13 Sensitive Issues before the European Court of Justice

The Right of Residence of Third Country Spouses Who Became Victims of Domestic Violence, as Well as Same-Sex Spouses in the Scope of Application of the Free Movement Directive (Legal Analysis of the NA *and* Coman *Cases)*

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13.1 Introduction

There are an increasing number of cases brought before the European Court of Justice whose facts are regulated by provisions that *a priori* belong to *the competence of the member states*, including those which govern *the entry and residence rights of third country citizens*, however, they are closely related to the right of EU nationals to free movement and residence. To approach the issue from another aspect, the enforcement of *thesupranational rights of the EU citizens* requires, incertain cases, that the EU law be applied in some highly sensitive areas which are traditionally the regulatory competence of the member states.Such issues include, for example, the loss of member state citizenship,[1] immigration policy,[2] or, the area of family law, as we will also see in this paper.

The cases that are discussed in the paper, including the *NA* and *Coman*[3] cases, also belong to the above group. They may appear to be about two completeley different issues, however, it is the very same question that is in their focus. More precisely, the focus is on the *rights of residence of the third country spouses of migrant EU citizens*, which arise from this status, regulated byEuropean Parliament and Council directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the EU member states[4] (hereinafter referred to as: the Free Movement Directive).

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1 *Rottman* judgment, C-135/08, ECLI:EU:C:2010:104.

2 *Zambrano* judgment, C-34/19, ECLI:EU:C:2011:124.

3 *NA* judgment, C-115/15 ECLI:EU:C:2016:487, *Coman* case, C-673/16 (case in progress).

4 Directive 2004/38/EC (April 30, 2004) 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 (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC,72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004, p. 77; Hungarian special edition, chapter 5, volume 5, p. 46).

One of the problems that has sparked intense debates in the national parliaments of the member states, at the various judicial forums, as well as in the media is a rather sensitive and very complex[5] issue, i.e. *the recognition* of same-sex marriages *in a member state that is different from the one where the marriage was entered into*during exercising the right to free movement. I do not think that the moral, religious and human rights aspects of the problem need to be dwelt upon, furthermore, that the constitutional disputes that surround this topic should be discussed in detail either. In the latter disputes, the views voicing the constitutional principles of equality, the right to self-determination and human dignity on the one hand, and the member state considerations that openly reject same-sex marriages in their fundamental laws, on the other hand, are in conflict with each other.[6] Unfortunately, not even the Free Movement Directive gives any guidance with regard to the above debate. The latter keeps quiet about what it regards as a valid marriage, so basically, it is not specified either whether the rules of the Directive regarding free movement and residence can be applied for same-sex marriages.

However, it seems that in the future, the Union will be less and less in the position to avoid giving an answer to the above-detailed family law issues.[7] Through the liberalization of member state regulations and the relevant Strasbourg jurisprudence, the following question is expected to come up more and more frequently: what will happen if a same-sex couple[8] that validly got married in one of the members states would like to move or return to the territory of a member state where same-sex marriages are not recognized, exercising their right to free movement? In this case, can the couple claim EU-level 'family reunification rights'? In other words, the question is whether the third country member of the married couple may obtain the 'family member' status in accordance with the Free Movement Directive and primarily the residence rights arising from this status.[9] The *Coman* case, brought before the European Court of Justice for preliminary

5 The recognition of the marriage of same-sex couples in a member state different from the place where the marriage was entered into raises quite a number of further questions, for example, the legal effects of the marriage, the use of names, adoption, as well as participation in a human reproduction procedure.

6 According to these views, the recognition of the relationship of same-sex couples as a family would inevitably lead to the reinterpretation and depreciation of the institution of marriage, as well as the radical transformation of the fundamental structure of society. M. Király: 'Egység és sokféleség' ('Unity and Diversity'), Az Európai Unió jogának hatása a kultúrára (The Impact of the Law of the European Union on Culture), Új ember Publishers, Budapest, 2007, p. 79.

7 As the number of marriages involving an international element is growing and in parallel, there are more and more provisions related to family law in the EU-level international private law norms, this issue is increasingly coming into focus. This is also indicated by the setting up of the Commission on European Family Law in 2001, which endeavors to elaborate fundamental principles in the above field as an academic umbrella organization, examining the future role of EU family law harmonization.

8 The question logically arises in the case of those couples one of the members of which is a third country national.

9 Of course, the question may also hold relevance in case that both members of the couple are EU nationals and one of the members does not meet the requirements of lawful residence as defined in the Directive, i.e. he or she is economically inactive and does not have sufficient financial resources, so he or she would impose an unreasonable burden on the member state's social assurance system.

decision-making, is targeted at examining this very issue. In this case no decision has yet been adopted by the Court but it is still worth examining, in light of the current state of development of EU law, what kind of decision can be expected in the issue in question, with special regard to the great anticipation that surrounds it from the side of politicians,[10] advocacy group members, and last but not least, from academics.

This great anticipation is entirely understandable in view of the recent *Obergefell v. Hodges* decision of the US Supreme Court, requiring states to issue marriage licenses to same-sex couples and to recognize same-sex marriages that were legally formed in other states.[11] According to some views,[12] *Obergefell v. Hodges* is the case that put the US ahead of the EU with regards to the issue of the legal recognition of same-sex relationships and now Coman gives the EU the opportunity to catch up with the US. However, we must keep in mind that as things stand now, the EU cannot require Member States to open marriage to same-sex couples. Nonetheless, a number of EU law provisions appear to require Member States to recognise same-sex marriages lawfully entered into in the territory of another Member State. Following, I shall predict possible decision in light of those provisions.

I think that the *NA case* deserves similar attention, and although the subject of which, i.e. the issue of *domestic violence* has just recently come to the attention of the Court, it still raises similar legal and moral dilemmas. In the focus of the case, there is the issue of the right of residence of third country nationals in the host countries who fell victim to domestic violence during their marriage with EU citizens but the abuser had left the member state in question before the dissolution of the marriage. According to the Free Movement Directive, as a general rule, the victim may retain his/her right of residence after the dissolution of the marriage, however, it is not clarified by the directive whether this is so when the abuser, who is an EU citizen, leaves the territory of the host country prior to divorce, thus interrupting the process of the legality of residence. So, in fact, it is the loophole left by the Free Movement Directive again that requires legal interpretation from the European Court of Justice.

10 It is enough just to think about that recently, a high number of member state leaders were compelled to take an open stand on the issue of homosexuality. It is perhaps the Italian head of state Matteo Renzi who should be mentioned in this context, who, in response to the *Oliari* decision of the Strasbourg Court, announced, already before the summer break of the Parliament, that by the end of 2015, they would like to get the act recognizing the common-law relationship of homosexual couples adopted, which did happen by early 2016. The issue is given a special flavor by the fact that today, the governments ofIreland, Serbia and Luxembourg are all headed by homosexual politicians, however, the views of these politicians significantly vary on the individual rights of homosexual persons.

11 Two years ago (on 26 June 2015), a Supreme Court decision was adopted in the *Obergefell v. Hodges* case in the United States, which in principle 'seems to settle' the issue of the recognition of same-sex relationships. The decision adopted by the Supreme Court, the Fourteenth Amendment to the United States Constitution obliges every state to permit same-sex couples to get married and to recognize a lawfully permitted marriage, which was legally entered into between two persons of the same sex in another state.

12 A. Tryfonidou: *Same sex marriages: The EU is lagging behind*: http://eulawanalysis.blogspot.hu/2015/06/same-sex-marriage-eu-is-lagging-behind.html.

With regard to the fact that in the *NA* case, an interpretative decision was already adopted by the Court, this is the first thing that I am going to examine in my analysis and it is only then that I am going on to discuss the *Coman* case, in which the family reunification rights of same-sex couples under the Free Movement Directive are analyzed.

13.2 The Issue of Domestic Violence in View of the Free Movement of EU Nationals: The NA

13.2.1 The Facts of the Case and the Application for Preliminary Decision-Making

Pakistani national NA married German national KA in September 2003, then the married couple moved to the United Kingdom in May 2004, where the husband obtained an employee legal status. The relationship of the spouses later deteriorated. NA fell victim to domestic violence several times. In October 2006, KA left the common residence of the married couple, then in December 2006, he also left the host country, i.e. the United Kingdom. The married couple have two daughters, who were born in the territory of the United Kingdom and are German nationals. KA wished to get a divorce from NA through a Talaq pronounced in Karachi, Pakistan in March 2007. It was eventually NA who launched the procedure for the dissolution of the marriage in September 2008, in the United Kingdom. The dissolution of the marriage took binding effect on August 4, 2009. It was NA who was granted custody over the two children. The two daughters had attended school in the United Kingdom since January 2009 and September 2010, respectively. Then NA applied for permanent residence in the United Kingdom, which was rejected with the justification that NA was not authorized to retain her right of residence pursuant to the provisions set out in Section (2), Article 13 of the Free Movement Directive.

The Court of Appeal decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

a. In its first question, the Court expected an answer to whether the provisions set out in Point c) of the first subsection of Section (2), Article 13 of the Free Movement Directive should be interpreted as follows:in case a third country national who is divorced from a Union citizen at whose hands she has been the victim of domestic violence during the marriage, is entitled to retain her right of residence in the host Member State, on the basis of that provision, where the divorce post-dates the departure of the Union citizen spouse from that Member State.
b. In its second and third questions, the point was whether he/she can retain his/her right of residence based on the primary right, as long as he/she is not allowed to retain this right of residence pursuant to the Free Movement Directive. Thus, the question

sought ascertain whether Article(s) 20 and /or 21 of the Treaty on the Functioning of the European Union, (hereinafter referred to as TFEU) which ensures the EU citizens legal status and the related right to free movement, should be interpreted in such a way that they confera right of residence in the host member state on a minor Union citizen who has resided since birth in that Member State but is not a national of that Member State, and on the parent, a third-country national, who has sole custody of that minor.[13]

c. The fourth question asked by the Court was targeted at the case law on theresidence of the family members of ex-EU workers, more precisely, whether the provisions set out in Article 12 of Regulation (EEC) No. 1612/68 on freedom of movement for workerswithin the Community[14] should be interpreted in such a way that a child and a third-country national parent who has sole custody of the child are entitled to a right of residence in the host Member State, under that provision, in a situation, such as that in the main proceedings, where the other parent is a Union citizen and has worked in that Member State, but has ceased to reside there before the date when the child begins to attend school in that Member State.

13.2.2 The Legal Context of Preliminary Decision-Making

The legal documents on the free movement of EU citizens do not provide any original rights to the non-EU nationals. This means that they can only obtain the right of residence in the territory of a member state in a *derivative* way, through a tie to an EU citizen family member. As is put by Section (2), Article 7 of the Free Movement Directive, "[…] theright of residence shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State […]".

The residence of non-EU citizen family members based on a derivative right, however, may cause several problems. The question arises what happens, for example, if the family ties that serve as the legal grounds for the residence are terminated or perhaps weakened during the residence in the host country, so the married couple gets divorced, or they separate from each other with the intention of a divorce. Of course, it is also possible that the EU citizen spouse simply leaves the territory of the host country prior to the divorce,[15] as is well shown by the above-discussed *NA* case as well.

13 As long as the above-mentioned persons are entitled to a right of residence in this member state pursuant to national or international law.

14 Regulation (EEC) No 1612/68 of the Council of 15 October, 1968 on freedom of movement for workers within the Community OJ L 257, 19.10.1968, pp. 2-12 (DE, FR, IT, NL). This regulation has since been replaced by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April, 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, pp. 1-12).

15 This may happen due to the deterioration of the marriage or for a completely different reason as well, for example, the EU citizen spouse takes up employment in another member state.

The secondary EU law, including the Free Movement Directive aims to settle the above groups of cases under the titles "Retaining the rights of residence of family members […]". Thus, it gives a detailed list of the cases in which the family members who earlier used to stay in the country on the basis of a derivative right can retain their rights of residence. Article 13 of the Directive, which is relevant for this case, deals with the issues related to the dissolution of marriage, more precisely, it is Point (c), Section (2) of this Article that touches upon the question of *domestic violence*. Pursuant to the provision in question, the divorce does not affect the right of residence of the non-member state citizen if "this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting".[16] In these cases, the non-member state citizen may retain his right of residence and may later obtain a permanent right of residence, as long as he fulfills the other criteria set by the directive. This in itself would not bring up a serious question of interpretation. However, what still makes the interpretation of Article 13 difficultfor the Court is Article 12 of the Directive, more precisely, the joint interpretation of these two articles (Articles 12-13). The latter defines rules for for *the cases of* the death of the EU citizen or their *departure* from the territory of the host country. While, however, Article 12 expressly specifies the retention of the right of residence with regard to the member state citizen family member in the case of the departure of the EU citizen from the member state, it *says nothing* about the legal consequences of the same *with regard to a third country national family member*. Also, it basically leaves the question open what will happen if the two factual situations, i.e. the dissolution of the marriage and the circumstance of the prior departure, *occur jointly*. The directive gives no guidance whatsoever as to this and it does not specify whether either of the two provisions has priority over the other.

However, it is this very issue that is in the focus of the *NA* case, i.e. the retention of the right of residence of anEU national's third country spouse, in case that the *EU citizen has left* the member state in question *with no intention of returning* and after his departure, a procedure for the dissolution of marriage has been launched. This question had partially been answered by the the Court in its *Kuldip Singh* judgment,[17] which preceded the *NA* case. In this decision, the Court declared that as long as an EU citizen departs from the host member state before the judicial proceedings aimed at the dissolution of marriage commence, this will *automatically involve the lapsing* of the derivative right of residence of the third country spouse, which thus cannot be retained any more based on the provisions set out in Article 13 of the Directive. However, in the case that we have cited, unlike in the current case, the claimants were always such third country men whose EU citizen spouses had departed from the host country before the divorce case was launched, and no violence whatsoever occurred during the marriage.

16 Point (c), Section (2), Article 13 of the Directive.

17 *Kuldip Singh* judgment, C-218/14, ECLI:EU:C:215:476.

