

Text of presentation by Alina Tryfonidou, Professor of Law, University of Reading (UK) at the Workshop on LGBTI+ Rights in the EU, organised by the Policy Department for Citizens' Rights and Constitutional Affairs for the Committee of Petitions (22 March 2021)

The focus of my presentation will be on the position of same-sex unregistered partners and on the children of same-sex couples in situations where there is an exercise of EU free movement rights.

SAME-SEX UNREGISTERED PARTNERS

Starting with same-sex unregistered couples, currently, when a Union citizen moves from one EU Member State to another, it is not certain that she or he will be able to be joined there by his or her same-sex unregistered partner, as there are still a handful of EU Member States that do not recognise same-sex unregistered partners as a couple for establishing family reunification rights.

Also, once the couple is within the territory of the host EU Member State, the partners may not be able to claim rights granted to unregistered opposite-sex couples (e.g. hospital visitation rights, survivor's pensions, tenancy succession), due to the fact that the national law does not recognise them as a couple because they are members of the same sex.

But the question is: is this compliant with EU law? What are the requirements currently imposed by EU law?

As regards family reunification rights, Directive 2004/38 requires Member States to 'facilitate' the entry of the unregistered partner of a Union citizen who comes from another Member State into their territory and in *Reed* in 1986, the European Court of Justice held that the host Member State must allow the unregistered partner of a Union citizen to join him in the host Member State, if the latter provides such a right to the unregistered partner of its own nationals. **HOWEVER**, at the moment, it is unclear if the word 'partner' for the above purposes includes both same-sex and opposite-sex partners: it certainly can – and should – include same-sex partners but this has nowhere been explicitly noted.

Therefore, there is a need for a clarification to be provided by the European Commission and – if given the opportunity to do so – by the Court of Justice that the term 'partner' in the above contexts includes both same-sex and opposite-sex partners. Also, the Commission and – if the opportunity arises – the Court of Justice must clarify that for the purposes of 'facilitating' the entry of the unregistered partner of the Union citizen in the host Member State, the examination of the personal circumstances of the couple must be free from discrimination on the ground of sexual orientation.

With regard to the rights that the couple may wish to claim in the host Member State after they have been admitted into its territory, the situation is, again, unclear, as there is no piece of EU legislation which lays down the benefits and entitlements that unregistered partners must be granted once they have been admitted into the host Member State. Hence, the Study proposes that existing EU and national legislation which governs the grant of benefits and

entitlements must be interpreted in a way which is inclusive of same-sex unregistered partners. Hence, it must be clarified that Directive 2000/78 prohibits any discrimination against same-sex unregistered partners (on the basis of their sexual orientation) with regard to employment-related matters. In addition, the Commission and/or the Court of Justice must clarify that the host EU Member State should *at least* comply with the obligations imposed by the European Convention on Human Rights when determining which benefits/entitlements it should grant to unregistered same-sex couples who have moved to its territory from another EU Member State.

So, for same-sex unregistered couples, there is no need to promulgate new legislation but, rather, it will be enough if the EU institutions **explicitly** state that Member States must read existing legislation and principles established through case-law in an inclusive manner.

CHILDREN OF SAME-SEX COUPLES

As regards the children of same-sex couples, our starting point should be that the parental rights that same-sex couples enjoy under national law vary considerably throughout the EU, and, recently, there are backward steps in some Member States such as Poland, where there is currently a legislative proposal which aims to ban LGBT+ persons from adopting children even as single persons. It is unsurprising, therefore, that when rainbow families move to a large number of EU Member States, they will encounter significant obstacles which are caused by the lack of legal recognition of the parental ties between the child and (usually) one of the parents, despite the fact that these ties have been legally established in another country.

The question is: is this compliant with EU law? What are the requirements currently imposed by EU law?

Children with parents who are of different sexes can clearly qualify as the children of their parents for the purposes of EU free movement law. Thus the decision of the family to move to another Member State will not give rise to a separation of the members of the family and they will be entitled to claim all rights reserved for families, once they are admitted into the territory of the host Member State.

Conversely, the position of the members of rainbow families under EU free movement law is **unclear**. It is unclear whether the term 'family', for the purposes of EU free movement law, includes rainbow families and whether the various terms used in Directive 2004/38 and case-law of the European Court of Justice and which refer to parents and their children, include the members of rainbow families. This lack of clarity has caused some Member States which do not make provision for rainbow families within their own legal system, to believe that they are free to refuse to recognise the familial links among the members of such families when they move to their territory in exercise of EU free movement rights.

The Study, therefore, suggests that the EU institutions should provide a clarification that the terms used in Directive 2004/38 and in the case-law of the Court of Justice when referring to children and their parents, are inclusive of rainbow families: in this way, rainbow families will enjoy the same family reunification rights under EU law with families founded by opposite-sex couples. Moreover, in line with its LGBTIQ Equality Strategy 2020-2025, the Commission

should make a proposal for a Directive which will harmonise cross-border recognition of birth certificates. Finally, the Commission should issue a Communication clarifying that all EU Member States must ensure the continuity – in law – of the familial ties of the members of rainbow families that move to their territory from another EU Member State, at least in all the circumstances that this is required under the European Convention on Human Rights. Hopefully, some clarification will be provided soon by the Court of Justice in its judgment (to be delivered later this year) in Case Number 490/20 which involves the question of whether Bulgaria is obliged by EU law to recognise a Spanish birth certificate listing two women as the parents of a child born in Spain.
