Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

5 June 2018 (*)

(Reference for a preliminary ruling — Citizenship of the Union — Article 21 TFEU — Right of Union citizens to move and reside freely in the territory of the Member States — Directive 2004/38/EC — Article 3 — Beneficiaries — Family members of the Union citizen — Article 2(2)(a) — Definition of 'spouse' — Marriage between persons of the same sex — Article 7 — Right of residence for more than three months — Fundamental rights)

In Case C-673/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Curtea Constituţională (Constitutional Court, Romania), made by decision of 29 November 2016, received at the Court on 30 December 2016, in the proceedings

Relu Adrian Coman,

Robert Clabourn Hamilton,

Asociaţia Accept

v

Inspectoratul General pentru Imigrări,

Ministerul Afacerilor Interne,

intervener:

Consiliul Naţional pentru Combaterea Discriminării,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, M. Ilešič (Rapporteur), J.L. da Cruz Vilaça, A. Rosas, C.G. Fernlund and C. Vajda, Presidents of Chambers, E. Juhász, A. Arabadjiev, M. Safjan, D. Šváby, M. Berger, E. Jarašiūnas and E. Regan, Judges,

Advocate General: M. Wathelet,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 21 November 2017,

after considering the observations submitted on behalf of:

– Mr Coman and Mr Hamilton, by R. Iordache and R. Wintemute, consilieri, and R.-I. Ionescu,

avocată,

– Asociaţia Accept, by R. Iordache and R. Wintemute, consilieri, R.-I. Ionescu, avocat, and J.F. MacLennan, Solicitor,

– the Romanian Government, initially by R.-H. Radu, C.M. Florescu, E. Gane and R. Mangu, and subsequently by C.-R. Canţăr, C.M. Florescu, E. Gane and R. Mangu, acting as Agents,

– the Consiliul Naţional pentru Combaterea Discriminării, by C.F. Asztalos, M. Roşu and C. Vlad, acting as Agents,

– the Latvian Government, by I. Kucina and V. Soņeca, acting as Agents,

– the Hungarian Government, by M.Z. Fehér, G. Koós and M.M. Tátrai, acting as Agents,

– the Netherlands Government, by M.A.M. de Ree and M.K. Bulterman, acting as Agents,

– the Polish Government, by B. Majczyna, M. Kamejsza-Kozłowska and M. Szwarc, acting as Agents,

– the European Commission, by L. Nicolae, E. Montaguti and I.V. Rogalski, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2018,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 2(2)(a), Article 3(1) and (2)(a) and (b) and Article 7(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77; corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

2 The request has been made in proceedings between Mr Relu Adrian Coman, Mr. Robert Clabourn Hamilton and the Asociaţia Accept (together, ‘Coman and Others’), on the one hand, and the Inspectoratul General pentru Imigrări (General Inspectorate for Immigration, Romania, ‘the Inspectorate’) and the Ministerul Afacerilor Interne (Ministry of the Interior, Romania) on the other, in connection with a request concerning the conditions under which Mr Hamilton may be granted the right to reside in Romania for more than three months.

Legal context

European Union law

3 Recital 31 of Directive 2004/38 states as follows:

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

4 Article 2 of that directive, entitled ‘Definitions’, provides, in paragraph 2(a) and (b):

‘For the purpose of this Directive:

…

(2) “family member” means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host Member State;

…’

5 Article 3 of Directive 2004/38, entitled ‘Beneficiaries’, provides as follows:

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

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

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

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

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

6 Article 7 of that directive, entitled ‘Right of residence for more than three months’, is worded as follows:

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

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

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

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

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

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

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

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

(a) he/she is temporarily unable to work as the result of an illness or accident;

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

(d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.

4. By way of derogation from paragraphs 1(d) and 2 above, only the spouse, the registered partner provided for in Article 2(2)(b) and dependent children shall have the right of residence as family members of a Union citizen meeting the conditions under 1(c) above. Article 3(2) shall apply to his/her dependent direct relatives in the ascending lines and those of his/her spouse or registered partner.'