In the *NA* case, the Court is seeking an answer to the question what will happen if a third country wife becomes the victim of abuse during the marriage and the EU citizen husband leaves the host member state after committing such violent act but before the dissolution of the marriage. The question arises whether the departure of the EU citizen spouse, at least by taking the content of the above *Singh* judgment into account, will immediately terminate the status of the non-EU citizen as per the Free Movement Directive, even if the circumstance of domestic violence exists, dealing a death blow on the cases of retention of the right of residence as listed in Article 13. All this is asked in light of the fact that in accordance with the Court's earlier case law, the third country citizen will continue to be entitled to the right of residence in case the married couple *separates in the host member state*.[18]

The overall picture is further nuanced by the jurisprudence of the Court *regarding third country nationals who raise children with EU citizenship*, which expands the right of residence of family members in the territory of the host country to cases that go beyond those listed in the Free Movement Directive. Thus, taking the provisions set out in regulation No. 1612/68 on the freedom of movement for workers within the Community referredto above into account, it was declared by the Court that the child of a migrant worker has a right of residence if he or she wishes to attend educational courses in the host member State, even if the migrant worker no longer resides or works in that member State. That right of residence extends also to the parent who is the child's primary carer.[19] Furthermore, it was stipulated by the Court that a third country citizen parent who is a primary carerof an EU citizen child is also entitled to the right of residence in the member state where the child resides,[20] even ifthe case does not involve a cross border element[21] (*Zambrano* case). This last conclusion comes from the Court's famous *Zambrano* doctrine, according to which Article 20 TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.[22]

18 It was declared by the Court very early, i.e. in relation to the Diatta case that a third country citizen's permanent separation from their spouse does not affect the right of residence of this person either. Thus, this person may reside in the host member state even after the separation, up to the point when the divorce is declared in a binding decision. Diatta judgment, case No. C-267/83, ECLI:EU:C:1985:67.

19 *Baumbast* judgment, C-413/99, ECLI:EU:C:2002:493; *Teixeira* judgment, C-480/08, ECLI:EU:C:2010:83.

20 *Zhu and Chen* judgment, C-200/02, ECLI:EU:C:2004:639.

21 The parents will be entitled to this right even if the child in question never before used the right to free movement.

22 According to the Court, a refusal to grant a right of residence and also a work permit to a third-country national who has dependent minor children in the Member State where those children are nationals andreside, has such an effect. It must be assumed that a refusal (of a right of residence to such a person) would lead to a situation where those children would have to leave the territory of the Union in order to accompany their parents. Similarly, without a work permit such a person would risk not having sufficient resources to provide for himself and his family. That would also result in the children having to leave the territory of the Union.

In light of the above, the *NA* case in question allows the Court to examine the theoretical considerations underlying the rights of residence granted to third country citizens and also, to make an attempt at eliminating the tension that arises from the simultaneous exercise of supranational EU citizen's rightsand traditional member state competences in the field of immigration policy.

13.2.3 The Opinion of the Advocate General

In his opinion, Advocate General Wathelet primarily responded to the concept brought up by the Government of the United Kingdom, according to which the second and third questions asked by the referringforum are hypothetical in character, since the right of residence of NA and her children had already been recognized in the United Kingdom based on Article 8 of the European Convention of Human Rights.[23] In his response, the Advocate General very rightly pointed out that the referred questions are obviously not hypothetical, as the question whether NA is entitled to receive protection of a higher degree than the one offered by international law, one which is directly based on EU law,[24] will presumably be determined on the basis of the responses given to them. Then the Advocate General went on to answer the first question, i.e. whether NA should be able to prove, in order to be able to retain her right of residence, that her EU citizen spouse was still residing in the host country at the time of the dissolution of their marriage [see Point (a)].

Wathelet began his investigation into the issue by analyzing the content of the Court's above-cited *Kuldip Singh* decision. The situation is that in this decision, the fundamental principle was established, i.e. that the right of residence of the family members of an EU citizen who are not the citizens of any member state will ceaseimmediately when the EU citizen to whom the right of residence is related leaves the territory of the host member state.[25] The Advocate General, not paying any special attention to the problems of the revival of the right, or to the relationship between Articles 12 and 13, in answering the question, focused on Article 13 and the underlying considerations. He declared it very simply that any potentially occurring events within the framework of the proceedings aimed at the dissolution of marriage allow the retention of the right of residence of the family members, even despite the above.[26] At this point, he found it important to emphasize that it is not the divorce in itself but the special circumstances described in detail in Section (2), Article 13 of directive No. 2004/38, thus in the current case, the occurrence of the element of domestic violence as the "root cause" that maintains the right of resi-

23 According to the standpoint taken by the Dutch government, this conclusion makes all the questions hypothetical.
24 Advocate General's Opinion, Points 26-31.
25 Ibid. Point 62.
26 Advocate General's Opinion, Point 58.

dence of the family members.[27] Relying on the teleological interpretation, he found that the point of the provision is the very circumstance that the derivative right of residence of an EU citizen is converted into a personal right of residence if certain circumstances that warranting protection, such as domestic violence, exist.[28] This is what is referred to by Preamble (15) of the Directive too, which declares that "[the] family members should be legally safeguarded in the event of […]divorce […]."[29] The Advocate General also stresses the protective nature of the provision in question when he says that "the loss of the derived right of residence […]could be used as a means of exerting pressure to stop the divorce at a time when the circumstances are in themselves enough to wear the victim down psychologically and, in any event, to engender fear of the perpetrator of the violence."[30] Finally, kind of stressing his standpoint, he also defines the negative consequences of an interpretation that is contrary to the above, from the aspect of the implementation of a criminal procedure, such as the potential failure to call the abuser to account.[31] Thus, to sum up the above, according to the position taken by the Advocate General, as long as the marriage is dissolved after the occurrence of domestic violence, it is absolutely *irrelevant* with regard to the retention of the right of residence *where the EU citizen spouse resided* when the divorce case was launched.

The second and third questions were dealt with jointly by the Advocate General's opinion as well. In the course of this, it had to be answered whether the refusal to grant a right of residence to a minor EU citizen or a third country citizen parent having sole custody over this child runs contrary to Article 20 or Article 21 of the Treaty[see Point (b)]. In answering this question, the Advocate General first of all relied on the Court's earlier *Alokpa* judgment,[32] in which it was established that the non-EU citizen who has sole responsibility for her minor children who are EU citizens may reside in the host member state with his or her children by virtue of Article 21 of the TFEU, as long as the EU citizen meets the criteria specified in the Free Movement Directive. However, according to the Advocate General's Opinion, it is for the national court to determine whether NA's children meet the criteria laid down in Section (1), Article 7 of the Directive, particularly, the requirement to have sufficient financial means.[33] If this criterion is not met, the refusal to grant the right of residence will not breach Article 21 of the TFEU. Then the Advocate General endeavored to examine the referred question from the aspect of the conclusions of the *Alokpa* judgment regarding Article 20 of the TFEU. In the

27 Ibid. Points 54-61.
28 Ibid. Point 75.
29 Directive, Preamble Point 15.
30 Advocate General's Opinion, Point 70.
31 Ibid. Point 72.
32 *Alokpa* judgment, C-86/12, ECLI:EU:C:2013:645.
33 In the course of this, Point 27 of the Alokpa judgment, as well as Points 28-30 of the *Zhu and Chen* judgment were cited, according to which the source of the financial means is absolutely irrelevant, so these can also be secured by the third country parents of the affected minor citizens. Advocate General's opinion, Point 92.

course of this, the Court, taking the *Zambrano* doctrine into account, examined whether it was still possible to grant the right of residence on an exceptional basis if the refusal of such grant would result in the children's having to leave the territory of the European Union, depriving them the genuine enjoyment of the substance of the rights conferred by virtue of that status.[34]

Although the 'interpretation criterion on the deprivation of the very point of the rights'has been specified since the *Dereci* case,[35] the Advocate General still thinks that the question arises[36] whether the obligation to depart from the territory of the European Union is to be understood *in legal terms or in concreto*, i.e. with regard to the facts.[37] In his view, the possibility for a third country citizen and his or her EU citizen children to move to the member state according to the citizenship of the children should not exclusively exist "in the abstract".[38] As is very aptly put by Wathelet, NA's children have constructed their citizenship in the United Kingdom,[39] so they cannot reasonably be expected to reside in the member statethat they do not even speak the language of, which is otherwise the one according to their citizenship. However, the examination of these factual circumstances is the responsibility of the national court, which may thus mean a threat to the theoretical test of the *Zambrano* doctrine.[40]

In his opinion, Wathelet touched upon the question of taking the provisions on fundamental rights (Article 7 of the EU Charter of Fundamental Rights, Article 8 of the European Convention of Human Rights) into account well in applying the above provisions. The starting point in the argumentation of the Advocate General was again the Court's statement made on the *Dereci* case, i.e. "if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for

34 Ibid. Points 95-96.

35 *Dereci* judgment, C-256/11, ECLI:EU:C:2011:734.

36 The Court's answering this highly important question might have led to a potentially different decision in the *McCarthy* case that followed the *Zambrano* case. See L. Gyeney, 'Uniós polgárság: a piacorientált szemlélettol való elszakadás göröngyös útja: A Rottmann-, a Zambrano-, a McCarthy- és a Dereci-ügyek analízise' ('Union Citizenship: the Rough Path of Breaking from the Market-Oriented Approach: Analysis of the Rottmann, Zambrano, McCarthy and Dereci Cases'), the journal *Iustum Aequum Salutare*, issue 2012/2, pp. 141-164.

37 Advocate General's Opinion, Point 98.

38 Ibid., Point 114.

39 Ibid., Point 115.

40 It should be noted here that after the *Rendon Marín* judgment following the *NA* case, in its Zambrano test, the Luxembourg Court did not exclude the possibility for a family to move to the country of origin of the EU national child. Although it was indicated by the claimant that he had nothing to do with Poland and that they did not speak Polish, the Court did not conduct an in-depth analysis of the question but what it actually did was that it left it to the court of the member state to decide whether a parent who is in fact a primary carer of his children can be entitled to the derivative right of accompanying his children to Poland, and reside with them in Poland, as the case may be. *Rendon Marín* judgment, C-165/14 ECLI:EU:C:2016:675, Point 79.

private and family life provided for in Article 7 of the Charter."[41] What Wathelet thinks, however, that we also act under the effect of European Union law when the Court establishes that the refusal to grant the right of residence due to certain criteria is not contrary to the provisions set out by the Treaty. Consequently, if it was already established by court, as it happened in the case in question too, that the deportation of an EU citizen would violate Article 8 of the European Convention of Human Rights, the national court does have to take this into account when the test of the 'deprivation of the very point of rights' is considered.[42]

Finally, the Advocate General, concerning the question [see Point (c)] whether pursuant to Article 12, Regulation No. 1612/68, the child and the third country parent who is primary carer of him or her are entitled to the right of residence in case the EU citizen parent does not work there any more when the child begins his school studies, he gave a clearly affirmative answer. In his argumentation, he referred to the Court's earlier case law, more precisely, to its *Teixeira*[43] and *Ibrahim*[44] decisions.

13.2.4 The Court's Considerations on the Questions Submitted for Preliminary Ruling

As regards answering the first question [see Point (a)], the Court significantly deviated from the content of the opinion of the Advocate General. As a starting point, they used the points declared in the Court's earlier *Singh* judgment, which considerations can also be applied to the current case in the Court's opinion. Thus, in accordance with this, the right of residence of a third country spouse remaining in the host member state will cease to exist when the EU citizen spouse departs from this country. This right cannot be revived by applying for the dissolution of the marriage either, as Article 13 of directive No. 2004/38 only mentions the retention of the existing right of residence. Thus, the EU citizen spouse of a non-EU citizen shall stay in the host member state until the court proceedings aimed at the dissolution of the marriage are launched, in order to ensure that this third country citizen retains their right of residence in this member state under Section (2), Article 13of this directive.[45] The Court may just as well have stopped at this

41 *Dereci* judgment C-256/11 EU:C:2011:734, Point 72.

42 Advocate General Opinion, Point 124.

43 According to the reasoning of the judgment, the goal of Article 12 of regulation No. 1612/68 is, particularly, to ensure that the children of a Communityworker may commence and, as the case may be, complete their studies in the host member state even if the worker is not employed in the member state in question any more. *Teixeira* judgment, C-480/08, ECLI:EU:C:2010:83, Point 51.

44 In the judgment in question, the Court reaffirmed, that as is apparent from the very wording of Article 12 of Regulation No 1612/68, the right to equal treatment in respect of access to education is not limited to children of migrant workers. It applies also to children of former migrant workers. *Ibrahim* judgment, C-310/08, ECLI:EU:C:2010:80, Point 39.

45 *NA* judgment, Points 34-35.

point in answering the first question, but they still found it necessary to support their position by some further arguments. Thus, in the justification of its judgment, it went on to interpret Section (2) of Article 13 and especially, its Point (c), during which it practically demonstrated the entire repertoire of the interpretation methods. As regards the literal interpretation, it pointed out that Section (2) of Article 13 exclusively discusses the retention of the right of residence.[46] Then it stressed the exceptional nature of the provision in question, as the dissolution of the marriage does not involve the loss of the right of residence of third country citizens in the regulated groups of cases, which practice deviates from the general rule. This is so despite the fact that after the dissolution of the marriage, the former citizens do not fulfill the criteria listed in Section (2) of Article 7 of the directive any more, as they are no more the family members of the EU citizens who exercise the right of free movement.[47] The judgment briefly touches upon the contents of Article 12 as well, namely that the legislator did not wish to provide protection to third country family members for the case of the departure of the EU citizen relative from the host member state. As regards the legislator's intention, the judgment, similarly to the Advocate General's opinion, emphasizes the objective of Article 13, which is also stipulated in the preamble, i.e. that it aims to provide special protection for the case of divorce, thus granting a right of residence on a personal basis.[48] This objective is supported by historical data as well when it is pointed out that in the course of the elaboration of the proposed Free Movement Directive,[49] it was an express criterion to provide this special legal protection to those whose right of residence is attached to the family ties established through marriage, with a view to avoiding blackmailing. According to the proposed directive, however, "such protection will only be necessary if the marriage is dissolved with binding effect, considering that the separation does not affect the right of residence of the spouse who is a third country citizen".[50] Placing a rather strong emphasis on this statement, the Court has concluded that protection is only and exclusively subordinated to the dissolution of the marriage. It is after summarizing all this that the Court comes to the ultimate conclusion that a third country family member may only invoke the retention of the right of residence if the EU citizen was residing in the territory of the host country not only at the time of committing the act but also, at the time of launching the divorce proceedings.

After answering the first question, the Court went on to examine the fourth question [see Point (c)]. In answering this question, the Court cites the *Teixeira and Ibrahim*

46 Ibid. Point 40.

47 The Free Movement Directive does not provide the right of entry to and residence in the member states to all third country nationals, only to those who are the family members of an EU citizen who exercises his / her right to free movement through settlement in a member state that is different from the one of which he / she is a national, Points 41-42 of the judgment.

