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Provisional text

OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 11 January 2018 (1)

Case C-673/16

Relu Adrian Coman,

Robert Clabourn Hamilton,

Asociaţia Accept

v

Inspectoratul General pentru Imigrări,

Ministerul Afacerilor Interne,

Consiliul Naţional pentru Combaterea Discriminării

(Request for a preliminary ruling from the Curtea Constituţională a României (Constitutional Court, Romania))

(Reference for a preliminary ruling — Citizenship of the Union — Directive 2004/38/EC — Article 2(2)(a) — Concept of 'spouse' — Right of citizens of the Union to move and reside within the territory of the Union — Marriage between persons of the same sex — Marriage not recognised by the host State — Article 3 — Concept of '[other] family members' — Article 7 — Right of residence for more than three months — Articles 7 and 21 of the Charter of Fundamental Rights of the European Union)

I. Introduction

1. The present request for a preliminary ruling concerns Article 2(2)(a), Article 3(1) and (2)(a) and (b) and Article 7(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. (2)

2. It provides the Court with the opportunity to rule, for the first time, on the concept of 'spouse' within the meaning of Directive 2004/38 in the context of a marriage between two men. To do so is a delicate matter for, although it relates to marriage as a *legal* institution, in the specific limited context of freedom of movement of citizens of the European Union, the definition of the concept of 'spouse' to be given will necessarily affect not only the very identity of the men and women concerned, and therefore their dignity, but also the personal and social concept that citizens of the Union have of marriage, which may vary from one person to another and from one Member State to another.

II. Legal context

A. EU law

1. The Charter

3. Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), entitled 'Respect for private and family life', provides:

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

4. In the words of Article 9 of the Charter, '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'.

5. Article 21(1) of the Charter prohibits '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'.

2. The FEU Treaty

6. According to Article 21 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'.

3. Directive 2004/38

7. Recitals 2, 5, 6 and 31 of Directive 2004/38 state:

‘(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.

…

(5) 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.

(6) 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.

…

(31) This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation.’

8. Article 2 of Directive 2004/38, entitled ‘Definitions’, provides:

‘For the purposes of this Directive:

…

(2) “family member” 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);

…'

9. Article 3 of Directive 2004/38, entitled 'Beneficiaries', is worded as follows:

'1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. 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;

(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.'

10. Article 7(1) and (2) of Directive 2004/38, entitled 'Right of residence for more than three months', states:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) — are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).'

B. **Romanian law**

11. According to Article 259(1) and (2) of the Civil Code:

'1. Marriage is the union freely consented to of a man and a woman, entered into in the conditions provided for by law.

2. Men and women shall have the right to marry with a view to founding a family.'

12. In the words of Article 277(1), (2) and (4) of the Civil Code:

'1. Marriage between persons of the same sex shall be prohibited.

2. Marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania. …

4. The legal provisions relating to freedom of movement on Romanian territory by citizens of the Member States of the European Union and the European Economic Area shall be applicable.'

III. **Facts of the main proceedings**

13. Mr Relu Adrian Coman is a Romanian citizen who possesses United States nationality too. He met Mr Robert Clabourn Hamilton, a United States citizen, in New York (United States) in June 2002. They lived together in New York from May 2005 until May 2009, when Mr Coman took up residence in Brussels in order to work at the European Parliament as a parliamentary assistant, while Mr Hamilton remained in New York. They were married in Brussels on 5 November 2010.

14. In March 2012, Mr Coman ceased to work at the European Parliament and remained in Brussels. In December 2012, Mr Coman and his spouse embarked on the administrative steps with the Romanian administration in order to obtain the documents necessary for Mr Coman, with his non-EU-national spouse, to be able to work and reside lawfully in Romania for a period of more than three months.

15. By letter of 11 January 2013, the Inspectoratul General pentru Imigrări (General Inspectorate for Immigration, Romania) refused their request, maintaining that the extension of the right of temporary residence of a United States national on the conditions laid down in the Romanian legislation on immigration in conjunction with the other relevant legal provisions in that sphere could not be granted for the purposes of family reunion.

16. On 28 October 2013, Mr Coman and Mr Hamilton, together with Asociaţia Accept, brought an action against the decision of the Inspectoratul General pentru Imigrări before the Judecătoria Sectorului 5 București (Court of First Instance, District 5, Bucharest, Romania).

17. In the context of that dispute, they raised a plea of unconstitutionality against Article 277(2) and (4) of the Civil Code. In their submission, failure to recognise marriages between persons of the same sex entered into abroad, for the purposes of the exercise of the right of residence, constitutes

infringement of the provisions of the Romanian Constitution that protect the right to personal life, family life and private life and of the provisions relating to the principle of equality too.

18. On 18 December 2015, the Judecătoria Sectorului 5 București (the Court of First Instance, District 5, Bucharest) requested the Curtea Constituţională (Constitutional Court, Romania) to rule on that plea of unconstitutionality. The latter court considered that the present case related exclusively to recognition of the effects of a marriage lawfully entered into abroad between a citizen of the Union and his or her spouse of the same sex, a national of a third country, in the light of the right to family life and the right to freedom of movement, seen from the aspect of the prohibition of discrimination on grounds of sexual orientation. In that context, the Curtea Constituţională (Constitutional Court) had doubts as to the interpretation to be given to several terms employed in Directive 2004/38, read in the light of the Charter and of the recent case-law of this Court and of the European Court of Human Rights ('the ECtHR') on the right to family life. It therefore decided to stay proceedings and to request a preliminary ruling from the Court.

IV. **The request a preliminary ruling and the procedure before the Court**

19. By decision of 29 November 2016, received at the Court on 30 December 2016, the la Curtea Constituţională (Constitutional Court) therefore decided to refer the following questions to the Court for a preliminary ruling:

'(1) Does the term "spouse" in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?

(2) If the answer [to the first question] is in the affirmative, do Articles 3(1) and 7([2]) (3) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right of residence in its territory or for a period of longer than three months to the same-sex spouse of a citizen of the European Union?

(3) If the answer to [the first question] is in the negative, can the same-sex spouse, from a State which is not a Member State of the Union, of the Union citizen to which he or she is lawfully married, in accordance with the law of a Member State other than the host State, be classified as "any other family member" within the meaning of Article 3(2)(a) of Directive 2004/38 or a "partner with whom the Union citizen has a durable relationship, duly attested", within the meaning of Article 3(2)(b) of that directive, with the corresponding obligation for the host Member State to facilitate entry and residence for that spouse, even if that State does not recognise marriages between persons of the same sex and provides no alternative form of legal recognition, such as registered partnership?

(4) If the answer to [the third question] is in the affirmative, do Articles 3(2) and 7(2) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union, require the host Member State to grant the right of residence in its territory or for a period of longer than three months to the same-sex spouse of a Union citizen?'

20. Written observations were submitted by the applicants in the main proceedings, the Romanian, Hungarian, Netherlands and Polish Governments and by the European Commission too.

