

**FREE MOVEMENT OF
EUROPEAN UNION
CITIZENS – RIGHTS
AND CHALLENGES
TO SAME-SEX
FAMILIES IN
THE REPUBLIC
OF BULGARIA**

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Homophobia and unfair treatment of LGBTI people are still widespread in the European Union. Indicators of their level in individual Member States vary and the situation is seemingly better in some countries, but the data show that full equality for this group has not been achieved in any of them. Bulgaria is one of the countries where the situation is most unfavourable. In order to shed light on one of the contributing factors, this analysis presents the results of a study on the application of the Free Movement Directive to LGBTI couples on the territory of the Republic of Bulgaria. The analysis includes a review of the rights guaranteed to EU citizens and an analysis of the measures and deficiencies in the implementation of the Directive in Bulgaria, a review of administrative and judicial practice in the country and data from a national survey of same-sex couples with recognized status in other EU Member States who reside temporarily or live in Bulgaria.

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INTRODUCTION

Free movement of people is a major building block in the European Union's internal market, and it can be seen in a broader sense as one of the foundations of the European integration system. Originally envisaged in the form of different economic rights guaranteed to citizens of the Member States of the European Communities, free movement of people acquired its full significance of a fundamental dimension of European integration with the introduction of citizenship of the European Union under the Maastricht Treaty¹. As the Court of Justice of the EU determined, EU citizenship is a fundamental status of the citizens of Member States which guarantees them, within the framework of the Union's legal order, a certain range of rights because of their status as EU citizens, irrespective of the domestic law of the individual Member States². Among the rights guaranteed to EU citizens, the right to free movement³ and the right to equal treatment of persons in all situations covered by the Treaties of the European Union⁴ are of particular importance.

In addition to the provisions of primary EU law governing the general right to free movement and the resulting specific forms of freedom of movement associated with the exercise of various economic activities, a number of acts of secondary law governing the detailed rules of the exercise of free movement by EU citizens have been adopted. Among the acts of secondary law on the matter of free movement, Directive 2004/38/EC on the right of citizens of the

1. See Weiss, F., Wooldridge, F. "Free movement of persons within the European Community", 2nd edition, Kluwer Law International, The Netherlands, 2007, pp. 2 et seq.

2. See Judgment of 20 September 2001, Grzelczyk, Case C-184/99, ECLI:EU:C:2001:458, paragraph 31; Judgment of 17 September 2002, Baumbast and R, Case C-413/99, ECLI:EU:C:2002:493, paragraph 82.

3. See Article 20(2)(a) and Article 21(1) TFEU.

4. See Articles 18 and 19 TFEU in conjunction with Article 21 CFREU.

Union and their family members to move and reside freely within the territory of the Member States deserves particular attention⁵. Directive 2004/38/EC establishes the detailed common EU rules on the exercise of the right to free movement of persons and a number of derived rights applicable to all forms of free movement provided for in the Treaties. Within the case-law of the Court of Justice, it establishes a comprehensive legal framework which Member States are bound to apply without amending or complementing it through subsequent domestic authorizations, except for the matters expressly referred to in the Directive under domestic law⁶.

Among the issues of particular interest in the current state of development of EU law as regards the application of the right to free movement and the rules of Directive 2004/38/EC, we should emphasize the issue of equality in the treatment of LGBT⁷ persons in the exercise of free movement and, in particular, of the guaranteed rights of such persons' family members. Although it does not address this issue directly, Directive 2004/38/EC inevitably raises a number of practical problems with regard to the rights of LGBT persons, given that it provides for a number of rights for family members of EU citizens exercising free movement, and, on the other hand, Article 21(1)(1) of the Charter of Fundamental Rights of the European Union (CFREU) prohibits, within the framework of the integration legal order, any form of discrimination based on sexual orientation in particular. The relevance of this range of issues is also illustrated by the development of the case-law of the Court of Justice of the European Union which was already referred with the issue of applying the regime under the Directive to same-sex persons having a family relationship and a valid marriage⁸. On the other

5. OJ L 158, 30.4.2004, Special edition in Bulgarian: Chapter 05, Volume 007, p. 56.

6. See Христов, Хр., "Вътрешен пазар и основни свободи на движение в правото на Европейския съюз", Сиела, С., 2018, pp. 191 et seq.