48 Ibid. Point 45.

49 COM(2001) 257 final.

50 Points 46-47 of the judgment.

cases,[51] which also served as a ground for the opinion of the Advocate General, and as a result of which it reaches a conclusion that is in line with the Advocate General's opinion. Thus, the Court stipulates that the children of the ex migrant worker, namely those of KA, who have been residing in the host member state since they were born, are entitled to the right of pursuing studies and also, to the related right of residence. So, the fact whether the previously migrant worker parent resides in the member state in question when his or her child starts pursuing his or her studies, has no relevance whatsoever in this respect.[52]

Then the judgment started to examine the issue of NA's right of residence. The outcome of this examination also agrees with the opinion of the Advocate General, in that the right of residence of the children involves the right of residence of the parent who is a primary carer of the child, in this case, NA's right of residence. In order to support this, the Court cites the *Baumbast and R* case, which is of fundamental significance.[53] Finally, the Court goes on to jointly examine the second and third questions [see Point (b)]. Contrary to the motion filed by the Advocate General, it first of all studies the applicability of the *Zambrano* doctrine to the case in question. In the course of this, it repeats what it declared earlier, i.e. that those national measures which involve depriving the EU citizens of the genuine enjoyment of the substance of the rights ensured through this EU citizen's legal status run counter to Article 20 of the TFEU. Also, it stresses the exceptional nature of this criterion, i.e. that it exclusively refers to such situations where the secondary law that refers to the right of residence of third country citizens is not applicable.[54] However, since NA and her children are entitled to residence in the United Kingdom on the basis of the secondary law, including Regulation No. 1612/68, the exceptionality criterion laid down in the *Zambrano* judgment is not metaccording to the Court.

Then the European Court of Justice goes on to examine the applicability of the freedom of movement and right of residence as specified in Article 21 of the TFEU to the case in question, in the course of which the Court basically follows the line of thought of the Advocate General's opinion. Thus, it stipulates the necessity of meeting the criterion of sufficient financial means required by the Free Movement Directive.[55] However, the Court leaves the examination of this circumstance to the national court.

Finally, the Court cites the principle that is well-known from the case law of the Court and which was also voiced in the Advocate General's opinion, i.e. that the parent who is the primary carer of a minor EU citizen is also entitled to the right of residence with a

51 *Teixeira* judgment, C-480/08, ECLI:EU:C:2010:83, Point 51. *Ibrahim* judgment, C-310/08, ECLI:EU:C:2010:80, Point 39.

52 Point 63 of the *NA*-judgment.

53 Ibid. Point 65, *Baumbast and R* judgment, C-413/99, EU:C:2002:493, Point 71.

54 Points 70-72 of the judgment.

55 In relation to this, it is declared that this can also come from a third country citizen, i.e. the source of these means is absolutely irrelevant. Points 76-78 of the judgment.

view to ensuring the efficient exercise of the rights arising from EU citizenship.[56] So, if the criteria required by the directive, primarily those which refer to the need for sufficient financial resources, are met, NA as the parent who is a primary carer of the children may be granted residence in the territory of the host member state pursuant to Article 21 of the TFEU.

13.2.5 Criticism of the Argumentation

As was also pointed out by Advocate General Wathelet when he examined the acceptability of the question, it is by far not irrelevant with regard to this case whether NA and her children are only provided protection granted by international law,[57] or whether their right of residence is directly based on EU law, and if so, on what legal source of the latter, since the individual legal sources provide them different ancillary rights,[58] or they do not provide any rights at all.

So, the subject of the case is primarily not the question whether NA continues to be entitled to stay in the territory of the member state but it is rather to find out what the actual legal grounds of her stay are. The situation is that after the divorce, NA applied for the legal status of permanent residence, without any success, in light of the current judgment.

The legal status of permanent residence can be obtained by five years of continuous and lawful residence under the Free Movement Directive. The question arises whether this right also extends to those whose residence is ensured only derivatively under this directive. The answer given by Advocate General Wathelet in this respect is clearly affirmative. What is more, according to his position, the fulfillment of the criteria of permanent residence is also possible for NA through exercising several derivative rights of residence related to different EU citizens. However, it should also be pointed out that this criterion cannot be met in the case of those who are entitled to stay in the territory of the member state on the basis of Regulation (EEC) No. 1612/68 of the Council on freedom of movement for workers within the Community rather than on the basis of the Directive itself, at least pursuant to the Court's *Alarape* decision.[59] This is whyit has critical importance whether it is the directive itself or the legislation in question that will serve as the basis for NA's right of residence.

56 At this point, the Court quotes the above-cited *Chen* and *Alokpa* judgments. Points 79-80 of the judgment.
57 Advocate General's Opinion, point 30.
58 For example, the use of some social security and non-contributory benefits in addition to residence.
59 In its judgment, the Court declared that the periods of residence spent by the third country family members of an EU citizen in one of the host member states exclusively pursuant to Article 12 of Regulation No. 1612/68, and without fulfilling the criteria required by directive 2004/38 with regard to obtaining the right of residence, shall not be taken into account in obtaining a permanent right of residence as per the aforementioned directive by these family members. *Alarape* judgment C-529/11, ECLI:EU:C:2013:290.

In light of the above, it is unfortunate that according to the Court's decision, NA could exclusively obtain a right of residence in the territory of the host country on the basis of the referred legislation, in her capacity as a primary carerof her children.[60] Consequently, the third country citizen who does not have a child from his or her marriage,[61] or who does not obtain parental supervisory rights over his or her children, ad absurdum, whose EU citizen spouse forcibly takes their common child from the country in question when the latter departs from the host member state, will basically remain without protection in such a case. Similarly, if the EU citizen spouse happens to have worked in the territory of the host member state as a self employed rather than as an employee earlier, the third country spouse is not eligible to protection under the EU law again, at least pursuant to the content of the Court's *Czop* decision.[62]

In light of the above, the statement of the Court, according to which in order to be able to retain the right of residence of a third country citizen as stipulated in the directive, the EU citizen spouse should be staying in the territory of the host member state when the divorce case is launched, should be examined more thoroughly.

13.2.5.1 Criticism of the Argumentation of the European Court of Justice Regarding the Lapsing of the Right of Residence According to the Directive

The line of thoughts of the European Court of Justice with regard to the lapsing of the right of residence according to the directive is broken at several points, it is erroneous and imperfect. Thus, first of all, and contrary to the statement made by the Court, it is by far not so obvious that the move of an EU citizen to another member state will simply make the regulation relating to the dissolution of a marriage in the directive, i.e. the contents of Article 13invalid. The above position taken by the Court is based on their earlier *Singh* judgment, which decision[63] has received quite a number of critical remarks by the representatives of legal literature.[64]

60 Not as a victim of domestic violence, who may retain their right of residence after the divorce pursuant to the directive.

61 The Court, for example, did not attach any particular significance to the fact that at the time of the divorce, NA was only expecting their second child.

62 In the *Czop* judgment, the Court declared that Article 12 of Regulation (EEC) No. 1612/68 of the Council on the freedom of movement for workers within the Community provides the right of residence only to the migrant worker who is a primary carer of his or her child who pursues studies inthe host member state, without providing such a right to a self employed who in fact exercises parental supervisory rights over his or her child. C-147/11, *Czop* judgment, ECLI:EU:C:2012:538.

63 Pursuant to this decision, as long as the EU citizen spouse departs the territory of the host member state before the divorce proceedings are launched, this will involve the lapsing of the right of residence of the third country national spouse in the host member state and this right cannot be revived by an application for the dissolution of marriage either.

64 F. Strumia, 'Divorce immediately, or leave. Rights of third country nationals and family protection in the context of EU citizens' free movement: Kuldip Singh und Others', *Common Market Law Review* (2016), vol.

These critical remarks as we will see it below are primarilytargeted at an interpretation of Section (2) of Article 7 offered by the European Court of Justice, which makes the right of residence of the family member dependent on the continuous stay of the EU citizen in the host member state.[65] Similar doubts have emerged with regard to the Court's legal interpretation of Section (2), Article 13 of the directive. The situation is that the Court artificially connects the terms "commencement of divorce" and "residence in the host member state" mentioned in Point (a), Section (2) of Article 13 in the justification of the Singh judgment, which serves as the basis for the *NA* decision, from which the mistaken conclusion is easily drawn that the EU national spouse must reside in the host member state until the court proceedings aimed at dissolving the marriage are launched.[66] However, according to the right interpretation of Article 13, the EU national spouse may reside anywhere when the divorce case is launched, this in itself exerts no impact at all on the right of residence of the third country spouse.[67] It is this very right that is the subject of the provision in question in the case of the dissolution of a marriage. The situation is that Article 13 is meant to realize one of the major objectives of the law, i.e. that the protection of the third country spouse (and at the same time, their right of residence) should be ensured on a personal basis, irrespective of the place of residence of the ex-spouse.[68]

53, pp. 1373-1394; S. Peers, 'Domestic violence and free movement of EU citizens'. <http://eulawanalysis.blogspot.hu/2016/07/domestic-violence-and-free-movement-of.html>.

65 The situation is that Section (2), Article 7 says that "[…] the right of residence shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State […]". Strumia thinks that by this, the legislator essentially only wishes to specify those family members who are in principle entitled to reside with the EU citizen, at least as long as the other criteria set out in the directive are met. Thus, the terms "accompanying or joining" specified in the provision in question only refer to the commencement of the right of residence, and not to its process. Also, Section (2) of Article 7 does not refer to, at any point, the concept of a third country national who "continuously resides" with an EU citizen.

66 The point is that Point (a), Section (2) of Article 13 says that "[…] the divorce shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State if prior to initiation of the divorce […], the marriage […] has lasted at least three years, including one year in the host Member State". According to the right interpretation of the words of the directive, the one-year residence in the host member state may take place at any time during the three years of the relationship, not only in the year preceding the divorce. Thus, just contrary to the Court's decision adopted in the *Singh* case, this makes one conclude that the EU citizen spouse may reside anywhere at the time of launching the divorce proceedings, this in itself has no impact at all on the right of residence of the third country national spouse.

67 See Strumia op. cit., p. 1379.

68 "Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis." Preambles of the Directive, Point 15. This was confirmed by the Court's practice as well, see *Ogieriakhi* judgment, point 40, *Ogieriakhi* judgment, C-244/13, ECLI:EU:C:2014:2068.

The above is somewhat contradicted by the argument also voiced by the Court, i.e. that Article 12 of the directive keeps quiet about retaining the right of residence of a third country family member in the case of the departure of the EU national and it only provides for the retention of the right of residence in the case of EU nationals. The Court opines that by doing so, the EU legislator essentially meant to refrain from providing special protection to non-EU national family members in the case that the EU national leaves the territory of the host member state.[69] However, the Court acknowledges this purpose of protection for the cases set out in Section (2) of Article 13. In this context, it does refer back to the content of the draft Free Movement Directive, according to which it intends to provide protection to those third country nationals whose right of residence is related to the family tie established by marriage and who can thus be blackmailed with the dissolution of the marriage. According to the draft directive, however, such protection only becomes necessary when a marriage is dissolved with binding effect, since separation does not affect the right of residence of the third country national spouse. Unfortunately, from this, the Court draws the conclusion that ensuring protection is completely subordinated to the dissolution of marriage between the affected spouses. This argumentation, however, is logically wrong, what is more, it is almost absurd.[70] It is a fact that the separation of the parties does not affect the right of residence in each case,[71] as long as the EU national stays in the host member state. However, taking it into account that as a result of the departure of the EU citizen spouse, at least according to the Court's interpretation, the right of residence will cease to exist completely, safeguards will in fact become necessaryin such a case. Otherwise the EU citizen may hold their spouse in check by threatening with departure rather than divorce. The Advocate General also shares this view, as he thinks that the loss of the right of residence may be used as a means to impose pressure, to inflict an emotional trauma on the victim and to cause long-term fear in relation to the abuser.[72] The question arises whether the legislator in fact meant to create this distinction, i.e. that in one case the threat is acceptable, while it is excluded in the other.

69 *NA* judgment, Points 43-44.

70 See Peers op. cit.

71 The effect of the decision adopted by the Court on the Diatta case, i.e. that the spouse does not necessarily have to continuously live together with the EU national in order to become eligible to a residential right on a derivate basis, was further broadened by its judgment adopted in the *Ogieriakhi* case. In this, the Court declared that with regard to obtaining the permanent right of residence, it is irrelevant whether the married couple did not live together in a certain period of their marriage, or even if they lived with other partners. Thus, this essentially does not require any kind of co-habitation from the parties. This decision of the European Court of Justice was justified by that an interpretation contrary to this would involve the application of a more favorable system in the case of the dissolution of the marriage than in the case of separation, with regard to the affected third country nationals. Points 38-42 of the judgment.

72 See Articles 6,7 and 16 of the Directive.

13.2.5.2 The Theoretical Considerations Underlying the Rights Provided to Third Country Nationals

At this point of the analysis, it makes sense to examine the effect, nature and motives of the rights provided to third country citizens on a derivative basis, which may provide some guidance to those who apply the law. There are fundamentally two considerations underlying the rights provided to third country family members. These are primarily aimed at *the most efficient possible exercise of rights by EU nationals*, i.e. at facilitating the exercise of their free movement and residential rights. This is certified by the Court's jurisprudence of expanded effect, which broad interpretation ensures the right of residence to third country family members beyond the scope of eligible parties specified in the directive,[73] in other cases too. Thus, for example, to a third country national who in fact raises an EU national child while the EU national parent is exercising the right of free movement,[74] a third country family member who is a primary carer of his or her child with union citizenship,[75] and TCN parent caretakers where no free movement has occurred but the substance of a Union citizen's rights would otherwise be impaired (Zambrano doctrine).[76] As is also explained in the justification of the *Iida* judgment,[77] it is a common element of the above facts that, although they are regulated by such provisions which are the a priori competence of the member states,[78] they are still closely related to the EU nationals' right of free movement.[79] The situation is that the non-recognition of the above rights may interfere with the union citizens' right to free movement by having an adverse effect on the family life of these nationals, which deter or holds them back from exercising their right of entry into the host member state and residence in that member state.[80]

The above consideration may be logically questioned by the departure of the EU national, considering that third country family members do not need residence in the host member state any more in relation to exercising their free movement and family rights. In principle, this may explain the "keeping quiet" of Article 12, including that in the case of the departure of the EU national, the protection of the third country national in the host member state will cease.