21. In addition, with the exception of the Netherlands Government, they all submitted oral argument at the hearing on 21 November 2017. The Latvian Government and the Consiliul Naţional pentru Combaterea Discriminării, which had not submitted written observations, were also granted leave to submit their arguments at that hearing.

V. **Analysis**

A. **The applicability of Directive 2004/38**

22. Article 3(1) of Directive 2004/38 defines as 'beneficiaries' of the rights conferred by the directive 'all Union citizens who move to or reside *in a Member State other than that of which they are a national*, and … their family members as defined in point 2 of Article 2 who accompany or join them'. (4)

23. In the context of the main proceedings, Mr Hamilton cannot therefore rely on the directive. As the Court has already held in particularly clear terms, 'it follows from a literal, systematic and teleological interpretation of Directive 2004/38 that that directive does not establish a derived right of residence for third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national'. (5)

24. However, the Court has recognised that a derived right of residence might in some circumstances be based on Article 21(1) TFEU and that, in that context, Directive 2004/38 must be applied by analogy. (6)

25. In fact, if the third-country national who is a member of the family of a Union citizen did not have a right to reside in the Member State of which the Union citizen is a national, that Union citizen could be discouraged from leaving that State in order to pursue an activity on the territory of another Member State owing to the prospect of not being able to continue, on returning to his Member State of origin, a way of family life which might have come into being in the host Member State. (7) In order for that derived right of residence to be applicable, however, 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. (8)

26. It is therefore settled law that 'where, during the genuine residence of the Union citizen in the host Member State, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) of Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that the citizen's family life in the host Member State may continue on returning to the Member State of which he is a national, through the grant of a derived right of residence to the family member who is a third-country national. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life with his immediate family members which has been created or strengthened in the host Member State'. (9)

27. In the present case, it appears to be accepted that Mr Coman and Mr Hamilton did indeed consolidate a family life while Mr Coman, a Union citizen, was residing in Belgium. When they had lived together for four years in New York and, in so doing, founded a family life, (10) their relationship was indisputably consolidated by their marriage, in Brussels, on 5 November 2010.

28. The fact that Mr Hamilton did not live continuously with Mr Coman in that city does not seem to me to be capable of rendering their relationship ineffective. In a globalised world, it is not unusual for a couple one of whom works abroad not to share the same accommodation for longer or shorter periods owing to the distance between the two countries, the accessibility of means of transport, the employment of the other spouse or the children's education. The fact that the couple do not live together cannot in itself have any effect on the existence of a proven stable relationship — which is the case — and, consequently, on the existence of a family life. (11)

29. The questions submitted by the referring court therefore remain relevant since the interpretation of the provisions referred to in the request for a preliminary ruling may be helpful in determining the case before the Curtea Constituţională (Constitutional Court).

B. First question

30. By its first question, the referring court asks whether the term 'spouse' used in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, applies to a third-country national of the same sex as the Union citizen to whom he or she is lawfully married in accordance with the law of a Member State other than the host State.

31. The parties having lodged observations propose two quite opposite answers. According to the applicants in the main proceedings, the Netherlands Government and the Commission, Article 2(2)(a) of Directive 2004/38 must be given a uniform autonomous interpretation. According to that interpretation, the national of a third country of the same sex as the Union citizen to whom he or she is lawfully married in accordance with the law of a Member State is covered by the term 'spouse'. In contrast, the Romanian, Latvian, Hungarian and Polish Governments contend that that term does not fall within the scope of EU law but must be defined in the light of the law of the host Member State.

32. In my view the latter approach cannot be followed. On the contrary, I consider that the autonomous interpretation must be applied and that the meaning of the term 'spouse' used in Article 2(2)(a) of Directive 2004/38 must be independent of the sex of the person who is married to a Union citizen.

1. An autonomous interpretation of the concept of 'spouse'

33. Although Article 2(2)(b) of Directive 2004/38 on registered partnership refers to 'the conditions laid down in the relevant legislation of the host Member State', Article 2(2)(a) of that directive makes no *renvoi* to the law of the Member States for the purpose of determining the status of 'spouse'.

34. According to the Court's settled case-law, it is required by both the uniform application of EU law and the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union. (12) That interpretation must have regard not only to the wording of the provision but also to its context and the objective pursued by the legislation in question. (13)

35. That methodology has been expressly used in the context of Directive 2004/38; I see no reason to depart from it to interpret the term 'spouse'. (14)

36. Admittedly, it is settled law that legislation on civil status falls within the competence of the Member States and that EU law does not detract from that competence. (15) However, two remarks are called for in this regard.

37. On the one hand, the Court has consistently held in various areas of law that, when exercising their competences, Member States must observe EU law. (16) Matters relating to the marital status of persons do not derogate from that rule, and the Court has expressly held that the provisions relating to the principle of non-discrimination must be observed in the exercise of those competences. (17)

38. On the other hand, the legal issue at the heart of the main proceedings is not that of legalisation of marriage between persons of the same sex but that of the freedom of movement of a Union citizen. While Member States are free to provide or not for marriage for persons of the same sex in their internal legal order, (18) the Court has held that a situation governed by rules falling *a priori* within the competence of the Member States may have 'an intrinsic connection with the freedom of movement of a Union citizen which prevents nationals [of third countries] being refused the right of entry and residence in the Member State of residence of that citizen, in order not to interfere with that freedom'. (19)

39. The fact that marriage — in the sense exclusively of the union of a man and a woman — is enshrined in certain national constitutions (20) cannot alter that approach.

40. In fact, if it were to be considered that the concept of marriage relates to national identity in certain Member States (which has not been expressly maintained by any of the Member States having lodged written observations, but only by the Latvian Government at the hearing on 21 November 2017), the obligation to respect that identity, which is set out in Article 4(2) TEU, cannot be construed independently of the obligation of sincere cooperation set out in Article 4(3) TEU. In accordance with that obligation, the Member States are required to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

41. In the present case, the questions submitted by the referring court relate exclusively to the application of Directive 2004/38. The only thing required, therefore, is to define the implications of an obligation resulting from an act of the Union. Consequently, interpretation of the term 'spouse', restricted to the ambit of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, will not adversely affect the current freedom of Member States as regards the legalisation of marriage between persons of the same sex. (21)

42. Furthermore, as I shall explain when I analyse the context and the objectives of Directive 2004/38, the fundamental rights linked with the term 'spouse' also preclude an interpretation liable to prevent a homosexual Union citizen being accompanied by the person to whom he or she is married or to make it more difficult for him or her to be accompanied by that person.

2. The concept of 'spouse' within the meaning of Article 2(2)(a) of Directive 2004/38

43. It is therefore appropriate to seek the interpretation of the term 'spouse' in Article 2(2)(a) of Directive 2004/38 having regard to the wording of the provision, its context and the objective pursued by Directive 2004/38.

(a) The wording and structure of Article 2(2)(a) of Directive 2004/38

44. Directive 2004/38 does not define the term ‘spouse’, which it uses on several occasions, in particular in Article 2(2)(a).