7. In the first part of this report, the term LGBT persons is used to refer to hypotheses related to the exercise of the right to free movement by lesbians, gay men, bisexual and transgender persons who can objectively form a family relationship with persons of the same sex. The other two parts of the analysis the broader terms LGBTI is used – lesbians, gay men, bisexual, transgender and intersex persons.

8. See Judgment of 5 June 2018, Coman e.a., Case C-673/16, ECLI:EU:C:2018:385.

hand, we should not underestimate the effect on the application of Directive 2004/38/EC to same-sex married couples that the case-law of the European Court of Human Rights can have in the light of the judgments *Oliari and Others v. Italy*⁹ and *Orlandi and Others v Italy*¹⁰ in view of the requirement that fundamental rights guaranteed in the EU corresponding to rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms (ECHR) be interpreted and applied as a minimum standard in this sense and scope of the Convention¹¹.

Insofar as the Republic of Bulgaria is one of the last EU Member States which has neither regulated the possibility of marriage between persons of the same sex nor has recognized a certain legal form of family relations in same-sex couples, the issues related to guaranteeing the full exercise of the right to free movement by LGBT persons and to guaranteeing equal treatment for EU citizens regardless of their sexual orientation are particularly acute in our country.

In this context, the first part of this analysis will primarily address the rights guaranteed to EU citizens under Directive 2004/38/EC, which are particularly relevant for same-sex family couples. On the other hand, the measures for implementation of the Directive in Bulgaria and the shortcomings they reveal in view of guaranteeing equal treatment of EU citizens who have formed family relations in same-sex couples will be analyzed. The second part of the analysis presents two cases from the case-law of Bulgarian courts concerning the rights of same-sex couples and violating Directive 2004/38/EC. The third part of the analysis focuses on the experiences of same-sex couples with recognized marriage or cohabitation during their stay in Bulgaria and reveals the effects the legal vacuum they are in has on their way of life.

9. Applications No. 18766/11 and 36030/11.

10. Applications No. 26431/12; 26742/12; 44057/12 and 60088/12.

11. See Article 52(3) CFREU.

PART ONE:

APPLICATION OF DIRECTIVE 2004/38/EC
WITH REGARD TO LGBTI COUPLES IN THE
TERRITORY OF THE REPUBLIC OF BULGARIA

I. FREE MOVEMENT OF EU CITIZENS AND RIGHTS UNDER DIRECTIVE 2004/38/EC

1. Scope of application of the free movement of persons and Directive 2004/38/EC

1.1. In the current version of the Treaties, the free movement of persons includes a **general right to free movement** of the citizens of the European Union guaranteed by Article 21 TFEU and Article 45 CFREU, and the specific rights of EU citizen individuals deriving from the free movement of workers, freedom of establishment and freedom to provide services¹². According to the case-law of the Court of Justice of the EU, the general right to free movement governed by Article 21 TFEU finds a specific manifestation in the various forms of free movement regulated by Articles 45, 49 and 56 TFEU¹³. At the same time, the specific forms of free movement laid down in the Treaty are detailed rules governing the exercise of the right to free movement. In view of that, in the presence of the conditions necessary for the application of one of those forms, it is namely that form that must be implemented, while the general right to freedom of movement may be a valid ground when there is no precondition for the implementation of any of the particular forms¹⁴.

1.2. Regardless of which form of free movement of persons is applicable in a particular hypothesis, the right to free movement is manifested in a **certain order of derived rights** related to freedom of movement and residence between the Member States of the

12. See Articles 45, 49 and 56 TFEU.

13. Judgment of 29 February 1996, Skanavi and Chryssanthakopoulos, Case C-193/94, ECLI:EU:C:1996:70, paragraph 22; Judgment of 26 November 2002, Olazabal, Case C-100/01, ECLI:EU:C:2002:712, paragraph 26; Judgment of 16 December 2004, My, Case C-293/03, ECLI:EU:C:2004:821, paragraph 33.

14. Judgment of 15 September 2005, Ioannidis, Case C-258/04, ECLI:EU:C:2005:559, paragraph 20.

European Union. These rights are currently covered in detail in Directive 2004/38/EC, which establishes the general regime of free movement of persons within the EU.