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73 See Articles 6, 7, 16 of the Directive.

74 *Carpenter* judgment C-60/00, ECLI:EU:C:2002:434; *Asiel* judgment, C-457/12, ECLI:EU:C:2014:136.

75 *Zu and Chen* judgment C-200/02, ECLI:EU:C:2004:639.

76 *Zambrano* judgment C-34/09, ECLI:EU:C:2011:124.

77 *Iida* judgment, C-40/11, ECLI:EU:C:2012:691.

78 Thus, the provisions on the rights of entry and residence of third country citizens.

79 Ibid., Point 72.

80 As early as at the outset of integration, the view was acknowledged that in order to be able to efficiently exercise the rights of the migrant member state citizens, it is critical to provide similar rights of residence and employment to their family members too. G. Barrett, 'Family Matters: European Community Law and Third-Country Family Members', *C.M.L.Rev.*, 2003 (40), pp. 375-376; A. Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach', *European Law Journal*, issue 2009/5, p. 636; A. Tryfonidou, 'Jia or 'Carpenter II': The edge of reason', *European Law Review*, 2007 (32), p. 913.

However, the other fundamental consideration underlying the provision of rights to third country citizens, which is the requirement of the *protection of personal rights*, should also be mentioned.

The rights of citizens of third countries, which were originally provided on an exclusively derivative basis, should start living an independent life in certain situations. The dissolution of a marriage with an EU national (Article 13) and the rights of residence provided in the case of the death of an EU national (Article 12) are the specific expressions of this very consideration. This means that at this point, the legal institution of EU citizenship penetrates into the areas that traditionally belong to the competence of the member states, which "now requires the member states to regard the third country citizens as one of the members of their community, irrespective of the nature of the family tie, or the exercise of the EU national's free movement rights."[81]

The *NA* case unfortunately falls into the legal loophole between the provisions set out in Article 12 and Article 13, which as we have seen, poses a major challenge to those who apply the law. Furthermore, it seems like the considerations underlying the rights that the third country citizens are entitled to do not provide a clear guidance either, as they point to different directions.

The situation is that in the light of ensuring the effective exercise of the rights of the EU nationals as a fundamental consideration, the above standpoint, according to which the third country national spouse does not need protection from the host member state any more in the case of the departure of the EU national, seems entirely justifiable. This assumption, however, can still be challenged in certain cases, as long as the examination of the protection of family life in the context of the rights of free movement can contribute to this.

13.2.5.3 The Protection of Family Life in the Context of Free Movement

In the EU law, the institution of the *family* receives protection through the idea of *cross-border EU citizenship*, which conception is specifically represented in the rights to free movement. This unique context in which the right to free movement is stressed is one which at the same time allows the narrow or broad interpretation of the concept of family life. The former concept is built on the definition of the *market citizen*, in which a family is acknowledged strictly as the means to ensure free movement, subordinated to the interest of the economically active member state citizen. The above approach of the Court was enforced in a high number of cases when the Court, instead of invoking the fundamental rights, many times disregarding even the opinion of the Advocate General, ensured the protection of family life on *sui generis* EU basis.[82] As compared to this, the *Singh* and *NA* decisions mean a further twist in the above approach to the family concept related to family rights and EU citizenship.[83] Before the above

81 See Strumia op. cit., p. 1384.
82 The above-quoted *Baumbast*, *Zambrano*, *Alokpa*, *Zu* and *Chen* judgments.
83 See Strumia op. cit., p. 1387.

decisions were adopted, it was the protection of the unity of the family that served as a safeguard for free movement. After the judgments in question, however, it is concerning that in certain cases, only*the final dissolution of the family*, including the dissolution of the marriage may provide protection to those third country rights which cannot be integrated into the classical framework of free movement. In other words, in the future, the interpretation of Article 13 of the directive by the Court may serve as a kind of *incentive* for the dissolution of the family tie as soon as possible, i.e. for the launch of the divorce case before the departure of the EU citizen, thus filling the protection gap with regard to the third country citizens' rightsdisintegrating from the rights to free movement.

Looking at the issue from another angle, however, it is the very cross-border nature of free movement and EU citizenship that may pave the way for the acceptance of *a progressive family model.* The *Singh* and *NA* cases are excellent examples for showing that the legislations in question do not always provide appropriate protection for the migrant EU citizen and mainly, for the latter's family members left behind in his/her host member state. It is the very cross-border nature of free movement and EU citizenship that may justify a more flexible approach, in which the spouses, in a certain period of their family life, live in geographic separation from each other, in two different member states of the European Union but they keep the unity of their family all through. This is, at least partly,[84] supported by the *Diatta* decision of the European Court of Justice, which does not necessarily require permanent co-habitation with the migrant worker in order to guarantee the exercise of derivative rights any more. This decision of the Court was later confirmed by the *Iida* case, in which it was added that this is so even if the spouse thinks that they would later like to get divorced from each other.[85] In a Europe without borders, more and more people "may be compelled" to take up employment in another member state, far from their spouse, by using their right to free movement. Thus, in light of the above line of thought, the standpoint taken by the Court in the *Singh and NA* cases, i.e. that the departure of an EU national spouse will automatically cease the rights of residence of a third country family member, can be questioned. The departure of an EU national from the host member state may become part of a cross-border family life in pretty much the same way as the EU national's exercise of the right to free movement for the first time, including his/her move to the host member state.

Thus, based on the above approach, the legal consequences of the EU national's departure from the host member state should be reconsidered, even in the case of the occurrence of a "family crisis". Taking into account the aim of effective exercising of the EU nationals' right to free movement as a fundamental consideration, it is actually possible to have such an interpretation of Articles 12 and 13 of the directive by the European Court of Justice in which the temporary separation of the family is acknowledged

84 Considering that the facts of the matter are restricted to one member state in the case in question.

85 *Iida* case, Point 58, judgment (even if, as the case may be, Mr. Iida did not have the chance to enjoy the advantages offered by the directive, considering that he wished to obtain a right of residence in the member state according to the nationality of his EU national spouse).

as the means to facilitate free movement, as the case may be, and it is on the basis of this consideration that the family members may be entitled to protection.[86]

In this case, however, a very legitimate question arises: where are the limits of the Court's broadinterpretation? Where is the point at which the expanded interpretation of the European Court of Justice may easily transform into the member states' resistance against the institution of free movement? There is nothing that would express this better than those, sometimes almost threatening, political statements which are targeted at strongly curbing the rights to free movement, or the very fact of Brexit.[87] The potential tensions arising from issues of competence may even act as a logical explanation for the cautious approach taken by the Court in the *Singh* and *NA* cases.

The Court's "cautiously progressing" approach, however, forces the affected third country citizens to make a rather bitter choice. 'Get divorced as soon as possible, or leave the host country', as the judgment goes.

This situation is further aggravated by that in the *NA* case, we are talking not only of an average third country family member whose relationship with her EU national spouse has in the meantime deteriorated. We should always keep in mind that NA became a victim of *domestic violence*. The situation is that according to the *NA* decision, as long as a third country spouse would like to get away from domestic violence by breaking the family tie, or the very abuser would like to avoid the potential legal consequences, the non-EU national family member should, as a general rule, face expulsion from the territory of the host member state.

Thus, except for the above-described, isolated groups of cases, many times there is nothing else that the third country citizen can do but to continue with the relationship, not risking their residence in the host member state and the potential loss of their children.

Discussing the above in light of a specific case, we can see that the claimant of the case in question could retain her right of residence according to the decision if she commenced the divorce proceedings before her EU national spouse leaves the host member state. However, one wonders what chance it stands that a third country mother who is five months pregnant and has an eleven-month-old baby, fleeing domestic violence, will file for divorce in the host member state when she also faces problems of housing and livelihood.

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86 This may be realized in practice through the joint interpretation of Article 21 of the Treaty ensuring the right of free movement, and the provisions in question, which however, raises quite a number of problems. Thus, the question arises what will happen if the EU national spouse happens to leave for a third country rather than another member state. On the basis of this scenario, the third country family members would obviously not be entitled to any protection.

87 Thym thinks that by now, free movement has obtained a "symbolic function", it acts as a kind of projection of the currently emerging economic, social and political fears. D. Thym, 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens', *C.M.L.Rev*.,2015, Vol. 52, p. 18.

13.2.6 The Significance of the Judgment

In the *NA* case, we are facing an exceptional situation, as the number of such cases when the EU national who commits domestic violence departs from the host member state before the divorce is very low.[88] Even if the number of those affected by the decision is very low, the issue of domestic violence should be taken seriously, especially in the case of the European Union, which is an organization committed to the idea of the rule of law and fundamental rights. What is more, the Commission proposedthe European Union to sign the 2011 Istanbul Convention,[89] the goal of which document of the Council of Europe is to prevent and eliminate violence against women and domestic violence.[90] Article 59 of the Istanbul Convention requires the provision of the right of residence independently from the spouse, in cases of domestic violence.[91] The situation is that neither the document nor the interpretative explanation thereof contain any reference whatsoever to the above distinction, depending on whether the abuser has or has not departed from the territory of the country in the meantime. But why would it contain such anyway? For the Convention, the place of residence of the abuser is totally irrelevant.[92] The exclusive goal of this, as well as that of the respective Article 13 of the directive, is to provide protection to the victim. The Court will definitely have to take this into account in its future judgments. This is partly why it is very difficult to understand the consideration underlying the *NA* decision, according to which the third country spouse will not need the protection of the host member state after the departure of the EU national spouse, so the right of residence of the former can automatically be terminated. As, however, it has been very rightly pointed out by Advocate General Wathelet, in such cases, the loss of the right of residence of the spouse who is a third country citizen "may be used as a means to impose pressure […], to inflict an emotional trauma on the victim and to cause long-term fear in relation to the abuser."[93] What is more, the Court interpretation of Article 13 of the directive essentially deprives the legislation in question of its effectiveness, as it makes the protection dependent exclusively on the intention of the offender to stay in the territory of the host member state.

The reconsideration of the decision is also encouraged by the examination of the protection of family life in the context of the right to free movement. The interpretation

88 Consequently, the number of those third country nationals whose right of residence would thus be retained is presumably insignificant.

89 <www.coe.int/en/web/istanbul-convention/home>.

90 <europa.eu/rapid/press-release_IP-16-549_hu.htm>.

91 "The Parties shall take the necessary legislative or other measures to ensure that victims whose residence status depends on that of the spouse or partner as recognized by internal law, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship." See Article 59 of the Istanbul Convention.

92 See Peers op. cit.

93 Opinion of the Advocate General, Point 70.

of the *NA* case submitted by the Court may act as an incentive for the dissolution of family ties as soon as possible in the future, so for the launching of the divorce case before the departure of the EU national from the territory of the country in question, thus filling the gap of protection with regard to third country national rights emancipating from the rights of free movement. However, it is exactly the cross-border nature of free movement and EU citizenship that may justify a more flexible approach. According to this, the departure of the EU citizen from the host member state, including the temporary separation of the family members does not necessarily have to result in the lapsing of the right of residence of the third country spouse. This secondary movement may become a part of cross-border family life just like the exercise of the rights of free movement for the first time.[94] Of course, the question arises where the boundaries of expanded interpretation are. We should realize that the judges are not in an easy situation when they have to provide guidance to those who apply the laws in the buffer zone of immigration policy, which is traditionally a member state competence, on the one hand, and supranational EU rights, on the other hand. What is more, they have to do all this in the midst of a crisis period that gravely affects Europe, in which the very institution of free movement was also jeopardized.[95] The *NA* case was not the first time when the complex issues of the relationship between the EU nationals residing on the basis of their original right and the third country nationals residing on the basis of a derivative right are in the focus of attention, allowing the Court to settle those competence issues which have caused tension for a long time.[96] The situation is that there is an increasing number of cases before the Luxembourg forum whose facts are regulated by provisions that *a priori* belong to *the competence of the member states*, thus those that regulate *theright of entry and residence of third country nationals*, however, they are still closely related to the right of EU citizens to free movement and residence. One of the critical stepsin this respect was the Court's judgment adopted in the *Zambrano* case. During this case, the Court reached such a high level of the protection of the EU citizens' rights derived from Article 20 of the TFEU in which it ensures family reunification rights to the third country parents of EU citizens in a purely member state situation, giving an undoubtedly spectacular example for how judges can develop the law. In its less generous case law following the *Zambrano* decision, the Court, however, also made it clear that the protection provided on the basis of Article 20 of the TFEU may only be applied in highly exceptional cases. Thus, basically

94 This is, at least partially, supported by the Diatta decision of the European Court of Justice, which does not necessarily require permanent co-habitation with the migrant worker in order to guarantee the exercise of derivative rights.

95 Laura Gyeney: "The limits of Member State solidarity", in Marcel Szabó (editor-in-chief): *Hungarian Yearbook of International and European Law* (The Hague:Eleven International Publishing) 2016.434.

96 The Court is more and more often accused of too intensively interfering with the area of immigration policy, namely into the regulation of the third country nationals' right of entry and residence, which is a national competence, in its jurisprudence under the pretext of the effective exercise of the rights arising from EU citizenship, *Metock* judgment, C-127/08 ECLI:EU:C:2008:449, Point 67.

only in the case of such EU minors who reside in their country of origin with their third country parents, without ever having exercised their right to free movement.[97] In the *NA* case, this was obviously not the case, as opposed to the subsequent *Rendon Marin* and *CS* cases,[98] in which the Court examined the derivative right of residence of third country parents with a criminal record based on Article 20 of the TFEU. In the above cases, the EU national children have been residing in the member state of which they were nationals since they were born. In these decisions, the Court now clearly confirmed that in the case of EU nationals residing in the host member state, it is first of all always Article 21 of the Treaty that ensures the right of free movement that can be invoked and it is only then that Article 20 underlying the Zambrano test can be applied. The Court's decision adopted in the *NA* case is an excellent example for this. The situation is that it is declared by the Court crystal clearly that in relation to the case in question, what should primarily be investigated into is whether the EU citizen and their third country relative may obtain a right of residence under secondary law. From all this, it becomes absolutely clear that the protection provided on the basis of Article 20 of the TFEU may only act as a last resort, even if we are talking about a mother who fell victim to domestic violence. In light of the above, the *NA* decision adopted by the Court is to be carefully considered, especially in contrast with the Court's decisions adopted in the Rendon Marin and Cs cases. Based on all this, it seems like a criminal enjoys a higher level of protection,[99] according to the current status of EU law than a mother who fell victim to domestic violence.