Romanian Law

7 Articles 259(1) and (2) of the Codul Civil (Civil Code) states as follows:

'1. Marriage is the union freely consented to of a man and a woman, entered into in accordance with the conditions laid down by law.

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

8 Article 227(1), (2) and (4) of the Civil Code is worded as follows:

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

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

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

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Mr Coman, who holds Romanian and American citizenship, and Mr Hamilton, an American citizen, met in New York (United States) in June 2002 and lived there together from May 2005 to May 2009. Mr Coman then took up residence in Brussels (Belgium) in order to work at the European Parliament as a parliamentary assistant, while Mr Hamilton continued to live in New York. They were married in Brussels on 5 November 2010.

10 In March 2012, Mr Coman ceased to work at the Parliament but continued to live in Brussels, where he received unemployment benefit until January 2013.

11 In December 2012, Mr Coman and Mr Hamilton contacted the Inspectorate to request information on the procedure and conditions under which Mr Hamilton, a non-EU national, in his capacity as member of Mr Coman's family, could obtain the right to reside lawfully in Romania for more than three months.

12 On 11 January 2013, in reply to that request, the Inspectorate informed Mr Coman and Mr Hamilton that the latter only had a right of residence for three months because, under the Civil Code, marriage between people of the same sex is not recognised, and that an extension of Mr Hamilton's right of temporary residence in Romania could not be granted on grounds of family reunion.

13 On 28 October 2013, Coman and Others brought an action against the decision of the Inspectorate before the Judecătoria Sectorului 5 București (Court of First Instance, District 5, Bucharest, Romania) seeking a declaration of discrimination on the ground of sexual orientation as regards the exercise of the right of freedom of movement in the European Union, and requesting that the Inspectorate be ordered to end the discrimination and to pay compensation for the non-material damage suffered.

14 In that dispute, they argued that Article 277(2) and (4) of the Civil Code is unconstitutional. Coman and Others maintain that failure to recognise, in connection with the exercise of the right of residence, marriages between persons of the same sex entered into abroad constitutes infringement of the provisions of the Romanian Constitution that protect the right to personal life, family life and private life and the provisions relating to the principle of equality.

15 By order of 18 December 2015, the Judecătoria Sectorului 5 București (Court of First Instance, District 5, Bucharest) referred the matter to the Curtea Constituţională (Constitutional Court, Romania) for a ruling on that plea of unconstitutionality.

16 The Curtea Constituţională (Constitutional Court) states that the present case relates to recognition of a marriage lawfully entered into abroad between a Union citizen and his spouse of the same sex, a third-

country national, in the light of the right to family life and the right to freedom of movement, viewed from the perspective of the prohibition of discrimination on grounds of sexual orientation. In that context, that court had doubts as to the interpretation to be given to several terms employed in the relevant provisions of Directive 2004/38, read in the light of the Charter of Fundamental Rights ('the Charter') and of the recent case-law of this Court and of the European Court of Human Rights.

17 In those circumstances, the Curtea Constituțională (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

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

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

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

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

Consideration of the questions referred

Preliminary observations

18 It is the Court's established case-law that the purpose of Directive 2004/38 is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States, which is conferred directly on citizens of the Union by Article 21(1) TFEU, and that one of the objectives of that directive is to strengthen that right (judgments of 12 March 2014, *O and B*, C-456/12, EU:C:2014:135, paragraph 35; of 18 December 2014, *McCarthy and Others*, C-202/13, EU:C:2014:2450, paragraph 31, and of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 31).

19 Article 3(1) of Directive 2004/38 provides that the directive is to apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members, as defined in point 2 of Article 2 of the directive, who accompany or join them.

20 In that regard, as the Court has held on a number of occasions, it follows from a literal, contextual and teleological interpretation of Directive 2004/38 that the directive governs only the conditions determining whether a Union citizen can enter and reside in Member States other than that of which he is a national and does not confer a derived right of residence on third-country nationals who are family members of a Union citizen in the Member State of which that citizen is a national (see, to that effect, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 37; of 10 May 2017, *Chavez-Vilchez and Oth*ers, C-133/15, EU:C:2017:354, paragraph 53; and of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 33).