45. Nonetheless, the structure of Article 2(2) of Directive 2004/38, in conjunction with Article 3(2)(b) of that directive, confirms that the concept of ‘spouse’ refers to that of ‘marriage’.

46. In fact, besides the direct descendants and direct ascendants referred to in Article 2(2)(c) and (d) of Directive 2004/38, the ‘family members’ within the meaning of Directive 2004/38 are the spouse and the partner with whom the Union citizen has contracted a registered partnership. Article 3(2)(b) of Directive 2004/38 adds to the beneficiaries of the directive ‘the partner with whom the Union citizen has a durable relationship, duly attested’.

47. If they are not to be rendered irrelevant, those three examples necessarily relate to different situations, from the most binding to the most flexible from a legal viewpoint. Since the simple relationship outside any legal link is envisaged in Article 3 of Directive 2004/38 and since the existence of a registered partnership is referred to in Article 2(2)(b) of the directive, the term ‘spouse’ necessarily comprehends the third and last situation that can be legally envisaged, that is to say, a relationship based on marriage. (22)

48. Moreover, the Court has already, implicitly but beyond all doubt, associated with marriage the term ‘spouse’ used in Article 2(2)(a) of Directive 2004/38. In its judgment of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449), the Court held that Article 3(1) of Directive 2004/38 must be interpreted as meaning that ‘a national of a non-member country *who is the spouse of a Union citizen* residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, *irrespective of when and where their marriage took place* and of how the national of a non-member country entered the host Member State’. (23)

49. If it is therefore certain that the word ‘spouse’ used in Article 2(2)(a) of Directive 2004/38 relates to marriage, it is gender-neutral and independent of the place where the marriage was contracted.

50. That the place where the marriage was entered into is irrelevant is confirmed, a contrario, by the Union legislature’s decision to make express reference to the law of the host Member State in the case of a registered partnership. That difference may easily be explained by the fact that the legal institution of marriage has, or at the very least is presumed to have, a certain universality in the rights it confers and the obligations it places on the spouses, whereas the laws on ‘partnerships’ differ and vary in their personal and material scope, as do their legal consequences. (24) Furthermore, the Union legislature conferred the benefit of Article 2(2)(b) of Directive 2004/38 solely on registered partnerships ‘equivalent to marriage. (25)

51. The drafting history of Directive 2004/38 confirms that the word chosen was deliberately neutral. Although the expression ‘spouse’ had previously been used, without more, by the Commission in its initial proposal, (26) the Parliament wished the irrelevance of the sex of the person concerned to be mentioned, by adding the words ‘irrespective of sex, according to the relevant national legislation’. (27) However, the Council expressed its reluctance to opt for a definition of the term ‘spouse’ that would expressly include spouses of the same sex, since at the time only two Member States had adopted legislation authorising marriage between persons of the same sex and since the Court had also held that the definition of marriage generally accepted by the Member States at the time referred to a union between two persons of opposite sexes. (28) Relying on the Council’s concerns, the Commission preferred to ‘restrict [its] proposal to the concept of

spouse as meaning in principle spouse of a different sex, *unless there are subsequent developments*'. (29)

52. It therefore seems to me that no argument in favour of one theory rather than the other can be derived from the drafting history of the directive. There can be no doubt that the Union legislature was perfectly aware of the controversy that could arise over the interpretation of the word 'spouse' not otherwise defined. However, it did not desire to clarify that concept, whether by limiting it to heterosexual marriage or, on the contrary, by referring to marriage between persons of the same sex — although the Commission expressly emphasised the possibility that the situation might develop. The Commission's reservation in that regard is crucial. It makes it impossible for the term 'spouse' to be definitively fixed and sealed off from developments in society. (30)

53. It therefore follows from this first examination that the wording of Article 2(2)(a) of Directive 2004/38 is neutral. That choice on the part of the legislature allows the term 'spouse' to be interpreted independently of the place in which the marriage was celebrated and of the question of the sex of the persons concerned. The context and the objective of Directive 2004/38 confirm that interpretation.

(b) **The context of Article 2(2)(a) of Directive 2004/38**

54. When Directive 2004/38 was adopted, only two Member States of the Union: the Netherlands and Belgium, had laws making marriage available to persons of the same sex. As I have pointed out above, that played a part in the Council's decision not to follow the European Parliament's proposed amendment in favour of a more explicit formulation of Article 2(2)(a) of Directive 2004/38.

55. It seems to me, however, that the development envisaged at the time by the Commission in its amended proposal should be taken into account. In addition, the concept of 'spouse' is also closely linked to several fundamental rights; a contextual interpretation cannot be closed off from those rights.

(1) *The developing interpretation of the concept of 'spouse'*

56. As several Advocates General have already had occasion to maintain, EU law must be interpreted 'in the light of present day circumstances', (31) that is to say, taking the 'modern reality' (32) of the Union into account. In fact, the law 'cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise it would run the risk of imposing outdated views and taking on a static role. (33) That without doubt is particularly so in matters affecting society. As Advocate General Geelhoed has explained, 'if no account were taken of those developments, the relevant rules of law would risk losing their effectiveness'. (34) As the Court itself has pointed out, a provision of EU law must be interpreted in the light of the state of evolution on the date on which the provision in question is to be applied. (35)

57. That is why the solution adopted by the Court in the judgment of 31 May 2001, *D and Sweden* v *Council* (C-122/99 P and C-125/99 P, EU:C:2001:304), by which 'according to the definition *generally accepted by the Member States*, the term marriage means a union between persons of the opposite sex', (36) now seems to me outdated.

58. In fact, while at the end of the year 2004 only two Member States allowed marriage between persons of the same sex, 11 more Member States have since amended their legislation to that effect and same-sex marriage will be possible in Austria too, by 1 January 2019 at the latest. (37) That

legal recognition of same-sex marriage does no more than reflect a general development in society with regard to the question. Statistical investigations confirm it; (38) the authorisation of marriage between persons of the same sex in a referendum in Ireland also serves as an illustration. (39) While different perspectives on the matter still remain, including within the Union, (40) the development nonetheless forms part of a general movement. In fact, this kind of marriage is now recognised in all continents. (41) It is not something associated with a specific culture or history; on the contrary, it corresponds to a universal recognition of the diversity of families. (42)

(2) *The fundamental rights associated with the concept of 'spouse'*

59. The term 'spouse' used in Article 2(2)(a) of Directive 2004/38 is necessarily associated with family life and, consequently, the protection conferred on the latter by Article 7 of the Charter. The scope of that article must therefore be taken into account in a contextual interpretation. (43) In that regard, the development of the case-law of the ECtHR must not be overlooked.