13.3 Exercising the Right to Free Movement in the Case of Same-Sex Couples: The *Coman* Case

13.3.1 The Facts of the Case and the Application for Preliminary Decision-Making

Adrian Coman, Romanian gay rights activist married a US citizen back in 2010. The couple currently lives in the United States. Mr. Coman turned to the Romanian immigration authorities in 2012, in order to find out about the criteria that are required to be

97 *Rendon Marin* judgment, C-165/14, ECLI:EU:C:2016:675, Point 74.

98 *Cs* judgement, C-304/14, ECLI:EU:C:2016:674.

99 In the *Cs* case, the Court decided that the member state may take an expulsion measure in exceptional circumstances based on public policy and public security considerations, however, this has very strict criteria and this can only happen after a very thorough consideration of the existing interests, among others, considerations of fundamental rights. The high-level protection provided by the Zambrano doctrine is referred to by Article 7 of the Charter of Fundamental Rights of the European Union ensuring the protection of family life, as well as Section 24(2), which safeguards the best interests of the child, what is more, the relevant Strasbourg practice, including the reference of the Court to *the Jeunesse v. the Netherlands* judgment, both in the *Rendon Marin* (Point 66) and the *Cs* (Point 36) judgments.

fulfilled by his partner for obtaining the right of residence in the territory of the member state. The authorities responded that his application would be turned down, with regard to the fact that according to the Romanian Civil Code, a marriage entered into abroad by a same-sex couple cannot be recognized. The couple filed a claim, according to which the rejection of the application for residence by the Romanian authorities on the above grounds violates Mr. Coman's right to free movement, and also, it represents an example for discrimination on the basis of sexual orientation, which runs counter to the provisions set out in the Charter of Fundamental Rights of the European Union. The court of appeal turned to the Romanian Consititutional Court in order to request the constitutionality examination of the relevant article of the Romanian Civil Code. Finally, the Constitutional Court suspended the procedure and referred the following questions to the European Court of Justice for a preliminary ruling.

a. Does the concept of spouse defined in Point (a), Section (2), Article 2 of the Free Movement Directive include the same-sex spouse of an EU national, and if so, can the host member state be required to grant the right of residence on its own territory for more than three months to the same-sex spouse of a migrant EU citizen?
b. If the answer to the first question is negative, can the same-sex spouse of the EU citizen, who is a third country national, qualify as "any other family member" pursuant to Point (a), Section (2) of Article 3, or according to Point (b), Section (2) of Article 3 of the directive, "the partner with whom the Union citizen has a durable relationship, duly attested", and if so, will the host member state be obliged to facilitate for these persons to enter and reside in that country if the host member state does not recognize same-sex marriages and does not provide for an alternative form of legal recognition, for example, registered partnerships.

Taking the liberalization trend of the past fifteen years into account, as a result of which the number of those member states which provide some kind of legal recognition to same-sex relationships is growing, it seems like the EU cannot avoid a response to the recognition of *somecross-border relationship rights of same-sex couples*, including that of their '*family reunification rights*' in the EU law sense of the word. In this sensitive issue, the Court has not been compelled to take an open stance up till now,[100] the *Coman* case is the first one in which the Court can express itsposition on the above issue.[101]

100 In the anti-discrimination jurisprudence of the European Court of Justice, the Court got rather close to this but definitely not in a cross-border context. The situation is that the facts of the respective cases were either centered around the country of origin (*Grant, Maruko, Römer, Hay* cases), or emerged in relation to the EU's civil servant staff regulations (the cases *D. and Sweden v. Council of Europe, W. v. Commission*).

101 Although in the context of the *Cocaj* case, which also had Hungarian implications, a similar question was also brought to the Court earlier, the referring forum finally withdrew its claim. In this case, the Court was supposed to similarly clarify the concept of a registered partner in the context of free movement. Case No. C-459/14

The restraint demonstrated in this respect is entirely understandable from the part of the Union, as it is commonly known that the regulation of *family law* is an issue that still belongs *exclusively to the competence of the member state*. Thus, the member states can decide by themselves whether the same-sex couples can enter into a marriage or a registered partnership in their respective territories. Despite all this, the question arises what will happen if an EU national, using their right to free movement, travels to the territory of such a member state, with their same-sex spouse, in which member state the legal system does not recognize this form of a relationship as valid. It is a question whether the host member state may refuse to provide residence to a third country citizen in its territory under the legal title of family reunification.

As we have already explained in the context of the *NA* case, the legislator recognized, as early as at the outset of European integration, the importance of ensuring family reunification rights during the member state nationals' exercise of their right to free movement. As we could also see, the rights of residence provided by the Free Movement Directive bear special significance for third country nationals, as they can exclusively exercise these rights of theirs derivatively, in their capacity as family members.[102] What is more, the EU law now also provides these rights to those EU nationals who use their right to free movement and then return to their State of nationality.[103] Although such cases of return are not regulated by the Free Movement Directive, the family reunification rights ensured in the directive *should still be applied to the returners* too, *through an analogy*, as has been stipulated by the Court in the *O&B* case.[104] Exactly because of this, the questions submitted for decision-making in the *Coman* case, as in the above *NA* case as well, are targeted at the interpretation of the relevant articles of the Free Movement Directive, thus primarily at examining whether *the concept of spouse* as specified in Point (a), Section (2), Article 2 of the Directive includes the same-sex spouse of an EU national.

13.3.2 The Legal Context of Preliminary Decision-Making

The *spouse* of a migrant citizen has always been considered one of the family members that can rely on EU law in order to require the Member State of destination to accept him or her in its territory.As was already mentioned above, these rights are provided by the Directive to the family members irrespective of their origins, i.e. it is not relevant whether we are talking of an EU or a third country family member in the case in question.

This is absolutely clear because, as we already explained in the context of the *NA* case,[105] the family reunification rights were and are still merely targeted at *facilitating free move-*

102 The scope of those eligible is stipulated by Articles 2 and 3 of the Directive.
103 *Surinder Singh* judgment, C-370/90, ECLI:EU:C:1992:296, Eind judgment, C-291/05, ECLI:EU:C:2007:771.
104 *O & B* judgment, C-456/12, ECLI:EU:C:2014:135.
105 Under the title of 'Considerations of principle underlying the rights provided to third country citizens', Point 2.5.2.

ment, so in the first place, they are aimed at avoiding a situation in which the fact that the EU citizens cannot be accompanied or later joined by their family members should exert a *deterrent effect* on the free movement of EU citizens.

In the *Coman* case, the referring forum is trying to find an answer to the question whether the concept of a spouse as defined in the Directive includes the same-sex spouse of an EU national, who uses the right to free movement. As it was already mentioned above the Directive itself *does not define* the concept of *a spouse*. The relevant provision in question, i.e. Point (a), Section (2) of Article 2 was defined *in an* absolutely *gender-neutral way*, despite the fact that this issue was in fact on the agenda when the proposed directive was discussed.[106] While the European Parliament meant to make an explicit reference to same-sex couples when defining the concept of marriage, the co-legislator refrained from doing so without explicitly excluding the theoretical legal possibility for this.[107] In summary, it can be concluded that the legislator, exactly because of the divergence of opinion between the member states on this issue, avoided to give an exact definition, thus making this an issue that would have to be resolved by judicial interpretation.The lack of such definition obviously does not cause a problem when the directive is applied to heterosexual couples, as such marriages are equally recognized by each member state. However, exactly with regard to the lack of consensus between the member states, as we can see, this may cause a problem with regard to the free movement of same-sex couples.

Among the legal commentators, there are some who think, even in lack of the definition of marriage/spouse on the level of secondary law, that the concept extends to same-sex couples too, so no legal interpretation by the European Court of Justice will become necessary. Costello thinks, by taking the literal interpretation into account, that "a marriage is a marriage", i.e. the effect of the directive extends to the marriagesvalidly entered into in the territory of one of the member states in each and every case.[108] Kochenov represents a similar view, as he thinks that if a same-sex couple enters into a marriage that is valid in one of the member states, the host member state will be obliged to recognize such marriage in each case, pursuant to EU law. In his opinion, "the wording of the directive is crystal-clear in this respect", so the European Court of Justice does not need to intervene in any way whatsoever with regard to its definition.[109] In this respect, however, we have to agree with Tryfonidou, who does not think that it is so clear in prac-

106 It is absolutely clear from the draft directive that the Commission considered to limit the concept of a spouse to persons of the opposite sex, avoiding the mere suspicion of its intending to interfere with the area of family law, which is the exclusive competence of the member states. COM(2003) 199, p. 11.

107 M. Bell,'Holding back the tide? Cross-border recognition of same-sex partnerships within the European Union', *European Review of Private Law*, Vol. 12, No. 5, 2004, p. 621.

108 C. Costello,' Metock: Free movement and normal family life' in the Union, 46 CML Rev., 2009, pp. 615-616.

109 D. Kochenov, 'The Right to Have What Rights? EU Citizenship in Need of Clarification', European Law Journal, Vol. 19, p. 502, D. Kochenov and U. Belavuasu: On the 'entry options' for the 'right to love': Federalizing legal opportunities for LGBT movements in the EU, EUI Working papers, issue 2016/09, p. 11.

tice.[110] The situation is that by the legislator's having failed to define the concept of marriage as understood in the directive, and thus, to stipulate the mutual obligation of the member states to recognize same-sex marriages, basically, it is the "principle of the host member state that was tacitly accepted".[111] On the basis of this, the host member state may in turn refuse to recognize the same-sex spouse as a spouse as per the directive, along with all of its legal consequences.

Thus, first of all, we should examine the relevant member state regulation concerning same-sex marriages, furthermore, how the EU legislation and the Luxembourg case law relate to same-sex relationships, i.e. whether these take the changes in member state regulation into consideration.

13.3.3 Assessment of Same-Sex Marriages in the Member States, with Special Regard to Romania

In Europe, the only legal way to make a relationship official was the institute of marriage for long centuries, which possibility was exclusively open to heterosexual couples. As a result of the liberalization trends of the past two decades, however, more and more member states ensure the recognition of same-sex marriages. The Netherlands was the first country to ensure a legal framework for same-sex marriages in 2001. The Netherlands was followed by Belgium, where homosexual couples have been allowed to get married since June 2003. In Spain, the marriage of same-sex couples was legalized in July 2005, while in Sweden, the official marriageof same-sex couples in the framework of a civil or church ceremony has been permitted since May 2009. In Portugal, a law became effective on June 1, 2010, which deleted the reference to "opposite sex" spouses from the definition of marriage. In Denmark, same-sex couples have been permitted to hold church weddings since 2012. In England and Wales, the Parliament agreed to legalize same-sex marriages in 2013. In the summer of 2013, France also made this possible, 14th among the countries of the world. In Finland and Luxemburg, the Parliament made such a decision in 2014, while Ireland was the first in the world to vote for the legalization of gay marriage in the form of a referendum in 2015. A Slovenian law allowing same-sex marriage took

110 A. Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition'(2015) 21, Columbia Journal of European Law, p. 210. What is more, the Court, contrary to its jurisprudence applied in economic issues (see the concept of EU workers), has never endeavored to elaborate genuinely autonomous concepts in the area of family law, including the introduction of uniform Union-level concepts.

111 Tryfonidou (2015) op. cit., p. 212. In the case of registered relationships, the legislator wishes to enforce the principle of the host member state expressis verbis, as the registered partner will be entitled to automatically enter and reside in the host country if "the laws of the host member state regard the registered partnership as one that is equal to marriage".

effect in February 2017.[112] In July 2017, Malta also adopted the law that permits the marriage of homosexual couples. Same-sex marriage became legal in Germany on 1 October 2017.[113]

However, quite a high number of member state constitutions prohibit the marriage of same-sex couples, which means that Croatia, Bulgaria, Latvia, Lithuania, Slovakia and Poland have a constitutional ban on gay marriages. The Fundamental Law of Hungary[114] also protects the institution of marriage as a union that is established between a man and a woman, based on a voluntary decision.[115]

As regards the member state affected by the case, i.e. Romania, the country's Chamber of Deputies also voted for a proposal amending the constitution in May 2017, in which a family is defined as "the marriage of a man and a woman established by a voluntary decision", thus preventing that a law on same-sex marriages be adopted in Romania.[116] The amendment of the fundamental law (which currently mentions "spouses" in the definition of the family) was proposed by a civil society organization called "Coalition for Family", affiliated with the Orthodox Church, which has since then collected as many as over three million supporting signatures for their civil initiative. By the way, Romania does not ensure any possibilities for the official recognition of same-sex relationships in any form whatsoever. The *Coman* case is the second major Romanian case that has been

112 The Slovenian Act Concerning Partnership affords same-sex couples the right to marry, extending the same rights and duties of opposite-sex married couples to same-sex married couples, with the exception of adoption and assisted reproduction.

113 However, in a high number of further member states, it is possible for same-sex couples to make their relationship official without getting married. This becomes possible through *the registration of a partnership*, for example in Austria, the Czech Republic, Hungary, Estonia, Greece, Croatia, Italy and Cyprus.

114 The new Fundamental Law of Hungary strives, both on the level of solemn declarations and on that of more specific regulations, to provide a stronger protection to the institution of the family than before. The article on the protection of the institutions of marriage and family contains a unique extra element as compared to the earlier text: "(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation." Article (L), Section (1)). B. Schanda,' A jog lehetoségei a család védelmére' (The Possibilities of Law to Protect the Family), the journal *Iustum, Aequum, Salutare*, VIII. 2012, Vol. 2, p. 77.

115 As you can see, the level of acceptance of same-sex relationships is the highest in Northern and Western Europe, while the Central-Eastern European countries tend to oppose them. Balázs Schanda and Katinka Bojnár do notthink that this is surprising, since the countries with similar historical backgroundsreact to each other's decisions, they exert an effect on each other. B. Schanda – K. Bojnár:'Házassági jogrendszerek versenye, vagy párkapcsolati szupermarket?' ('Competition of Legal Systems of Marriage, or the Relationship Supermarket?')the journal *Iustum, Aequum, Salutare*, XII. 2016, Vol. 2. 178; J. Scherpe: The legal recognition of same-sex couples in Europe and the role of the European Court of Human Rights', *The Equal Rights Review*, (2013) 10, p. 84.