21 In the present case, as indicated in paragraphs 9 to 11 above, Mr Coman, a Romanian and American citizen, and Mr Hamilton, an American citizen, contacted the Inspectorate to request information on the procedure and conditions under which Mr Hamilton, in his capacity as member of Mr Coman's family, could obtain a derived right of residence in Romania, the Member State of which Mr Coman is a national. It follows that Directive 2004/38, which the national court has asked the Court of Justice to interpret, cannot confer a derived right of residence on Mr Hamilton.

22 Nonetheless, as the Court has repeatedly held, even if, formally, the referring court has limited its questions to the interpretation of the provisions of Directive 2004/38, that does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has specifically referred to them in the wording of its questions (see, to that effect, judgments of 10 May 2017, *Chavez-Vilchez and Oth*ers, C-133/15, EU:C:2017:354, paragraph 48; and of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 28 and the case-law cited).

23 In that regard, the Court has previously acknowledged, in certain cases, thatthird-country nationals, family members of a Union citizen, who were not eligible, on the basis of Directive 2004/38, for a derived right of residence in the Member State of which that citizen is a national, could, nevertheless, be accorded such a right on the basis of Article 21(1) TFEU (judgment of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 46).

24 In particular, the Court has held that, where, during the genuine residence of a Union citizen in a Member State other than that of which he is a national, pursuant to and in conformity with the conditions set out in Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that that citizen's family life in that Member State may continue when he returns to the Member State of which he is a national, through the grant of a derived right of residence to the third-country national family member concerned. If no such derived right of residence were granted, that Union citizen could be discouraged from leaving the Member State of which he is a national in order to exercise his right of residence under Article 21(1) TFEU in another Member State because he is uncertain whether he will be able to continue in his Member State of origin a family life which has been created or strengthened in the host Member State (see, to that effect, judgment of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 54 and the case-law cited).

25 As regards the conditions under which such a derived right of residence may be granted, the Court has stated that they must not be stricter than those laid down by Directive 2004/38 for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen having exercised his right of freedom of movement by settling in a Member State other than that of which he is a national. That directive must be applied, by analogy, to the situation referred to in paragraph 24 above (see, to that effect, judgments of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraphs 50

and 61; of 10 May 2017, *Chavez-Vilchez and Oth*ers, C-133/15, EU:C:2017:354, paragraphs 54 and 55; and of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 61).

26 In the present case, the questions referred by the national court are based on the premiss that, during the period of his genuine residence in Belgium pursuant to Article 7(1) of Directive 2004/38, Mr Coman created and strengthened a family life with Mr Hamilton.

27 The questions asked by the national court must be answered in the light of the foregoing considerations.

The first question

28 By its first question, the referring court seeks to ascertain, in essence, whether, in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38, in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.

29 It should be recalled that, as a Romanian national, Mr Coman enjoys the status of a Union citizen under Article 20(1) TFEU.

30 In that regard, the Court has held on numerous occasions that citizenship of the Union is intended to be the fundamental status of nationals of the Member States (judgments of 20 September 2001, *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraph 41; and of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paragraph 29).

31 As is apparent from the Court's case-law, a national of a Member State who, as in the main proceedings, has exercised, in his capacity as a Union citizen, his freedom to move and reside within a Member State other than his Member State of origin, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) TFEU, including, where appropriate, against his Member State of origin (see, to that effect, judgments of *Morgan and Bucher*, C-11/06 and C-12/06, EU:C:2007:626, paragraph 22; of 18 July 2013, *Prinz and Seeberger*, C-523/11 and C-585/11, EU:C:2013:524, paragraph 23, and of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 51).

32 The rights which nationals of Member States enjoy under that provision include the right to lead a normal family life, together with their family members, both in the host Member State and in the Member State of which they are nationals when they return to that Member State (see, to that effect, judgments of 7 July 1992, *Singh*, C-370/90, EU:C:1992:296, paragraphs 21 and 23, and of 14 November 2017, *Lounes*, C-165/16, EU:C:2017:862, paragraph 52 and the case-law cited).