60. According to Article 52(3) of the Charter, the meaning and scope of the rights which correspond to rights guaranteed by the ECHR are to be the same as those laid down in that Convention. According to the explanations on the Charter of Fundamental Rights — which must be 'given due regard by the courts of the Union' (44) —, the rights guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 of the ECHR. The former therefore have the same meaning and the same scope as the latter. (45)

61. In fact, the development of the case-law of the ECtHR concerning Article 8 of the ECHR is significant.

62. While the ECtHR consistently confirms the freedom of States to make marriage available to persons of the same sex, (46) it considered, at the beginning of the 2010s, that it was 'artificial to continue to take the view that, unlike a heterosexual couple, a homosexual couple could not have a "family life" for the purposes of Article 8 [of the ECHR]'. (47) That interpretation has since been several times confirmed. (48) The ECtHR has also confirmed that Article 8 of the ECHR required States to afford homosexual couples legal recognition and the legal protection of their relationship. (49)

63. That development in the understanding of family life has indisputably had an impact on the right of residence of nationals of third countries. Although Article 8 of the ECHR does not entail a general obligation to accept the installation of non-national spouses or to authorise family reunion in the territory of a Contracting State, decisions taken by States in the immigration sphere can in some cases amount to an interference with the right to respect for private and family life secured by Article 8 of the ECHR. (50) That is the case, in particular, when the persons concerned possess sufficiently strong personal or family ties in the host country that are liable to be seriously affected by the application of the measure in question. (51)

64. According to the ECtHR, although 'protection of the traditional family may, in some circumstances, amount to a legitimate aim …, [the ECtHR] considers that, regarding the matter in question here — granting a residence permit for family reasons to a homosexual foreign partner — it cannot amount to a "particularly convincing and weighty" reason capable of justifying, in the circumstances of the present case, discrimination on grounds of sexual orientation'. (52)

65. It even seems that the ECtHR is inclined to consider that a difference in treatment based solely — *or decisively* — on considerations regarding the applicant's sexual orientation are quite simply unacceptable under the ECHR. (53) In a different context, Advocate General Jääskinen had

expressed a similar point of view. It seemed to Advocate General Jääskinen ‘to go without saying that the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation [because] it is difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it’. (54)

66. That development in the right to respect for family life therefore seems to me to lead to an interpretation of ‘spouse’ that is necessarily independent of the sex of the persons concerned when it is confined to the scope of Directive 2004/38.

67. In fact, that interpretation provides the optimum respect for family life guaranteed in Article 7 of the Charter while leaving to Member States the freedom to authorise or not marriage between persons of the same sex. On the other hand, an interpretation to the contrary would amount to a difference in treatment of married couples depending on whether they are of the same sex or of different sexes, since no Member State prohibits heterosexual marriage. Based on sexual orientation, such a difference in treatment would be unacceptable under Directive 2004/38 and the Charter, as it must be interpreted in the light of the ECHR.

(c) **The objective pursued by Directive 2004/38**

68. The objective pursued by Directive 2004/38 also supports an interpretation of the term ‘spouse’ independent of sexual orientation.

69. It has consistently been held that the purpose of Directive 2004/38 is to facilitate that primary and individual right to move and reside freely within the territory of the Member States which is conferred directly on citizens of the Union by Article 21(1) TFEU and to reinforce that right. (55)

70. That objective is set out in recital 1 of Directive 2004/38. Recital 2 adds that the free movement of persons constitutes one of the fundamental freedoms of the internal market, which is enshrined in Article 45 of the Charter.

71. Recital 5 of Directive 2004/38 emphasises, moreover, that 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 granted to the members of their family too, irrespective of nationality. (56) As the Court has held on several occasions, the exercise of the freedoms guaranteed to Union citizens by the Treaty would be seriously obstructed if they were not allowed to lead a normal family life in the host Member State. (57)

72. Thus, as I observed when examining the applicability of Directive 2004/38 to the present case, Union citizens could be discouraged from leaving the Member State of which they are a national and from becoming established on the territory of another Member State owing to the prospect of not being able to continue, on returning to the Member State of origin, a way of family life which might have come into being, by the effect of marriage or family reunion, in the host Member State. (58)

73. Because of those objectives, the Court consistently considers that the provisions of Directive 2004/38 may not be interpreted restrictively and at all events must not be deprived of their effectiveness. (59) The Court has even recognised that that was a principle in accordance with which ‘the provisions, such as Directive 2004/38, establishing the free movement of Union citizens, which constitute one of the foundations of the European Union, must be construed broadly’. (60)

74. Consequently, where there is a choice between an interpretation of the term ‘spouse’ that limits the scope of Directive 2004/38 and another that, respecting the wording and the context of the provision being interpreted, facilitates the free movement of a greater number of citizens, the second interpretation must be chosen.

75. There are even stronger reasons for opting for that interpretation of the term because it is consistent with another objective of Directive 2004/38, set out in recital 31, which states that Member States should implement Directive 2004/38 ‘without discrimination between the beneficiaries of [the] Directive on grounds such as … sexual orientation’. A definition of the term ‘spouse’ that was limited to heterosexual marriage would inevitably give rise to situations involving discrimination on grounds of sexual orientation. (61)

76. Lastly, interpretation of the term ‘spouse’ irrespective of the question of the sex of the persons concerned is also apt to ensure a high level of legal certainty and transparency, for a Union citizen who is lawfully married knows that his or her spouse, whatever the latter’s sex, will be regarded as a spouse for the purposes of Article 2(2)(a) of Directive 2004/38 in the other 27 Member States of the Union. (62)

3. **Interim conclusion**

77. The literal, contextual and teleological interpretations of the term ‘spouse’ used in Article 2(2)(a) of Directive 2004/38 lead to giving it an autonomous definition independent of sexual orientation. (63)

78. First of all, it is a requirement of the uniform application of EU law and of the principle of equal treatment that the terms of a provision of EU law that has not been defined and that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope should be given uniform autonomous interpretation throughout the European Union.

79. Next, if the structure of Article 2(2) of Directive 2004/38, in conjunction with Article 3(2)(b) of that directive, requires the concept of ‘spouse’ to be associated with marriage, the legislature deliberately chose, moreover, to use a neutral term, without further detail.

80. Last, both the development of European society — which is reflected in the number of Member States whose legislation permits marriage between persons of the same sex and in the current definition of family life in Article 7 of the Charter — and the objectives of Directive 2004/38 — facilitating the free movement of Union citizens while respecting their sexual orientation — lead to the concept of ‘spouse’ being interpreted independently of sexual orientation. (64)

C. **Second question**

81. By its second question, the referring court asks whether Article 3(1) and Article 7(2) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, require the host Member State to grant the right to reside on its territory for a period of more than three months to the same-sex spouse of a citizen of the European Union.

82. Article 7(2) of Directive 2004/38 is clear: the right of a Union citizen to reside for more than three months on the territory of another Member State extends to his or her spouse who is a national of a third country and who accompanies or joins the Union citizen in the host Member State,

provided that such Union citizen satisfies the conditions laid down in Article 7(1)(a), (b) or (c) of Directive 2004/38.