116 In Romania, the draft amendment of the constitution has to be accepted by both chambers of the Parliament with a two-third majority in order to be able to amend the fundamental law, and within thirty days from such acceptance, a referendum should be called. This referendum is expected to be held in the autumn of 2017.

brought before the European Court of Justice, and in the focus of which are the rights of homosexuals.[117]

In summary, we can conclude that the European legislation is rather diverse with regard to the legal recognition of same-sex marriages.

13.3.4 Assessement of the Relationship Rights of Same-Sex Couples in the EU Law, Issues of Competence

It cannot be stressed enough that the *Coman* case is exclusively targeted at the issue of the cross-border recognition of same-sex marriages. The situation is that, differently from the Supreme Court of the USA, the European Court of Justice still has no competence to require the legalization of same-sex marriages by the member states.[118] According to the current status of the EU law, family law issues are to be deemed as ones that traditionally belong to the competence of the member states. Thus, in the case of *purely internal situations*, the member states make their own decisions on any issues concerning family law. This is fully understandable, as this is a very sensitive area that reflects the social and cultural values of a state, where the member states wish to maintain their regulatory competences. The sensitive nature of the issue is indicated by the fact that not even the Lisbon Treaty has brought about any major changes in the EU-level harmonization of family law.[119] In light of the above, it is not at all surprising that the *Treaty* approved in the last century and the related *secondary law*rest on the basis of a conser-

117 The first case was the one called Asociatia ACCEPT, which surfaced in the context of the prohibition of discrimination on grounds of sexual orientation, which is also stipulated by directive 2000/78/EC on equal treatment. In this, the Court essentially declared that due to the homophobic statements made by the "head" of the football club, it may be up to the club to prove that they do not apply a discriminatory admission policy. *Asociatia ACCEPT* judgment, C-81/12, ECLI:EU:C:2013:275.

118 The *Obergefell v. Hodges* decision adopted by the Supreme Court does not only render it obligatory to recognize marriages entered into between two persons of the same sex, but it essentially legalizes the marriages entered into by same-sex couples. It should be noted here that it was right after this decision was adopted in the States that the European Court of Human Rights adopted a decision of a similar subject in the *Oliari and others v. Italy* case, to be discussed later (Appl. No. 18766/11, 36030/11, July 21, 2015), in which the European Court of Human Rights only renders the minimum level of protection in the state recognition of relationships. Renáta Uitz thinks that the European Court of Human Rights obviously does not even wish to revisit the issue of gay marriages under Article 12 of the Convention, as in this part, it did not deem the motion acceptable. R. Uitz, 'Egy lépéssel lejjebb, egy lépéssel feljebb' ('One Step Lower, One Step Higher'), Fundamentum, issue 2015.4, p. 85; furthermore, Balázs Schanda and Katinka Bojnár emphasize that the parties argued in vain that an increasing number of states open the possibility for same-sex couples to get married, and although the Court quotes the position taken by the US Supreme Court, it did not think that this was an example to follow, confirming by this its earlier jurisprudence. B. Schanda – K. Bojnár, p. 180.

119 Although Section (3), Article 81 of the Treaty on the Functioning of the European Union creates a legal basis for the acceptance of measures aimed at family law issues with a cross border implications, in the framework of the judicial cooperation in civil matters, the resistance of the member states in this respect is well reflected by the fact that the requirements of unanimity and the consultation procedure for decision-making have remained unchanged in family law issues. This basically gives a veto right to the member states

vative family model, in the center of which you can find the institution of heterosexual marriage.[120] In this respect, the draft proposal consolidating the system of free movement[121] and the Free Movement Directive approved on this basis and serving as the subject for preliminary decision-making have not brought about any major changes either.[122] Same-sex couples, despite the above-described proposal of the EP,[123] have remained invisible, maintaining by this the uncertainties of the earlier system, including the freedom of the member states to make decisions on the interpretation of the concept of a spouse.[124] Exactly because of the above, in the case of the new Brussels II Regulation on matrimonial matters and the matters of parental responsibility,[125] legal literature was uniform for a long time in that it is only the form of monogamous co-habitation of opposite-sex couples that should be understood by the concept of marriage within the scope of the regulation, while the marriage of same-sex couples is not within the scope of the regulation. However, this interpretation is by far not so unambiguous today.[126] The effect of the Rome III Regulation related to divorce cases[127] clearly extends to same-sex marriages as well.

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against those EU proposals affecting family law which the member states deem incompatible with the values of the member state in question.

120 The family as a social unit is organized on a patriarchal basis, where the man is the breadwinner, the woman manages the household, and their relationship is based on a heterosexual marriage. E. Caracciolo di Torella and A. Masselot,' Under construction: EU family law', European Law Review, 2004, Vol. 29/1, p. 39.

121 COM(2001) 257.

122 This is understandable, with regard to the fact that the institution was accepted as late as 2001 even in The Netherlands, which was the first EU member state to accept gay marriage.

123 From the part of the European Parliament, those endeavors which aim to shift EU law from this traditional statuscontinue to be present. This is reflected by the recently accepted report of Lunacek as well, which, although has no legally binding force, requests the Commission to make proposals for the mutual recognition of the effects of all civil status documents across the EU, including registered partnerships, marriages and legal gender recognition, in order to reduce discriminatory legal and administrative barriers for citizens and their families who exercise their right to free movement.

124 It is here that we should make mention of the guidance on the transposition of the Free Movement Directive, which already suggests that in the application of the directive, in principle, all marriages that have been validly entered into anywhere in the world should be recognized for the purpose of the application of the Directive. In the case of forced marriages and polygamous marriages, however, it emphasizes that the member states are not obliged to recognize these marriages if this goes against their own systems of law, COM(2009) 313.

125 Council Regulation 2201/2003/EC (November 27, 2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1.

126 Zs. Wopera, Az európai uniós családjog érvényesülésének kritikus pontjai (The Critical Points of the Enforcement of EU Family Law), the journal *Családi Jog*, 11 (3) 2013, p. 42, S. Molnár,' Az uniós jog és jövoje a házasság és más típusú együttélések témájában' (EU Law and its Future with regard to Marriage and Other Types of Cohabitation), the journal*Iustum, Aequum, Salutare*, X. 2014/4, p. 143.

127 Council Regulation 1259/2010/EU (December 20, 2010) implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (OJ L 343, 29.12.2010, p. 10).

As regards the Court, we can also state that its case law preceding the turn of the millennium was for a long time based on the approach of traditional, heterosexual marriage, which, as a general rule, excluded the relationships operating in another form from the protection provided by the EU law. A good example for this is the statement made by the Court regarding the case *D. and Sweden v. the Council of Europe*, according to which the most generally accepted definition in the law of the member states is that "the term marriage means a union between two persons of the opposite sex".[128] In the specific case, the Court found that those who live in a marriage and those who are registered partners are not comparable, this is why in their case, we cannot talk of discrimination either.

After the millennium, however, the court' case law that directly examined the relationship rights of same-sex couples and the issues of discrimination based on sexual orientation brought a kind of turn, for example the decisions adopted by the European Court of Justice in the *Maruko*[129] and *Römer*[130] cases. In the cases in question, the Court interpreted Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation,[131] which, contrary to the earlier laws, expressly *mentions the prohibition of discrimination on the grounds of sexual orientation*.

Thus, according to the above decisions of the Court, the *concept of direct discrimination on the grounds of sexual orientation* could be applied. In this, it meant significant support that the Court, different from the earlier cases, did *not* require *general assessement of comparability* any more but merely that the two institutions, i.e. marriage and registered partnership should be comparable with regard to the application for *specific allowances*.[132] However, it should be stressed that in the reasoning of its judgment, the

128 D. and Sweden v. Council of Europe judgment, C-122/99 and C-125/99, ECLI:EU:C:2001:304. p. 34. In the case in question, a Swedish official working for the European Union and living in a registered partnership recognized by Swedish law applied for a family allowance, a so-called household allowance, similarly to married couples. However, his application was refused, with regard to the fact that he did not live in a marriage but in a registered partnership with a same-sex person. According to the decision adopted by the Court, the grounds for providing these allowances is a relationship that takes the form of a marriage, so the decision does not violate the provisions set out in Article 141 of the Treaty, which is on the equal pay for men and women (currently Article 157 of the Treaty on the Functioning of the European Union), as it is not the gender of the applicant but only the nature of their relationship that has governing effect. However, in the case in question, the nature of such tie was logically determined by the sexual orientation of the applicant.

129 *Maruko* judgment, C-267/06, ECLI:EU:C:2008:179.

130 *Römer* judgment, C-147/08, ECLI:EU:C:2011:286.

131 Council Directive 2000/78/EC of 27 November, 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, pp. 16-22. In the focus of the cases in question, there were such allowances provided in the scope of occupation under the effect of the Equal Treatment Directive which were refused to be provided to the homosexual persons living in a registered partnership of this case, as opposed to the heterosexual couples living in marriages.

132 The above decision of the Court, however, was strongly criticized, first of all because the Court left it to the member state court to define whether a spouse and a registered partner are in a comparable situation with regard to the above-mentioned benefits. Toggenburg thinks that the judgment is only revolutionary at first sight, exactly because of this. G. Tobbenburg,'LGBT go to Luxembourg: Lesbian, Gay, Bisexual and Transgender Rights before the European Court of Justice', European Law Reporter, 2008, Vol. 5, p. 174.

Court specifically declared that the legislation on the family status and the allowances based on the latter *belong to the competence of the member states onthe basis of the current status of the EU law*, and the EU law does not violate this competence of the member states.[133]

The twist in the jurisprudence of the European Court of Justice based on sexual orientation was further strengthened by the entry into force of the Lisbon Treaty. On the one hand, it incorporated a new article (Article 10) in the Treaty on the Functioning of the European Union, pursuant to which "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."[134] On the other hand, it gave binding effect to the Charter of Fundamental Rights of the European Union, according to Section (1), Article 21 of which all kinds of discrimination based on sexual orientation are prohibited. The changed direction is well indicated by the Court's highly practical and dynamic judgment in the *W. v. European Commission* case[135] aimed at the interpretation of the EU Staff Regulation, from which it becomes clear that the Court does not only rely on the word for word interpretation of the Regulation any more but it also pays due attention to the underlying considerations.[136] The *Hay* case[137] also deserves mention, the subject of which is the same as those of the *Maruko and Römer* cases but in which the Court already *conducted* the comparative analysis required for registered

133 *Maruko* judgment, Points 58-60, *Römer* judgment, Point 38, *Hay* judgment, Point 26. However, in Point 59 of the *Maruko* judgment, the Court also points it out that in exercising this competence, the member states are obliged to respect Community law, among others, the provisions on the principle of non-discrimination.

134 Article 10 of the Treaty on the Functioning of the European Union.

135 Thus, in the focus of the *W. v. European Commission* case, there was a Belgian-Moroccan double citizen living in a registered relationship, who complained of the decision in which the Commission refused to provide the household benefits to him. The Commission argued that according to the Staff Regulations, those officials will be entitled to receive support who live in a marriage, as long as this is allowed by the member state in question. The situation is that the Commission thought that their relationship was not in line with the criterion set out in the Staff Regulations, as in Belgium, they have the possibility to enter into a lawful marriage. In its decision, the Court found that this rights proves to be theoretical and illusory if the concept of "the possibility of entering into a lawful marriage in one of the member states" is interpreted exclusively by formal criteria, so when it is examined, it cannot be treated separately from the regulations of the other member state to which the situation in question is closely related due to the citizenship of the persons concerned and which declare the actions between homosexual persons punishable. *W. v. European Commission* judgment, F-86/09, ECLI:EU:F:2010:125.

136 S. O' Leary, Applying principles of EU social and employment law and EU staff cases, European Law Review, vol. 36, 2011, issue 6, p. 777.

137 F. Hay, who was living in a registered relationship with his same-sex partner, was denied some benefits that were provided to employees on the basis of a collective agreement, with the justification that these benefits are only due if a marriage is entered into. In this decision, the Court, basically overriding the *D. and Sweden v. the Council of Europe* case, declared that "The difference in treatment based on the employees' marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.", *Hay* judgment, Point 44.

partnerships and marriages *by itself*,[138] differently from the previous cases. This determined stance from the part of the Court definitely does signify something, according to Bell and Selanec.[139] Tryfonidou is of a similar opinion, as the Court's latest decisions, which already focus on individual rights, including the above-quoted ACCEPT and *X, Y and Z v. Minister voor Immigratie en Asiel* ("*XYZ*") cases,[140] also point towards the Court's changed policy.[141]

13.3.5 The Future Interpretation of the Concept of Spouse by the Court

Based on the above, we can see that the Court is not in an easy situation in answering the question whether the concept of spouse as defined in the Free Movement Directive should be interpreted as one that also extends to the marriage of same-sex couples, basically requiring the member states to ensure the settlement of such couples for family reunification purposes, including those states which otherwise do not allow homosexual couples to get married. This is understandable because the issue of same-sex marriages raises serious moral, legal and social philosophical questions,[142] which strongly divide public opinion and also, the member states themselves. The argument most frequently voiced by those who oppose the recognition of same-sex marriages is that recognizing these marriages in this way would gravely damage European social norms (*race to the bottom*).[143] Those who promote the issue of same-sex marriages, on the other hand, refer to some mutually agreed and stipulated human rights and those 'beyond' them,[144] which have been confirmed by the decision on the *Obergefell v. Hodges* case recently adopted by the Supreme Court of the USA.

Thus, as regards answering the question, there is*quite a number of legitimate interests in conflict with each other*, which have so far made both those applying the laws and the legislators cautious. This is best demonstrated by the fact that the Court, in its jurispru-

138 The situation was that in its request, the French court clearly pointed it out that those couples who live in a registered partnership with their same-sex partners are not comparable to married couples. As a response to this, the Court made it clear that those same-sex couples who live in registered partnerships are in fact in a similar position to those couples who enter into a marriage, with regard to the provision of the benefits in question, considering that at the time of the main proceeding, entering into a marriage was only allowed by the French regulations to opposite-sex couples, so they were not allowed to get married.

139 In their view, when the enforcement of the principle of equal treatment is jeopardized with regard to an EU act, the Court will not delay to defend them, not even in an area that traditionally belongs to the competence of the member states. C. Bell and N.B. Selanec,' 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. 5, pp. 661-662.

140 *X, Y, Z* joined cases, C-199/12–C-201/12, ECLI:EU:C:2013:720.

