* ECLI:EU:C:2007:809

[88] S. Douglas-Scott ‘The European Union and Human Rights after the Treaty of Lisbon’ [2011] 11(4) Human Rights Law Review 645, p 677; A.C.L. Davies ‘One Step Forwards, Two Steps Back? The Viking and Laval Cases in the ECJ’ [2008] 37(2) Industrial Law Journal 126; A. Hinarejos ‘Laval and Viking: the Right to Collective Action versus EU Fundamental Freedoms’[2008] 8(4) Human Rights Law Review 714, p 728; T. Novitz ‘Human Rights Analysis of Viking and Laval Judgments’ [2007] 10 (1) Cambridge Yearbook of European Legal Studies 541

or 'state control principle'[89] while Costello calls it the 'statist assumption.'[90] Both found that this principle was particularly prevalent in case law concerning family reunification.[91] The CJEU tends to be more flexible and have a 'wider and deeper'[92] remit than the ECtHR which means it can and does depart from the ECtHR standard in various aspects of its approach to migration issues including on issues of family reunification[93]

Costello has argued that there are various reasons why the CJEU makes a more sympathetic venue for family reunification issues. She points out that, unlike the ECtHR, the CJEU does not differentiate between family reunification and family formation (i.e. where the purpose of the migration is to form a family which will be particularly relevant to unmarried couples) and that the CJEU case law on EU citizens rights, whilst muddled, has generally enhanced the family reunification rights of those who can show a close family relationship with an EU citizen.[94] She also argues that whilst there clearly is a distinction in the case law between the treatment of those who can show a relationship to an EU citizen and third country nationals seeking family reunification under the Family Reunification Directive, the CJEU appears to take a 'citizenship-style' approach to its analysis on cases concerning third country nationals with an independent right of residence.[95] It is worth noting that the CJEU is not always consistently progressive in it's understanding of 'family'. In the *Garcia Nieto*[96] case which

[89] Marie-Benedicte Dembour, *When Humans Become Migrants: A Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 1, 3-5.
[90] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 9-12.
[91] See 'Dislocating Families: The Strasbourg Reversal' in Marie-Benedicte Dembour, *When Humans Become Migrants: A Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) and 'Human Rights to Family Life and Family Reunification' in Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016);
[92] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) p 53
[93] ibid p 49; p 130-163
[94] ibid p 132-139
[95] ibidp 153-154
[96] Case C-299/14 *Garcia Nieto* ECLI:EU:C:2016:114

concerned an unmarried couple with children, the Court appeared to implicitly consider an unmarried couple to not be technically ‘family’ under Article 24(2) of the Citizenship Directive. However, Costello also argues that both the CJEU and the ECtHR play an important role in the development of this right, as it is the ECtHR who is best placed to provide the underlying interpretation of who and what is meant by the term ‘family’ and hints that the way forward is for a ‘productive and progressive’ ‘cross fertilization’ in the case law[97] to better enhance family reunification rights.

## 7. Discrimination on the Grounds of Sexual Orientation

It is vital to recognise that the *Coman* case does not completely address the issue of discrimination on grounds of sexual orientation. Indirect discrimination on the grounds of sexual oreintaiton may arise from discrimination against unmarried couples. Indirect discrimination occurs when there is a policy or practice which, when applied, has the effect of disproportionately disadvantaging a certain group or groups and there is no legitimate justification for this.[98] The ECtHR has recognised that indirect discrimination can result in violations of the Convention.[99] The policy that marriage is the only relationship where there is no discretion for a Member State to refuse entry to the partner of an EU citizen or third country national clearly disadvantages same sex couples.

[97] Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) p 169

[98] Aileen McColgan *Discrimination and Equality Law* (Oxford University Press, 2014) 6

[99] See for example Application No 24746/94 *Jordan v United Kingdom* Judgment of 4 May 2001 para 154; Application No 58641/00 *Hoogendijk v the Netherlands* Judgment of 06 January 2005; Application No 57325/00 *D.H. and Others v Czech Republic* Judgment of 13 November 2007; Application No 15766/03 *Orsus and Others v Croatia* Judgment of 17 July 2008; Application No 43835/11 *S.A.S v France* Judgment of 1 July 2014 para 161

Whilst the ECtHR (problematically[100]) previously argued that different sex couples had the option to marry to enforce their rights, the same can certainly not be said for many same-sex couples around the world. Only 24 countries allow same-sex couples to marry .[101] This means that the limitation of migration rights to 'spouses' has a significant impact on same-sex couples. For example, if Mr Coman had met his partner, an American, in Romania and together they had wanted to move to Poland, a country which also does not recognise same-sex marriage. Then, under the *Coman* judgment, it appears that Mr Coman and his partner would have to take up genuine residence in a third Member State which does have same-sex marriage for a significant period of time, get married and *then* they could move to Poland. Firstly, this situation would clearly be financially prohibitive for many people. Secondly there is the issue of getting the third country national residence in the third Member State prior to marriage. It seems necessary that the partners would have to move to the third state together as in *Coman* the judgment clearly states 'the residence of the Union citizen in the host Member State must have been sufficiently genuine to enable that citizen to create or strengthen family life.'[102]