83. It is therefore an automatic right. Article 3(2) of Directive 2004/38 confirms this.

84. As the Court has held, 'it follows both from the wording of Article 3(2) of Directive 2004/38 and from the general system of the directive that the [EU] legislature has drawn a distinction between a Union citizen's family members as defined in Article 2(2) of Directive 2004/38, who enjoy, as provided for in the directive, a right of entry into and residence in that citizen's host Member State, and the other family members envisaged in Article 3(2) of the directive, whose entry and residence has only to be facilitated by that Member State'. (65)

85. However, we have seen that, in the context of the main proceedings, Mr Hamilton could not rely upon the directive because the provisions of Directive 2004/38 do not confer a derived right of residence on third-country nationals, members of the family of a Union citizen, in the Member State of which that citizen is a national. (66)

86. Nonetheless, Mr Hamilton should, in principle, be entitled to a derived right of residence on the basis of Article 21(1) TFEU and Directive 2004/38 should be applied to him by analogy. (67)

87. In those circumstances, in accordance with the Court's case-law, the conditions for granting a derived right of residence applicable in his spouse's Member State of origin should not, in principle, be stricter than those provided for by that directive if he was in a situation in which his spouse had exercised his right of freedom of movement by taking up residence in a Member State other than the Member State of which he was a national. (68)

88. Specifically, when Directive 2004/38 is applied by analogy, the conditions for granting a right of residence for a period of more than three months to the national of a third country, who is the same-sex spouse of a Union citizen, should not in principle be stricter than those laid down in Article 7(2) of that directive.

D. **Third and fourth questions**

89. The third and fourth questions submitted by the referring court are asked only if the term 'spouse' within the meaning of Article 2(2)(a) of Directive 2004/38 were to be interpreted as referring only to heterosexual couples joined in marriage.

90. That conclusion being, in my view, contrary to the wording and the context of the provision in question and also to the objectives pursued by Directive 2004/38, it should not be necessary to answer those questions. In the interest of completeness, however, I shall briefly examine them; furthermore, they may be examined together.

91. By its third and fourth questions, the referring court seeks, in essence, to ascertain whether a third-country national, of the same sex as the citizen of the European Union to whom he or she is married in accordance with the law of a Member State other than the host Member State, may, if he or she is not regarded as a 'spouse' within the meaning of Directive 2004/38, be classified as '[another] family member' or a 'partner with whom the Union citizen has a durable relationship, duly attested' within the meaning of Article 3(2)(a) or (b) of that directive, and what the consequences of being so classified are.

92. As I have already explained, it is artificial nowadays to consider that a homosexual couple cannot have a family life within the meaning of Article 7 of the Charter. (69)

93. Consequently, there can be no doubt that a third-country national, of the same sex as the citizen of the European Union to whom he or she is married in accordance with the law of a Member State, can fall within the scope of Article 3(2) of Directive 2004/38, as '[another] family member' or as the partner with whom the Union citizen has a durable relationship, duly attested.

94. However, it follows from the judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519), 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 fall within the scope of that provision. It merely places on them an obligation to confer a certain advantage, by comparison with applications for entry and residence of other nationals of third States, on applications submitted by persons falling within its scope. (70)

95. The Court has made it clear that, in order to fulfil that obligation, the Member States must, 'in accordance with the second subparagraph of Article 3(2) of Directive 2004/38, make it possible for persons envisaged in the first subparagraph of Article 3(2) to obtain a decision on their application that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons'. (71)

96. The Court has also found it necessary to point out that the Member States had 'wide discretion as regards the selection of the factors to be taken into account [since the] host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term "facilitate" … and which do not deprive that provision of its effectiveness'. (72)

97. To my mind, however, that discretion must be narrower in the situation described by the referring court.

98. On the one hand, refusal to grant the application for entry and residence of a third-country national, of the same sex as the citizen of the European Union to whom he or she is married in accordance with the law of a Member State, may not be solely or decisively based on his or her sexual orientation, without infringing Articles 7 and 21 of the Charter. (73) In that regard, 'although protection of the traditional family may, in some circumstances, amount to a legitimate aim under Article 14 [of the ECHR, which prohibits discrimination], the [European] Court [of Human Rights] considers that, regarding the matter in question here — *granting a residence permit for family reasons to a homosexual foreign partner* — it cannot amount to a "particularly convincing and weighty" reason capable of justifying, in the circumstances of the present case, discrimination on grounds of sexual orientation'. (74)

99. On the other hand, the obligation to facilitate the entry and residence of the national of a third State of the same sex as the citizen of the European Union to whom he or she is married is greater, and the discretion narrower, when the Member State does not allow marriage between persons of the same sex and does not afford homosexual couples the possibility of entering into a registered partnership. It follows from Article 8 of the ECHR, and therefore from Article 7 of the Charter, that there is a positive obligation to offer those persons, like heterosexuals, the opportunity of having their union recognised in law and protected by the courts. (75) Granting the spouse of a Union citizen a right of residence constitutes recognition and the minimum guarantee that can be given them.

VI. **Conclusion**

100. In the light of the foregoing considerations, I propose that the Court should answer the questions for a preliminary ruling submitted by the Curtea Constituţională (Constitutional Court, Romania) as follows:

(1) On a proper construction of Article 2(2)(a) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, the term 'spouse' applies to a national of a third State of the same sex as the citizen of the European Union to whom he or she is married.

(2) Article 3(1) and Article 7(2) of Directive 2004/38 must be interpreted as meaning that the spouse of the same sex as a citizen of the Union who accompanies that citizen in the territory of another Member State enjoys in that territory a right of residence of more than three months, provided that the Union citizen concerned satisfies the conditions laid down in Article 7(1)(a), (b) or (c).

Article 21(1) TFEU must be interpreted as meaning that, in a situation in which a citizen of the Union has developed or consolidated a family life with a national of a third State while actually residing in a Member State other than that of which he or she is a national, the provisions of Directive 2004/38 apply by analogy when that citizen of the Union returns, with the family member concerned, to his or her Member State of origin. In that situation, the conditions for the grant of a right of residence for a period of more than three months to the national of a third State, who is the same-sex spouse of a Union citizen, should not in principle be stricter than those laid down in Article 7(2) of Directive 2004/38.

(3) Article 3(2) of Directive 2004/38 must be interpreted to the effect that it can be applied to the situation of a national of a third State, of the same sex as the citizen of the Union to whom he or she is married in accordance with the law of a Member State, whether as '[another] family member' or as the 'partner with whom the Union citizen has a durable relationship, duly attested'.

(4) Article 3(2) of Directive 2004/38 must be interpreted as meaning that:

– it does not oblige Member States to grant the national of a third State legally married to a Union citizen of the same sex a right of residence on their territory for a period of more than three months;

– Member States must nonetheless ensure that their legislation includes criteria that allow that national to obtain a decision on his or her application for entry and residence that is founded on an extensive examination of his or her personal situation and, in the event of refusal, is supported by reasons;

– although the Member States have broad discretion in selecting those criteria, the latter must be consistent with the normal meaning of the word 'facilitate' and must not deprive that provision of its effectiveness; and

– refusal of the application for entry and residence may not at all events be based on the sexual orientation of the person concerned.