141 Tryfonidou (2015) op. cit., p. 221.

142 Király op. cit., p. 79.

143 On the extent to which reforms that are implemented in one member state increase the willingness to pass similar legislation in the other state, see in more detail Schanda and Bojnár op. cit.

144 So Kochenov and Belavusau quote the Right to Love in their article op. cit. (2016).

dence related to same-sex relationships, has always paid attention to the legislation of the EU and the level of legal development achieved there,[145] as a kind of response to those *concerns about democratic deficit* according to which a determined stance taken by the Court on the above issue would essentially deprive of the member state to make decisions in this important area. All this also holds true for the draft EU laws, in which regard the more conservative decisions of the Court are eagerly referred.[146]

In the following chapters, I am trying to explain those considerations which will presumably influence the Court in its decision-making on the basis of three topics, i.e. the fundamental right to free movement, the legal principle of equal treatment, as well as the enforcement of the EU requirement concerning the respect for family life as stipulated in Article 7 of the European Charter of Fundamental Rights.

13.3.5.1 The Exercise of the Right to Free Movement

There is basically agreement among the representatives of legal literature in that in lack of the recognition of a marriage entered into in one of the member states by the other member states, it is essentially the principle of the host member state that will prevail. The situation is that the refusal by the host member state to recognize a marriage that was validly entered into may also breach the right to free movement guaranteed by the provisions set out in Article 21 of the TFEU.[147] If one starts out from purely practical considerations, it is really hard to think that an EU citizen who entered into a lawful marriage in one of the member states would be ready to move to another member state to which he cannot be accompanied or later joined by his or her partner. Essentially, the situation is the same when the spouse may obtain a legimate right to reside in the territory of the member state on his or her own right, however, the marriage itself and the legal consequences thereof are not recognized by the member state in question. The problem is that this may result in serious legal disadvantages in many areas, including taxation, social benefits, property law, as well as inheritance law.[148] As we could see in the *NA* case, one of the key considerations underlying the residence rights provided to third country nationals is *to facilitate the exercise of free move-*

145 Thus, in the Court's judgment on the D and Sweden v. the Council of Europe, on the issue of treating a relationship as equivalent to a marriage, the decision was basically assigned to the legislator when it said that "Only the legislature can, where appropriate, adopt measures to alter that situation", point 38 of the judgment.

146 As a kind of vicious circle, the Commission proposed to the Council and the Parliament during the definition of the concept of "spouse" in the Free Movement Directive that they should restrict this concept exclusively to opposite-sex couples, by taking the Court's judgment on the *D v. Council of Europe* case into account. In some views, the reference to the above decision of the Court may act as a kind of justification for the legislator's conservativism, which may, however, lead to even more cautious judicial decisions in the future. H. Toner, Partnership Rights, Free Movement, and EU Law, Hart Publishing, 2004, p. 264.

147 Tryfonidou (2015), op. cit. p. 222-229, K. Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice, Fordham International Law Journal, 2011, Vol. 33, Issue 5, pp. 1355-1360, Bell and Selanec (footnote 143), p. 679.

148 Tryfonidou op. cit. (2015), p. 225.

ment rights conferred on EU citizens. Thus, the very fact that an EU citizen may not be certain of whether their spouse will be allowed to follow them to the country of destination, and if they are, whether they will in fact be regarded as a married couple, may in itself have a deterrent effect on exercising the right to free movement. With a view to supporting the above ideas, some commentators[149] draw parallels between the group of cases related to family status studied in this paper and some of the Court's case law *regarding the use of surnames* (*Garcia Avello, Grunkin Paul* decisions).[150]

The situation is that in these decisions, it was established by the European Court of Justice that the refusal by the host member state to register surnames according to the practice applied by the country of origin qualifies as a kind of measure aimed at preventing free movement, with regard to the fact that the discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels.[151] These representatives of legal literature think that the rejection of family status may cause even more significant inconveniences, which in this way undoubtedly has a deterrent effect on free movement, and it breaches the law exactly because of this.[152]

However, as it is commonly known, the measures restricting free movement do not always conflict with EU law, on condition that the member state in question can provide a legitimate reason by which these restrictions may be justified. In the scope of refusing to recognize marriages, the following *qualify as such legitimategoals: the protection of public morality*,[153] *the family, or traditional marriages* in the territory of the member state in question. If some of the commentators used the above parallelism, the *Sayn-Wittgenstein* and *Vardyn* decisions,[154] which are related to the use of names, are definitely to be mentioned at this point. In the former case, the Court accepted the reference of the member state to public policy and the principle of equality before the law as *a justification*, what is more, it stipulated that "Those specific circumstances which may justify *recourse to the concept of public policy*, may *vary from one country to another and from one period to another*. This is why "the competent national authorities must be allowed a margin of discretion within the limits imposed by the Treaty".[155] The same holds true for the *Var-*

149 G. Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships' in D. Gallo, L. Paladini, and P. Pustorino (eds), Same-Sex Couples before National, Supranational and International Jurisdictions, Springer, 2014, p. 376; Bell and Selanec op. cit., p. 674.

150 *Garcia Avello* judgment, C-148/02, ECLI:EU:C:2003:539; *Grunkin Paul* judgment, C-353/06, CLI:EU:C:2008:559.

151 What is more, they could not even be justified with regard to the immutability of surnames as one of the principles that establish social order and with reference to making public administration simpler (Garcia Avello judgment, Point 36 and 42, as well as *Grunkin Paul* judgment, Point 36).

152 G. Biagoni op. cit., pp. 376-377.

153 However, some authors point it out that public morality as grounds for exemption is not listed in the legal documents on the free movement of persons, unlike in the documents on the free movement of goods. See Kochenov and Belavusau op. cit. 2016, p. 15.

154 *Malgožata Runevic-Vardyn* judgment, C-391/09, ECLI:EU:C:2011:291, *Sayn-Wittgenstein* judgment, C-208/09 ECLI:EU:C:2010:806.

155 *Sayn-Wittgenstein* judgment, Points 87-88.

dyn case, where the member state restriction was accepted with reference to the protection of the national language, with special regard to Section (2), Article 4 of the Treaty on European Union, which says that "the Union shall respect the national identities of member states, inclusive of the protection of the official national language of the states."[156]

Similarly to the protection of the national language, Section (2), Article 4 of theTreaty on European Union has special significance for the member state protection of the institution of marriage as well, as it declares that "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional. (..)"[157] The situation is that the definition of the concept of marriage by the member state is undoubtedly the expression of the *national identity*. Some member states, as mentioned above, ensure *the institutional protection oftraditional marriages* in their national fundamental laws, for this very reason, stipulating it on the highest constitutional level that a marriage means a tie between a man and a woman in each and every case.[158] What is more, a high number of member states accepted the above constitutional amendments following the call of a national referendum, ensuring by this full legitimacy to adapting the constitutional legal system to the nationalreligious and cultural identity.[159]

The above is confirmed by Article 10 of the Charter too, pursuant to which EU citizens areentitled to express their religious views in a collective form, furthermore, by Article 3 of theTreaty on European Union and Article 167 of the Treaty on the Functioning of the European Union, which stipulate that the Union shall respect cultural diversity.[160] The protection of the concept of *cultural diversity* is also present in the jurisprudence of the European Court of Human Rights. In the justification of the *Vallianatos* case of the Strasbourg forum, the Court specifically acknowledged that "the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment",[161] while in the above-mentioned *Oliari* case, it

156 *Vardyn* judgment, Points 85-86.

157 Section (2), Article 4 of the Treaty on European Union.

158 Similarly to Hungary, Bulgaria and Poland are also in the ranks of such countries.

159 So, for example, Slovakia called a referendum in protection of the family.

160 Article 3, Treaty on European Union: "The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.", Article 167 of the Treaty on the Functioning of the European Union: "The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore."

161 *Vallianatos and others v. Greece*, Appl. No. 29381/09, 32684/09, Judgment of 7 November, 2013, Point 83. In the Vallianatos case, theEuropean Court of Human Rightsexamined the compatibility of the Greek regulation that excludes same-sex couples from registered partnerships with the Convention. In relation to this, the Court established that with regard to the claim for the legal recognition and protection of their relationship, the applicant same-sex couple is in a comparable situation with the opposite-sex couples and that the law constitute unequal treatment on grounds of sexual orientation. The Court found that the protection of families in the traditional sense of the word, as well as of children born out of wedlockcan be a strong and legitimate reason to apply a different treatment, however, in this specific case, it decided that

said that "the national authorities, who are best placed to assess and respond to the needs of society", so they have *wide discretionary powers* to enforce the interests of their communities.[162]

This means that pursuant to the EU law, the member states should be provided *a margin of discretion* when they wish to restrict the enforcement of one of the fundamental freedom, in this case, that of the right to free movement, with reference to *their national traditions*. For this, it is not even necessary for a restrictive measure issued by the authorities of one of the member states tocorrespond to a conception shared by all Member Stateswith regard to the protection of the interest in question, including the moral, religious or cultural considerations shared by all the member states.[163] However, it should be noted that pursuant to Article 27 of the above-discussed directive 2004/38/EC, *any measures taken on grounds of public policy* shall be based exclusively on the *personal conduct* of the individual concerned. What is more, during the consideration of competing interests, the test of *proportionality* shall always be taken into account, so in this specific case, what is to be reckoned with is that the member state measure restricting free movement should on the one hand be suitable for achieving the aim of public interest, i.e. in this case for protecting the traditional institution of marriage, and on the other hand, it should prove to be the least restrictive means to achieve this goal.

Finally, the question arises whether the possible mutual recognition of marriages in the scope of free movement carries the risk of '*marriage tourism*', similarly to the threat of social tourism. The situation is that it may easily happen that an EU national, leaving his or her home country, settles down in another member state, with a view to invoke the rights offered by free movement when he or she returns to his or her country of origin. In this respect, it should be pointed out that in its recent case law, the Court has been trying

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Greece had not supported the exclusion of same-sex couples from the effect of the regulation with a duly convincing, objective and reasonable justification.

162 *Oliari and others v. Italy*, Appl. No. 18766/ 11 and 36030/11, Judgment of 21 July, 2015, Point 191. In the *Oliari* case, three homosexual couples who have been living in a partnership for several years turned to the European Court of Human Rights, since no recognition whatsoever was given to their relationship by Italian law. The Italian state referred to the discretion that the member states are given, underlining that it is the member states that are in the best position for assessing the sentiments of their communities. This was not disputed by the European Court of Human Rights but it still judged, in the case in question, that the Italian state was not able to show off any such community interest which may compete with the momentous interests of those who lodged the applications. Thus, it declared that the lack of a formal state recognition, including the uncertain legal situation of homosexual couples in Italy violates the provisions set out in the Convention, more precisely, Article 8, which ensures respect for private and family life.

163 *Omega Spielhallen* judgment, C-36/02, ECLI:EU:C:2004:614, Point 37. According to the Court's jurisprudence, however, the concept of "public policy" should always be interpreted narrowly in the EU context, when an exceptionon a fundamental freedom has to be proven, in such a way that the content of this concept could not be one-sidedly defined by the member states, without control by the institutions of the Community.

to keep these endeavors at bay.[164] In its above-cited *O and B* decision,[165] the Court emphasized that it is exclusively *genuine residence* in the host member state that may generate EU rights for the family members. The Court also quantified this when it said that only a period of residence that exceeds three months may create such right of residence on return.What is more, even after residence that exceeds a period of three months, there will only be a presumption on the intention to settle in the host member state, which should be examined by the national court on an individual basis in each case.[166]

Consequently, with reference to the above practice followed by the Court, the risk of marriage tourism can be reduced if not fully eliminated, since those whose residence is not genuine in the territory of the state in question may not benefit from fee movement law.

13.3.5.2 Non-Discrimination on the Grounds of Sexual Orientation

In interpreting the provision of the Free Movement Directive regarding marriage, the Court shall not disregard the general princples of EU law, including the requirement of *equal treatment*, which is also mentioned in Article 21 of the Charter.[167] This is all the more important because the prohibition of discrimination on the grounds of sexual orientation is also included in the Free Movement Directive as a guideline in the application of the Directive. Preamble 31 of the Directive stipulates that "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 sexual orientation." In light of the above, it seems like the directive itself requires that its own provisions, including the definition of the concept of spouse, be interpreted without sexual discrimination. This is confirmed by the Luxembourg Court's above-cited case law of non-discrimination on the grounds of sexual orientation (*Maruko, Römer* and *Hay* cases), in which it was clearly declared that the advantages offered by Directive 2000/78/EC shall not be denied from homosexual couples purely based on sexual orientation. It is a question whether the above conclusions can be applied for the Free Movement Directive through an analogy. The question becomes whether a member state constitutes prohibited discrimination if it does not ensure the advantages arising from the EU law to homosexual married couples arriving from other member states, in this case, the right to family reunification, which it otherwise ensures to heterosexual married couples.Although in some views, including the opinion of Mark Bell, no doubts

164 This is clearly proven by the recently adopted decisions in the *Dano* and *Alimanovic* cases, with regard to the issue of social tourism. *Dano* judgment, C-333/13, ECLI:EU:C:2014:2358; *Alimanovic* judgment, C-67/14, ECLI:EU:C:2015:597.

165 *O & B* judgment, C-456/12, ECLI:EU:C:2014:135.

166 Ibid., Points 32-57.

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

whatsoever may emerge in this respect,[168] some others like Chloé Bell and Nica Bacic Selanec ask for caution, with regard to the different nature of the non-discrimination investigation in relation to the two directives.[169] While the comparison remained within the boundaries of national legislation in the *Maruko, Römer and Hay* cases, the examination of cross-border family reunification extends to the regulation of several member states rather than one. This means that it extends, on the one hand, to the regulation of the member state where the legally binding marriage was entered into, and on the other hand, to that of the host member state, where the homosexual couple wishes to exercise their rights stemming from the EU law. In this context, Mark Bell opines that as the recognition of a marriage entered into by a homosexual couple in another member state exerts no effect whatsoever on the member state competences regardingthe authorization of the marriages of same-sex couples, homosexual and heterosexual marriages are definitely comparable with regard to the merely EU law objectives. The only factor that makes them different is their sexual orientation. Different treatment on these grounds, however, is prohibited under the EU law, as is also stipulated by Article 21 of the Charter. What is more, after the *Hay* case, these comparability tests can now also be conducted by the Luxembourg Court. Of course, the justification opportunity also comes up here but the practice followed by the European Court of Human Rights will have governing effect in this case as well, according to which a different treatment on the grounds of sexual orientationcan only be justified by especially grave reasons.[170]

13.3.5.3 The Right to Respect for Private and Family Life

Finally, during the preliminary decision-making procedure, the Court will presumably discuss the question whether the limitation of the concept of marriage to heterosexual couples in the directive is in compliance with the provision of Article 7 of the European Charter of Fundamental Rights regarding *the respect for private and family life*. The situation is that it can easily happen that the refusal to grant family reunification rights as described above would not only violate Article 21 of the Charter but also, its Article 7, which declares the right to the respect for private and family life. With regard to the fact that the European Court of Justice does not yet have an established case law for the interpretation of the relationship rights of same-sex couples in light of Article 7 of the Charter, it is the jurisprudence of the Stasbourg Court aimed at respecting private and family life, in line with the

168 Mark Bell puts it very bluntly, i.e. that the interpretation of the concept of marriage in the directive by any institution, even the Court, which excludes same-sex spouses, qualifies as direct discrimination on grounds of sexual orientation, which violates the contents of Article 21 of the European Charter of Fundamental Rights. M. Bell, EU directive on free movement and same sex families: guidelines on the implementation process, ILGA Europe, October 2005, p. 5.