33 As to whether the 'family members' referred to in the paragraph above include the third-country national of the same sex as the Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state, it should be recalled at the outset that Directive 2004/38, applicable, as indicated in paragraph 25 above, by analogy in circumstances such as those of the main proceedings, specifically mentions the 'spouse' as 'family member' in Article 2(2)(a) of the directive.

34 The term ‘spouse’ used in that provision refers to a person joined to another person by the bonds of marriage (see, to that effect, judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, paragraphs 98 and 99).

35 As to whether that term includes a third-country national of the same sex as the Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state, it should be pointed out, first of all, that the term ‘spouse’ within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned.

36 Next, it should be noted that, whereas, for the purpose of determining whether a partner with whom a Union citizen has contracted a registered partnership on the basis of the legislation of a Member State enjoys the status of ‘family member’, Article 2(2)(b) of Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside, Article 2(2)(a) of that directive, applicable by analogy in the present case, does not contain any such reference with regard to the concept of ‘spouse’ within the meaning of the directive. It follows that a Member State cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state.

37 Admittedly, a person’s status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States and EU law does not detract from that competence (see, to that effect, judgments of 2 October 2003, *Garcia Avello*, C-148/02, EU:C:2003:539, paragraph 25; of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, paragraph 59, and of 14 October 2008, *Grunkin and Paul*, C-353/06, EU:C:2008:559, paragraph 16). The Member States are thus free to decide whether or not to allow marriage for persons of the same sex (judgment of 24 November 2016, *Parris*, C-443/15, EU:C:2016:897, paragraph 59).

38 Nevertheless, it is well established case-law that, in exercising that competence, Member States must comply with EU law, in particular the Treaty provisions on the freedom conferred on all Union citizens to move and reside in the territory of the Member States (see, to that effect, judgments of 2 October 2003, *Garcia Avello*, C-148/02, EU:C:2003:539, paragraph 25; of 14 October 2008, *Grunkin and Paul*, C-353/06, EU:C:2008:559; paragraph 16, and of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paragraph 32).

39 To allow Member States the freedom to grant or refuse entry into and residence in their territory by a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that state, according to whether or not national law allows marriage by persons of the same sex, would have the effect that the freedom of movement of Union citizens who have already made use of that freedom would vary from one Member State to another, depending on whether such provisions of national law exist (see, by analogy, judgment of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 67). Such a situation would be at odds with the Court’s case-law, cited by the Advocate General in point 73 of his Opinion, to the effect that, in the light of its context and objectives, the provisions of Directive 2004/38, applicable by analogy to the present case, may not be interpreted restrictively and, at all events, must not be deprived of their effectiveness (judgments of 25 July 2008, *Metock and Others*, C-127/08, EU:C:2008:449, paragraph 84, and of 18 December 2014, *McCarthy and Oth*ers, C-202/13, EU:C:2014:2450, paragraph 32).

40 It follows that the refusal by the authorities of a Member State to recognise, for the sole purpose of

granting a derived right of residence to a third-country national, the marriage of that national to a Union citizen of the same sex, concluded, during the period of their genuine residence in another Member State, in accordance with the law of that State, may interfere with the exercise of the right conferred on that citizen by Article 21(1) TFEU to move and reside freely in the territory of the Member States. Indeed, the effect of such a refusal is that such a Union citizen may be denied the possibility of returning to the Member State of which he is a national together with his spouse.

41 That said, it is established case-law that a restriction on the right to freedom of movement for persons, which, as in the main proceedings, is independent of the nationality of the persons concerned, may be justified if it is based on objective public-interest considerations and if it is proportionate to a legitimate objective pursued by national law (see, to that effect, judgments of 14 October 2008, *Grunkin and Paul*, C-353/06, EU:C:2008:559, paragraph 29; of 26 February 2015, *Martens*, C-359/13, EU:C:2015:118, paragraph 34, and of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paragraph 48). It is also apparent from the Court's case-law that a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective (judgment of 26 February 2015, *Martens*, C-359/13, EU:C:2015:118, paragraph 34 and the case-law cited).