1 Original language: French.

2 OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

3 There seems to have been an error in the wording of the second question, as the referring court makes reference to Article 7(1) of Directive 2004/38. However, since Mr Hamilton is a citizen of a third State, that provision does not apply to his situation, unlike Article 7(2) of that directive. It is the latter provision, moreover, that is referred to in the fourth question.

4 Emphasis added.

5 Judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 37). See also judgments of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraph 53), and of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 33).

6 See, to that effect, judgments of 12 March 2014, *O. and B.* C-456/12, EU:C:2014:135, paragraphs 50 and 61); of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraphs 54 and 55); of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraphs 46 and 61); and, with regard to Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II) p. 475), judgment of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771, paragraph 39).

7 See, to that effect, judgments of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771, paragraphs 35, 36 and 45); of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraph 70); and of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 46). As long ago as 1992, the Court had held that the rights of movement and establishment granted to an EU national by the Treaties ‘[could not] be fully effective if such a person [might] be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when [an EU] national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under [EU] law if his or her spouse chose to enter and reside in another Member State’ (judgment of 7 July 1992, *Singh*, C-370/90, EU:C:1992:296, paragraph 23). For an application of that case-law, see also judgment of 11 July 2002, *Carpenter* (C-60/00, EU:C:2002:434, paragraphs 38 and 39).

8 See, to that effect, judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 51).

9 Judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 54).

10 According to the Court's case-law, 'nationals of non-member countries who are family members of a Union citizen derive from Directive 2004/38 the right to join that Union citizen in the host Member State, whether he has become established there *before or after* founding a family' (judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 90; emphasis added).

11 See, to that effect, ECtHR, 7 November 2013, *Vallianatos and Others v. Greece*, CE:ECHR:2013:1107JUD002938109, paragraph 73; ECtHR, 21 July 2015, *Oliari and Others v. Italy*, CE:ECHR:2015:0721JUD001876611, paragraph 169; and ECtHR, 23 February 2016, *Pajić v. Croatia*, CE:ECHR:2016:0223JUD006845313, paragraph 65. The fact that Mr Coman and Mr Hamilton lived as a couple before their relationship was 'consolidated' in a Member State of the Union allows their situation to be distinguished from the situations that gave rise to the judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135).

12 See, among many examples, judgment of 18 October 2016, *Nikiforidis* (C-135/15, EU:C:2016:774, paragraph 28 and the case-law cited).

13 See, for recent applications, judgments of 18 May 2017, *Hummel Holding* (C-617/15, EU:C:2017:390, paragraph 22), and of 27 September 2017, *Nintendo* (C-24/16 and C-25/16, EU:C:2017:724, paragraph 70).

14 See, as regards the expression 'who have resided legally' in the first sentence of Article 16(1) of Directive 2004/38, judgment of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraphs 31 to 34). See also Opinions of Advocate General Bot in *Rahman and Others* (C-83/11, EU:C:2012:174, point 39), and of Advocate General Mengozzi in *Reyes* (C-423/12, EU:C:2013:719, point 29).

15 See, to that effect, judgments of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraph 38); of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 26); of 1 April 2008, *Maruko* (C-267/06, EU:C:2008:179, paragraph 59); and of 24 November 2016, *Parris* (C-443/15, EU:C:2016:897, paragraph 58).

16 See, with regard to citizenship, concerning the names of persons, judgment of 2 October 2003, *Garcia Avello* (C-148/02, EU:C:2003:539, paragraph 25); with regard to direct taxation, judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21); with regard to criminal matters, judgment of 19 January 1999, *Calfa* (C-348/96, EU:C:1999:6, paragraph 17).

17 See, to that effect, judgments of 1 April 2008, *Maruko* (C-267/06, EU:C:2008:179, paragraph 59), and of 24 November 2016, *Parris* (C-443/15, EU:C:2016:897, paragraph 58).

18 See, to that effect, judgment of 24 November 2016, *Parris* (C-443/15, EU:C:2016:897, paragraph 59).

19 Judgment of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraph 72). That case involved rules relating to the right of entry and residence of nationals of third countries outside the scope of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44) or Directive 2004/38.

20 Namely: the constitutions of Bulgaria, Latvia, Lithuania and Poland.

21 The reflection formulated by S. Pfeiff in the context of an extensive study of the ‘portability of personal status’ can be transposed to the effects of Directive 2004/38. According to that author, ‘the main argument against recognition of the homosexual marriage relates to the desire to protect traditional marriage. However, recognition of the foreign homosexual marriage does not directly undermine traditional marriage in the forum State. *It does not prevent heterosexual couples from marrying*. *Nor does it allow couples of the same sex to marry in the host State.The effect of recognition* of the foreign homosexual marriage is therefore confined to the couples concerned and *does not undermine the superstructure*’ (Pfeiff, S., *La portabilité du statut personnel dans l’espace européen*, Bruylant, Coll. Europe(s), 2017, especially No 636, p. 572; emphasis added).

22 To be precise, free union could still be distinguished from the situation in which a couple has entered into a private-law contract in order to govern their relationship (see, to that effect, Franq, St., ‘Nouvelles formes de relation de couple, mariage entre personnes de même sexe, partenariat enregistré, pacs, etc.’, in *Actualités du contentieux familial international*, Larcier, 2005, pp. 253 to 281, especially pp. 255 to 256). In the context of Directive 2004/38, those situations seem to me, however, to fall within the scope of Article 3(2)(b).

23 Paragraph 99 and paragraph 2 of the operative part of the judgment, emphasis added. See also judgment of 17 April 1986, *Reed* (59/85, EU:C:1986:157). In that judgment, the Court held,

concerning the interpretation of the concept of 'spouse' within the meaning of the provision that preceded Directive 2004/38 (that is to say, [Regulation No 1612/68]), that 'the term "spouse" in … the regulation refer[red] to a marital relationship only', to the exclusion of a 'companion in a stable relationship' (paragraph 15).

24 On those criteria, no fewer than five categories of registered partnerships can be distinguished within the European Union. See, to that effect, Goossens, E., 'Different regulatory regimes for registered partnership and marriage: out-dated or indispensable?', in *Confronting the frontiers of family and succession law:liber amicorum Walter Pintens*, vol. 1, Intersentia, Slp ed., 2012, pp. 633 to 650, especially pp. 634 to 638.