169 C. Bell and N. B. Selanec op. cit., p. 680.

170 *Dudgeon v. United Kingdom*, Appl. No. 7525/76, 22 October, 1981, Point 52; *Smith and Grady v. United Kingdom*, Appl. No. 33985/96 and 33986/96, Point 81.

provisions set out in Section (3), Article 52 of the Charter,[171] that can serve as a starting point for the investigation. As regards the relevant case law followed by the EuropeanCourt of Human Rightson this subject, first of all it is the *Schalk & Kopf* judgment adopted in 2010 that should be mentioned, which somewhat seems to shift from the earlier conservative approach. In this case, the Court already recognized homosexual couples as a family and it declared that"it would be artificial to uphold the position that, as opposed to heterosexual couples, the concept of 'family life' as defined in Article 8 of the Convention does not include same-sex relationships".[172] This was followed by the above-cited judgments of the European Court of Human Rightson the *Vallianatos and Oliari*cases and finally, itslatest *Pajic v. Croatia* decision,[173] which also has migration-related implications. In this case the Strasbourg forum decided that same-sex and opposite-sex couples are in a comparable situation, so the Croatian regulation that excludes the former group from family reunification in the territory of Croatia commits an act of discrimination with regard to the right to the respect of private and family life ensured by the Convention. Thus, the above-mentioned judgment may serve as a guide to Luxembourg court in cases on similar subjects. Although Article 7 EUCFR cannot, if interpreted in the same manner as Article 8 ECHR, be relied on to require a Member State to admit within its territory the (opposite-sex or same-sex) spouse of a Union citizen, when that provision is read together with Article 20 EUCFR (Everyone is equal before the law), it requires same-sex spouses to be admitted to the territory of the host State under the same conditions that are imposed on opposite-sex spouses.[174]

171 As long as the Charter contains rights which are in line with the ones ensured by the European Convention for the Protection of Human Rights and Fundamental Freedoms, then the content and extent of these rights should be deemed equivalent to those which are set out in this convention. This regulaiton does not prevent the EU law from providing more expanded protection. Section (3), Article 52 of the Charter.

172 See *Schalk and Kopf* judgment, Appl. No. 30141/04, 24 June, 2010, Point 94.

173 *Pajic v. Croatia* judgment, Appl. No. 68453/13, 23 February, 2016. In 2011, Pajic, a Bosnian-Herzegovinan nationalapplied to the Croatian authorities for residence, in order to be able to settle down in the town of Sisak with his Croatian partner. This application was refused by the Croatian authorities with the justification that at the time of the occurrence of the case, the Croatian Aliens Actcontained no provisions whatsoever on the entry of same-sex couples to the country for family reunification purposes. After two years of litigation, he finally turned to the Strasbourg court, saying that the stable partnership in which he lives qualifies as a protected family under Article 8 of the European Convention of Human Rights and as such, the exclusion of his same-sex relationship from the right to settle with the purpose of family reunification, which opposite-sex couples are entitled to, is a case of direct discrimination pursuant to Article 14 of the European Convention of Human Rights. The assertion of the Croatian government, according to which the participating states have a wide margin of appreciation concerning the concepts of family and private life and immigration policy was rejected by the Court. In its decision, the Court referred to its established case law, according to which, pursuant to Article 8 of the European Convention of Human Rights, the concept of family life does not only extend to married couples but also, to same-sex couples in a stable partnership. Ultimately, it was concluded by the Strasbourg forum that same-sex and opposite-sex couples are comparable, so the Croatian regulation that excludes the former group of citizens from family reunification in the territory of Croatia, realizes an act of discrimination with regard to the right to respect for private and family life ensured by the Convention.

174 Tryfonidou, Alina: <http://eulawanalysis.blogspot.hu/2017/03/awaiting-ecj-judgment-in-coman-towards.html>.

13.3.6 Qualifying a Same-Sex Spouse as "Another Family Member" or "a Partner"

The second part of the question on preliminary decision-making submitted in relation to the*Coman*case is essentially aimed at finding out whether, in case the Court gives a negative answer to the first question, the same-sex spouse of the migrant EU national may be qualified as "another family member"as per the definition provided in Point (a), Section (2), Article 3 of the directive, or pursuant to Point (b), Section (2) of Article 3 of the directive, as "a partner of the EU national with whom the former maintains a durable, duly attested relationship". In principle, the reference to Section (2), Article 3 of the directive is a valid solution for same-sex couples, as it says that "the host Member State shall, in accordance with its national legislation, facilitateentry and residence for the following persons". However, this would involve the 'downgrading' of marriages entered into in the state of origin and at the same time, disregarding the norms of the country of origin, which is strongly criticized by some commentators,[175] and in addition to these, it should be pointed out that pursuant to the above-mentioned article, facilitating entry by the member state *isnot an automatic right*, as opposed to the rights provided to married couples based on the provisions set out in Section (2), Article 2 of the directive. This is supported by the Court's judgment on the *Rahman* case, which topic was not brought up in the context of registered partnerships but in that of blood relatives however it was also targeted at the interpretation of the provision under review, i.e. that of Article 3(2) ensuring the entry and residence rights of members of the more extended family. Here, the referring forum basically expected an answer to the question what the *facilitation obligation* for the group of beneficiaries of other family members specified in Section (2), Article 3 of directive 2004/38 means with regard to entry and residence. In its judgment, the Court repeatedly stipulated that "the member states are not obliged to accord a right of entry and residence to persons who are family members, in the broad sense, dependent on a Union citizen" [..], however, they should provide certain advantages to the persons who depend on the EU national in some way, over the other nationals of third countries.[176] In order to be able to meet this obligation, the member states should ensure that the decision on the application should be based on an extensive examination of the personal circumstances of such persons, and it should contain a justification in the case of rejection.[177] However, the Court emphasized all through that the turn of phrase "in accordance with its national legislation" mentioned in Section (2), Article 3 ensures *wide discretionary powers* for the member states regarding the facilitation of entry. The only constraint in this respect is that this provision may not be deprived *of its effectiveness*. This means that the Court's *potential future expanded interpretation*of the family reuni-

175 Ibid. 201, K. Waaldijk, 'Free Movement of Same-Sex Partners', 1996, Vol. 3, *MJ*, pp. 271, 280.
176 C-83/11 *Rahman and others* judgment, ECLI:EU:C:2012:519, Point 21.
177 See ibid., Point 22. In its judgment, the Court mentions a few circumstances such as the extent of financial or physical dependence, or the level of kinship.

fication rights of other family membersand registered partners is not at all reflected in this decision.[178] In this case, the only safeguard can again be provided by the application of *the principle of proportionality*. Furthermore, the fact that the couple in question has already entered into a binding marriage in another member state may serve as a kind of protection, i.e. based on "their personal circumstances", it can be justifiably assumed that they live in a stable relationship.

What is more, the scope of the rights provided on the basis of Point (b), Section (2), Article 3 may also be problematic. With regard to the fact that the Court has not yet adopted a relevant judgment on this subject, it is a question whether the member state should only be obliged to facilitate the entry and residence of same-sex spouses in the member state in question, or whether on this basis, the latter would become entitled to receive all the advantages ensured by the directive, including the permanent residence status and the rights attached to this status. However, it may easily happen that the scope of these rights will also be the subject of *member state discretion*, which will give them a wide space of maneuver.

13.3.7 The Prospective Judgment and Its Significance

Although some issues related to the recognition of same-sex relationships had already been put on the agenda of the Court not long after the turn of the millennium, they have so far remained strictly within the competence of the member states. The *Coman* case is the first one to focus on *thefamily reunification right* of an EU national, thus reaching beyond the borders of the member states. However, the *cross-border* nature of the case may curb the decision-making authority of the member states, which otherwise have exclusive competence on family law issues, considering that the member states shall also *comply with EU law* even if they act in their own competence.

It is exactly because of the above that it is possible that in the *Coman* case, the Court will decide that the member states, including those which do not allow same-sex marriages in their territories, will be obliged to recognize the marriages lawfully entered into in the territory of another member state, with a view to the enforcement of the provisions set out in the Free Movement Directive, irrespective of whether the couples are heterosexual or homosexual.[179]

Even if this happens so, the Court will presumably highlight in its decision that *the principle of mutual recognition is not an absolute rule*, exactly with regard to the *sensitive nature* of the issue and the member states that oppose same-sex marriages *with a view to*

178 Some authors think that this would be a kind of forced solution, through which same-sex couples would subject themselves to the discretion of the member states. See C. Bell and N.B. Selanec op. cit., p. 684.

179 It cannot be stressed often enough that the recognition of marriages cannot oblige the member states in any way whatsoever to redefine the concept of marriage on the national level.

protecting traditional European values. As we know, Article 21 of the Treaty on the Functioning of the European Union, which provides for the right to free movement, as well as Section (2), Article 27 of the directive in question specifically allow this derogationfrom a fundamental freedom, as long as this restriction *is legitimately justified with reference to public interests*, including, as the case may be, *the protection of family and marriage*, and it passes the test of *proportionality*. Ultimately, it is the test of proportionality that may answer, in specific cases, whether the rejection of same-sex marriages under the concept of marriage used in the directive for the above reason may prove to be a suitable and not over-restrictive meansto achieve the goals of public interest set by the member state in question.

As we have seen, the Court has been highly cautious on the issue of same-sex marriages to date, which has only been replaced by a more dynamic approach just recently (*W. v. the European Commission, Hay* cases).The *Coman* case now allows the Court to take a further step on the above-mentioned path through its decision in which it extends the concept of a spouse specified in the directive to same-sex couples, by this eliminating the legal uncertainty that has existed in this area and avoiding the duplication of family statuses.[180]

13.4 Conclusion

The *NA* and *Coman* cases have clearly shown that the provisions set out in the Free Movement Directive do not provide protection in every case for the migrant EU citizens and their third country spouses. The situation is that quite a number of questions were left open by the EU legislator in the wording of the directive, thus offering the member states an opportunity to exclude certain third country relatives from some rights ensured by the directive, with reference *to their competences in immigration policy* and *family law*.

The placement of the goal of the directive, i.e. the effective exercising of the right to free movement into the focus of the *Coman* case, may however, serve as a clear guidance for the interpretation of the provisions in question by the Court. Thus, in the course of decision-making, the Luxembourg forum will definitely take it into account that the restriction of the concept of a spouse exclusively to heterosexual married couples may exert a deterrent effect on the same-sex couples' exercise of the rights to free movement.The EU requirement of the mutual recognition of same-sex marriages is also supported by both the prohibition of discriminationon the grounds of sexual orientation specified in Article 21 of the Charter, and the provision regarding respect for private and family life set out in Article 7 of the same, also with regard to the latest decision adopted by the Strasbourg Court on the *Pajic v. Croatia* case. At the same time, during the examination

180 I.e. that there are marriages recognized only on the national level, or ones recognized on both the national and the European levels.

of the above issue, the Courtwill have to take into account, all through, that the restrictive act by the member states *with reference to public interests*, thus primarily *to the protection of family and marriage*, may *be legitimately justified*, as long as this is in line with the requirement of *proportionality*.

In light of ensuring the effective exercise of rights for EU nationals as a fundamental consideration with regard to the *NA* case, the position supported by the Court that in the case of the departure of an EU national from the member state, the third country national spouse does not need the protection of the host member state any more, may seem to be justifiable at first, thus the right of residence may automatically be ceased. However, this approach has many deficiencies. For example, it disregards the other major consideration underlying the residence rights of third country nationals, which is the requirement of the protection of personal rights in the case of spouses who became victims of domestic violence.

The situation is that the issue of domestic violence should be taken seriously, especially in the case of an international organization that is committed to the idea of the rule of law and fundamental rights, i.e. the European Union. Thus, the decision adopted by the Court is questionable from a legal aspect, and even more so from a moral one, especially in light of the Rendon Marin judgment that followed the *NA* case, where the high-level protection provided by the Zambrano doctrine was extended by the European Court of Justice to a third country national with a criminal record. This high-level protection however could not be applied in the *NA* case exactly because of the cross-border nature of it i.e. the possibility to invoke the secondary law of the right to free movement in the case in question.

At the same time, it is the very cross-border nature of the exercise of the right to free movement and the EU citizenship that may justify a more flexible approach, in accordance with which the departure of the EU national from the host member state, i.e. the temporary separation of the family does not necessarily have to result in the lapsing of the residence rights of the third country national spouse.

Of course, the question becomes where the boundaries of the broad interpretation of the Court lie. Where is the point from which the expanded interpretation of the European Court of Justice may easily turn into the member states' resistance against the institution of free movement?

The Court had a difficult choice in the *NA* case. Of course, the situation is not at all easier for the Court's decision-making in the *Coman* case either. However strong the arguments voiced by the Eurpoean Union for the mutual recognition of homosexual marriages may be, the legitimate considerations declared by the member states have at least the same weight, with special regard to the requirement stipulated by Section 4 (2) of the Treaty on European Union, pursuant to which "the Union shall respect the national identities of its Member States". The situation is that defining the concept of marriage by the member state is without any doubt the expression of *national identity*.

It is concerning that whatever decision is adopted in the *Coman* case, the judgment to be passed by the Court will come to the cross-fire of major criticism. Perhaps exactly because of this, it would be desirable that in such a sensitive issue, the final word should be uttered by the EU's legislature rather than the Court.