42 As regards public-interest considerations, a number of Governments that have submitted observations to the Court have referred in that regard to the fundamental nature of the institution of marriage and the intention of a number of Member States to maintain a conception of that institution as a union between a man and a woman, which is protected in some Member States by laws having constitutional status. The Latvian Government stated at the hearing that, even on the assumption that a refusal, in circumstances such as those of the main proceedings, to recognise marriages between persons of the same sex concluded in another Member State constitutes a restriction of Article 21 TFEU, such a restriction is justified on grounds of public policy and national identity, as referred to in Article 4(2) TEU.

43 In that regard, it must be noted that the European Union is required, under Article 4(2) TEU, to respect the national identity of the Member States, inherent in their fundamental structures, both political and constitutional (see also, to that effect, judgment of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paragraph 73 and the case-law cited).

44 Moreover, the Court has repeatedly held that the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions. It follows that public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (see, to that effect, judgment of 2 June 2016, *Bogendorff von Wolffersdorff*, C-438/14, EU:C:2016:401, paragraph 67, and of 13 July 2017, *E*, C-193/16, EU:C:2017:542, paragraph 18 and the case-law cited).

45 The Court finds, in that regard, that the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State, which is defined by national law and, as indicated in paragraph 37 above, falls within the competence of the Member States. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.

46 Accordingly, an obligation to recognise such marriages for the sole purpose of granting a derived right of residence to a third-country national does not undermine the national identity or pose a threat to the public policy of the Member State concerned.

47 It should be added that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected (see, by analogy, judgment of 13 September 2016, *Rendón Marín*, C-165/14, EU:C:2016:675, paragraph 66).

48 As regards the term 'spouse' in Article 2(2)(a) of Directive 2004/38, the right to respect for private and family life guaranteed by the Charter is a fundamental right.

49 In that regard, as is apparent from the Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), in accordance with Article 52(3) of the Charter, the rights guaranteed by Article 7 thereof have the same meaning and the same scope as those guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

50 It is apparent from the case-law of the European Court of Human Rights that the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple in the same situation (ECtHR, 7 November 2013, *Vallianatos and Othersv.Greece*, CE:ECHR:2013:1107JUD002938109, § 73, and ECtHR, 14 December 2017, *Orlandi and Othersv*. *Italy*, CE:ECHR:2017:1214JUD002643112, § 143).

51 In the light of all the foregoing considerations, the answer to the first question is that, in a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38, in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.

The second question

52 By its second question, the referring court seeks to ascertain, in essence, whether, in the event that the first question is answered in the affirmative, Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months.

53 As indicated in paragraphs 23 and 24 above, where, during the genuine residence of a Union citizen in a Member State other than that of which he is a national, pursuant to and in conformity with the conditions set out in Directive 2004/38, family life is created or strengthened in that Member State, the effectiveness of the rights conferred on the Union citizen by Article 21(1) TFEU requires that that citizen's family life in that Member State may continue when he returns to the Member of State of

which he is a national, through the grant of a derived right of residence to the third-country national family member concerned.

54 As regards the conditions under which that derived right of residence may be granted, the Court has stated, as indicated in paragraph 25 above, that they must not be stricter than those laid down by Directive 2004/38 for the grant of a derived right of residence to a third-country national who is a family member of a Union citizen having exercised his right of freedom of movement by settling in a Member State other than that of which he is a national.

55 In that regard, as is apparent from Article 7(2) of Directive 2004/38, the right of residence provided for in Article 7(1) of that directive is to extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that the Union citizen satisfies the conditions referred to in Article 7(1)(a), (b) or (c) of the directive.

56 In the light of the foregoing considerations, the answer to question 2 is that Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

The third and fourth questions

57 In view of the answer given to the first and second questions, there is no need to answer the third and fourth questions.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.**

2. **Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.**

[Signatures]

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* Language of the case: Romanian.