25 However, I wonder about the current validity of that reference to the law of the host Member State, *a fortiori* as it is indisputably associated with the restriction of the scope of Article 2(2)(b) of Directive 2004/38 to registered partnerships equivalent to marriage. In fact, the ECtHR has very clearly held that Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), placed on States Parties to the ECHR the obligation to afford homosexual couples the possibility to obtain legal recognition and legal protection of their union. That means, specifically, that a State that limits marriage to heterosexual couples without establishing a registered partnership open to homosexual couples violates Article 8 of the ECHR and, consequently, Article 7 of the Charter (see, to that effect, ECtHR, 21 July 2015, *Oliari and Others v. Italy*, CE:ECHR:2015:0721JUD001876611). In fact, under Article 52(3) of the Charter, rights which correspond to rights guaranteed by the ECHR are to have the same meaning and scope as those laid down by the ECHR. According to the Explanations relating to the Charter — to which, according to Article 52(7) of the Charter, 'due regard' is to be given 'by the courts of the Union' — the rights guaranteed in Article 7 of the Charter correspond to those guaranteed by Article 8 of the ECHR. The former therefore have the same meaning and scope as the latter.

26 See Article 2(2)(a) of the Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final (OJ 2001 C 270 E, p. 150).

27 See European Parliament Report of 23 January 2003 on the proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (A5/2003/9).

28 See Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council with a view to adopting Directive 2004/…/EC of the European Parliament and of the Council 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 No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and

93/96/EEC (OJ 2004 C 54 E, p. 12). Although the Council does not identify the case-law to which it alludes, the Commission refers, in its Amended Proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2003) 199 final) to the judgment of 31 May 2001, *D and Sweden* v *Council* (C-122/99 P and C-125/99 P, EU:C:2001:304, paragraph 34).

29 See Amended Proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2003) 199 final, p. 11). Emphasis added.

30 This risk and the more general difficulty in determining the legislature's intention mean, moreover, that the historical interpretation is afforded a secondary role. See, to that effect, Titshaw, Sc., 'Same-sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives', *Bodson University International Law Journal*, 2016, vol. 34:45, pp. 45 to 112, especially pp. 76 to 78.

31 See, to that effect, Opinion of Advocate General Wahl in *Haralambidis* (C-270/13, EU:C:2014:1358, point 52).

32 See, to that effect, Opinion of Advocate General Szpunar in *McCarthy and Others* (C-202/13, EU:C:2014:345, point 63).

33 Opinion of Advocate General Tesauro in *P.* v *S.* (C-13/94, EU:C:1995:444, point 9).

34 Opinion of Advocate General Geelhoed in *Baumbast and R* (C-413/99, EU:C:2001:385, point 20).

35 See judgment of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335, paragraph 20).

36 Paragraph 34, emphasis added.

37 By judgment of 4 December 2017 (G 258-259/2017-9), the Austrian Constitutional Court annulled the provisions of the Civil Code which restrict the right to marriage to heterosexual couples and, moreover, held that, save intervention on the part of the legislature prior to that date, marriage between persons of the same sex would be possible from 1 January 2019. The Member States that have already amended their legislation are, in chronological order, the Netherlands and Belgium Spain, Sweden, Portugal, Denmark, France, the United Kingdom (apart from Northern Ireland), Luxembourg, Ireland, Finland, Germany and Malta.

38 Whereas 44% of the population of the Member States questioned stated that they were in favour of marriage between persons of the same sex in 2006 (see Standard Eurobarometer 66, Autumn 2006, p. 43), that figure had risen to 61% less than 10 years later (see Special Eurobarometer 437, 'Discrimination in the EU in 2015', p. 12).

39 The question whether the Constitution should be amended in order to make provision therein for marriage to be contracted in accordance with law by two persons without distinction as to their sex was put to the Irish people in a referendum on 22 May 2015. Out of 1 935 907 voters, 1 201 607, or 62.07%, voted in favour of the proposal (see results published in Iris Oifigiúil, 26 May 2015, No 42, pp. 1067 to 1069: www.irisoifigiuil.ie/archive/2015/may/Ir260515.PDF).

40 Unlike in Ireland, marriage between persons of the same sex was rejected, for example, by a referendum in Croatia on 1 December 2013.

41 Unless I am mistaken, marriage between persons of the same sex has been authorised, to date and at least, by legislation in Canada (Civil Marriage Act, S.C. 2005, v. 33); in New Zealand (Marriage (Definition of Marriage) Amendment Act 2013, 2013 No 20); in South Africa (Civil Union Act, 2006, Act No 17 of 2006); in Argentina (Ley 26.618 (Ley de Matrimonio Igualitario)); in Uruguay (Ley No 19.075, Matrimonio Igualitario); or again in Brazil (Resolução No 175 de 14 de maio de 2013 do Conselho Nacional de Justiça); and by the courts in Mexico (judgment of the Supreme Court No 155/2015 of 3 June 2015); in the United States (judgment of the Supreme Court of 26 June 2015, *Obergefell et al.v. Hodges, Director, Ohio Department of Health, et al*., 576 U.S. (2015); in Colombia (judgment of the Constitutional Court SU-214/16 of 28 April 2016, Case T 4167863 AC); or again in Taiwan (judgment of the Constitutional Court of the Republic of China (Taiwan) of 24 May 2017, J.Y. Interpretation No 748, on the consolidated applications of Huei-Tai-12674 and Huei-Tai-12771).

42 Apart from the 13 Member States which have legalised homosexual marriage, nine other Member States have a registered partnership open to couples of the same sex, namely Slovenia, the Czech Republic, Hungary, Austria (as noted above, homosexual marriage will also be authorised in that country from 1 January 2019, at the latest), Croatia, Estonia, Cyprus, Greece and Italy. In spite of the positive obligation flowing from Article 8 of the ECHR — and therefore from Article 7 of the Charter — to offer homosexual couples the possibility of obtaining legal recognition of their union

(see ECtHR, 21 July 2015, *Oliari and Others v. Italy*, CE:ECHR:2015:0721JUD001876611, paragraph 185), six Member States (Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia) have no form of official legal recognition of couples of the same sex.

43 Recital 31 of Directive 2004/38 expressly states that the directive respects the fundamental rights and freedoms recognised by the Charter. The referring court also relies on Articles 9 (Right to marry and right to found a family), 21 (Non-discrimination) and 45 (Freedom of movement and of residence) of the Charter. Article 9 of the Charter does not strike me as relevant. On the one hand, the developments of the explanations on the Charter of Fundamental Rights (OJ 2007 C 303, p. 17) devoted to Article 9 stated that although '[its] wording … has been modernised [by comparison with Article 12 of the ECHR] to cover cases in which national legislation recognises arrangements other than marriage for founding a family, [that] article *neither prohibits nor imposes* the granting of the status of marriage to unions between people of the same sex' (emphasis added). Member States' freedom in that regard is confirmed by the case-law of this Court (see, to that effect, judgment of 24 November 2016, *Parris*, C-443/15, EU:C:2016:897, paragraph 59) and of the ECtHR (see, in particular, ECtHR, 9 June 2016, *Chapin and Charpentier v. France*, CE:ECHR:2016:0609JUD004018307, paragraphs 38 and 39). On the one hand, in the present case Mr Coman and Mr Hamilton were able to exercise that right in Belgium. The freedom of movement enshrined in Article 45 of the Charter is specifically mentioned in Directive 2004/38. I shall examine the impact of that right on the interpretation of the concept of 'spouse' when I examine the objective pursued by Directive 2004/38.