The situation is even more problematic for third country nationals who are part of a same-sex couple and trying to exercise family reunification rights in the EU. As stated above the *Coman* case did not determine the meaning of 'spouse' in the Family Reunification Directive but even if this is interpreted to include same-sex marriages there will still be issues. A third country national who is in an EU state which does not recognise same-sex marriage would

[100] It is beyond the scope of this article to discuss this in depth but there are numerous ideological arguments why a heterosexual couple may be unable to enter into marriage without compromising their beliefs as was the case in the recent UK case on access to civil partnerships for different sex couples: R (on the application of Steinfeld and Keidan) (Appellants) *v* Secretary of State for International Development [2018] UKSC 32. See Clare Chambers *Against Marriage* (Oxford University Press, 2017) for an overview of such arguments.
[101] International Lesbian, Gay, Bisexual, Trans and Intersex Association 'Maps -Sexual Orientation Laws: Recognition' October 2017 https://ilga.org/maps-sexual-orientation-laws
[102] Case C-673/16 *Coman and Others* ECLI:EU:C:2018:385 para 25

have to get both himself and his partner into a third EU state to get married. Even if the sponsor was in an EU state which does recognise same-sex marriage they may refuse family reunification for unmarried couples, thus making it impossible for the couple to have their relationship officially recognised. Again, leaving aside the logistical realities of third country nationals navigating immigration laws in the EU, this would likely be a significant financial burden.

The CJEU's definition of 'spouse' as a person joined to another person by the bonds of marriage" and the fact that the Citizenship Directive makes specific reference to registered partnerships makes it clear that Civil Partnerships are not, in the legal sense, equivalent to marriage and fall within state discretion.[103] Thus for the purposes of free movement those in civil or registered partnerships drift between recognition and being rendered un-partnered depending on which state they are in.[104] Even if they were covered by the Directives, only 28 countries offer civil partnerships and the vast majority of those also offer same-sex marriage,[105] meaning there are more than one hundred and fifty countries where same sex couples have absolutely no means of having their relationship officially recognised. Indeed, homosexuality remains criminalised in 72 states and 8 states impose the death penalty on those found guilty of homosexuality.[106] Thus, it would appear to be a rather clear-cut case of indirect discrimination. By prioritising marriage as the marker of an important relationship, those who have no ability to marry are significantly disenfranchised meaning there is discrimination on the grounds of sexual orientation.

---

[103] The distinction was last confirmed by the Court in early 2000s in Case C-125/99 P –Sweden v D and Council ECLI:EU:C:2001:304

[104] Mark Bell, 'Holding Back the Tide? Cross-Border Recognition of Same-Sex Partnerships within the European Union' (2004) 5 European Review of Private Law 613, 624

[105] International Lesbian, Gay, Bisexual, Trans and Intersex Association 'Maps -Sexual Orientation Laws: Recognition' October 2017 https://ilga.org/maps-sexual-orientation-laws

[106] International Lesbian, Gay, Bisexual, Trans and Intersex Association 'Maps -Sexual Orientation Laws: Criminalisation' October 2017 https://ilga.org/maps-sexual-orientation-laws

Moreover the current position seems to be at odds with the EUs commitment to equality.[107] Article 21 of the Charter of Fundamental Rights prohibits any discrimination on the grounds of sexual orientation. All EU legislation has to be compatible with the Charter and the implementation of EU law in Member States also must be in accordance with the provisions of the Charter. Article 10 of the Treaty on the Functioning of the European Union explicitly states: Article 10 ‘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'. This is more than merely a prohibition on discrimination as it seems to require the EU to actively promote equality and make such considerations integral in the carrying out of its activities. A report back in 2012 for the European Parliament identified that there were serious problems for diverse families trying to access their freedom of movement and family reunification rights, highlighting this as an issue for both EU citizens and third country nationals.[108] Yet little progress has been made in this area over the last five years. It is perhaps time for the CJEU to intervene.

## 8. Conclusion

Although an in-depth analysis of the *Coman* case itself may only affect a narrow set of circumstancs, it is possibly an important foundational case which will form part of the groundwork for the CJEU to advance the rights of unmarried couples. The numerous citations of the *Coman* case in *Banger*, which acknowledged non-married partners of EU citizens as having rights under EU law, demonstrates its potential. Marriage is no longer the

[107] Jessica Guth ‘When is a Partner Not a Partner? Conceptualisations of ‘family’ in EU Free Movement Law’ ( 2011 33(2) Journal of Social Welfare and Family Law 193

[108] Vanessa Leigh, Levent Altan and Jordan Long ‘Towards an EU Roadmap for Equality on the Grounds of Sexual Orientation and Gender Identity’ (European Parliament, 2012) 42-46

only indicator of a long-term partnership and several EU states have provided various official alternatives to the traditional marriage relationships. It is vital that EU migration legislation reflects this. This is especially important given the increasing recognition by the Courts that such relationships should be protected under the right to a family and private life and the potential for discrimination on the grounds of sexual orientation where such relationships are not appropriately recognised in legislation.