44 Article 52(7) of the Charter.

45 See, to that effect, Explanations relating to the Charter of Fundamental Rights, Explanation on Article 7 — Respect for private and family life (OJ 2007 C 303, p. 20).

46 See, to that effect, for a recent confirmation and a reminder of the previous case-law, ECtHR, 9 June 2016, *Chapin and Charpentier v. France*, CE:ECHR:2016:0609JUD004018307, paragraphs 38 and 39 (with reference to Article 12 of the ECHR) and paragraph 48 (with reference to Article 8 in conjunction with Article 14 of the ECHR, which prohibits discrimination).

47 ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*, CE:ECHR:2010:0624JUD003014104, paragraph 94.

48 See, to that effect, ECtHR, 7 November 2013, *Vallianatos and Others v. Greece*, CE:ECHR:2013:1107JUD002938109, paragraph 73; ECtHR, 23 February 2016, *Pajić v. Croatia*, CE:ECHR:2016:0223JUD006845313, paragraph 64; ECtHR, 14 June 2016, *Aldeguer Tomás v.*

Spain, CE:ECHR:2016:0614JUD003521409, paragraph 75; and ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, CE:ECHR:2016:0630JUD005136209, paragraph 58.

49 See ECtHR, 21 July 2015, *Oliari and Others v. Italy*, CE:ECHR:2015:0721JUD001876611, paragraph 185.

50 See, to that effect, ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, CE:ECHR:2016:0630JUD005136209, paragraph 56.

51 See, to that effect, ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, CE:ECHR:2016:0630JUD005136209, paragraph 56.

52 ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, CE:ECHR:2016:0630JUD005136209, paragraph 93. On there existing no 'convincing and weighty reason', including protection of the family 'in the traditional sense of the word', justifying a difference in treatment on grounds of sexual orientation, see also ECtHR, 7 November 2013, *Vallianatos and others v. Greece*, CE:ECHR:2013:1107JUD002938109. The latter case concerned the exclusion of couples of the same sex from the law on registered partnerships, even though Greece did not afford those couples any other official legal recognition, unlike heterosexual couples.

53 See, to that effect, ECtHR, 23 February 2016, *Pajić v. Croatia*, CE:ECHR:2016:0223JUD006845313, paragraphs 59 and 84, and also ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, CE:ECHR:2016:0630JUD005136209, paragraph 89.

54 Opinion of Advocate General Jääskinen in *Römer* (C-147/08, EU:C:2010:425, point 175).

55 See, to that effect, judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 82); of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 35); of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 31); and of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 31).

56 See, to that effect, judgments of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 33), and also of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 31).

57 See, to that effect, judgment of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 62) and, predating Directive 2004/38, judgment of 11 July 2002, *Carpenter* (C-60/00, EU:C:2002:434, paragraphs 38 and 39).

58 See, to that effect, judgments of 7 July 1992, *Singh* (C-370/90, EU:C:1992:296, paragraphs 19, 20 and 23); of 11 July 2002, *Carpenter* (C-60/00, EU:C:2002:434, paragraph 38); of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771, paragraphs 35 and 36); of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 64); of 8 November 2012, *Iida* (C-40/11, EU:C:2012:691, paragraph 70); and of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 46).

59 See judgments of 25 July 2008, *Metock and Others* (C-127/08, EU:C:2008:449, paragraph 84), and of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 32).

60 Judgment of 16 January 2014, *Reyes* (C-423/12, EU:C:2014:16, paragraph 23). For examples of the application of this principle to legislation preceding Directive 2004/38, see judgments of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 74), and of 11 December 2007, *Eind* (C-291/05, EU:C:2007:771, paragraph 43).

61 See, to that effect, Titshaw, Sc., 'Same-sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives', *Bodson University International Law Journal*, 2016, vol. 34:45, pp. 45 to 112, especially p. 106.

62 For an illustration of legal certainty and transparency being taken into account in the interpretation of a provision of Directive 2004/38, see judgments of 15 September 2015, *Alimanovic* (C-67/14, EU:C:2015:597, paragraph 61), and of 25 February 2016, *García-Nieto and Others* (C-299/14, EU:C:2016:114, paragraph 49).

63 See, to that effect, Titshaw, Sc., 'Same-sex Spouses Lost in Translation? How to Interpret "Spouse" in the E.U. Family Migration Directives', *Bodson University International Law Journal*, 2016, vol. 34:45, pp. 45 to 112, especially pp. 83 and 111.

64 The impact of freedom of movement, the right to respect for family life and the prohibition of discrimination on the concept of 'spouse' within the meaning of Article 2(2)(a) of Directive 2004/38

is generally decisive in the analysis carried out in the literature. The conclusion reached by the authors consulted is similar to mine. See, in particular, Tryfonidou, A., 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: the Case for Mutual Recognition', *Columbia Journal of European Law*, 2015, vol. 21, pp. 195 to 248; Bell, Chl. and Bačić Selanec, N., 'Who is a "spouse" under the Citizens' Rights Directive? The prospect of mutual recognition of same-sex marriages in the EU', *European Law Review*, 2016, vol. 41, No 5, pp. 655 to 686; Borg-Barthet, J., 'The Principled Imperative to Recognise Same-Sex Unions in the EU', *Journal of Private International Law*, vol. 8, No 2, 2012, pp. 359 to 388; Bonini Baraldi, M., 'EU Family Policies Between Domestic "Good Old Values" and Fundamental Rights: The Case of Same-Sex Families', *Maastricht Journal of European and Comparative Law*, 2008, vol. 15, No 4, pp. 517 to 551.

65 Judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519, paragraph 19).

66 See, to that effect, judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 37). See also judgments of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraph 53), and of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 33).

67 See, to that effect, judgments of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraphs 50 and 61); of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354, paragraphs 54 and 55); and of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraphs 46 and 61). See also developments in Section V(A), The applicability of Directive 2004/38, in this Opinion.

68 See, to that effect, judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135, paragraph 61).

69 See developments above in Section V(B)(2)(b), Fundamental rights in conjunction with the concept of 'spouse', in this Opinion.

70 See, to that effect, judgment of 5 September 2012, *Rahman and Others* ((C-83/11, EU:C:2012:519, paragraph 21).

71 Judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519, paragraphs 22 and 26).

72 Judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519, paragraphs 24 and 26).

73 See, to that effect, ECtHR, 23 February 2016, *Pajić v. Croatia*, CE:ECHR:2016:0223JUD006845313, paragraphs 59 and 84, and ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, CE:ECHR:2016:0630JUD005136209, paragraph 89.

74 ECtHR, 30 June 2016, *Taddeucci and McCall v. Italy*, CE:ECHR:2016:0630JUD005136209, paragraph 93; emphasis added.

75 See, to that effect, ECtHR, 21 July 2015, *Oliari and Others v. Italy*, CE:ECHR:2015:0721JUD001876611, paragraph 185.