1.3. In the current phase of development of European Union law, the rights related to the free movement of persons are guaranteed to **EU citizens and their family members**. By virtue of Article 20(1) TFEU, an EU citizen shall be “*every person holding the nationality of a Member State*”. In addition thereto, the provision underlines that „*citizenship of the Union shall be additional to and not replace national citizenship*”¹⁵. In other words, EU citizenship derives from the national citizenship of at least one European Union Member State. European Union law does not provide for an autonomous way of acquiring or losing EU citizenship. The acquisition and loss of EU citizenship is an automatic consequence of the acquisition or loss of the citizenship of a Member State. Inasmuch as the right to free movement of people is guaranteed as a general principle for EU citizens only, the possibility for a third-country national to benefit from the free movement regime is only open to a European Union citizen’s family members¹⁶. At the same time, it has as its prerequisite the exercise of the right to free movement by that family member who is an European Union citizen or by the need to guarantee the real possibility of exercising the most essential part of the rights forming the status of the European Union citizen with regard to a minor whose parents are third-country nationals¹⁷.

1.4. Under Article 2(2) of Directive 2004/38/EC, **the following shall be considered family members of a European Union citizen exercising free movement:**

i. the spouse or the partner with whom the Union citizen has contracted a registered partnership;

15. See in detail regarding the common features of the legal regime of EU citizenship Lenaerts, K., Van Nuffel, P., Bray, R. Constitutional Law of the European Union, op. cit., pp. 541 et seq.; Weiss, F. Wooldridge, F. Free movement of persons within the European Community, pp. 163 et seq.

16. See Article 3(1) and (2) of Directive 2004/38/EC, op. cit.

17. Judgment of 8 March 2011, Ruiz Zambrano, Case C-34/09, ECLI:EU:C:2011:124; Judgment of 5 May 2011, McCarthy, Case C-434/09, ECLI:EU:C:2011:277; Judgment of 15 November 2011, Dereci e.a., Case C-256/11, ECLI:EU:C:2011:734.

- ii. the direct descendants who are under the age of 21;
- iii. the dependents or heirs of the spouse or registered partner;
- iv. the dependent direct relatives in the ascending line of the EU citizen or those of their spouse or registered partner.

In addition thereto, Article 3(2) of the Directive provides that, in accordance with authorizations granted under the national law of the Member States, the right of entry and residence in the host Member State may also be enjoyed by other family members other than those referred to in Article 2(2), who, in their country of origin, are dependent persons or members of the household of the EU citizen, persons for whom serious health reasons require personal care, and a partner with whom an EU citizen has a lasting relationship. It should be emphasized that each category of family members is subject to a different regime, inasmuch as those under Article 2(2) have rights directly governed by the Directive, the implementation of which cannot be within the discretion of the Member States, whereas for the persons under Article 3(2) the Member State retains a degree of discretion as to the conditions under which it allows them to reside in its territory¹⁸. Article 7(4) of Directive 2004/38/EC respectively states that, as regards any persons exercising free movement for education purposes, only a spouse, a registered partner, dependent children of the citizen concerned or dependents in the ascending line of the respective citizens shall enjoy the rights of family members within the meaning of the Directive.

Family members of an EU citizen in the exercise of their right to free movement are considered those who are relatives in the descendant line up to the age of 21 or who are dependent on the respective EU citizen or their spouse or registered partner, even if they have exceeded that age. Family members are also considered to be the dependent direct family members in the ascending line of the EU citizen, their spouse or registered partner. These could be the

18. See Judgment of 5 September 2012, Rahman e.a., Case C-83/11, ECLI:EU:C:2012:519, paragraph 18–26; Guild, E., Peers, S., Tomkin, J. *The EU Citizenship Directive*. Oxford University Press, Oxford, 2014, pp. 1–3, 30.

children or grandchildren of the EU citizen, of their spouse or their registered life partner, as well as the parents of such children. No further conditions can be imposed on this circle in order for them to exercise the rights under Directive 2004/38/EC, for example, they cannot be required to live together with the respective European Union citizen. Along with direct relatives, other family members of the EU citizen, their spouse or registered partner, who are members of the household, are dependent, or for whom the respective citizen, spouse or partner is taking personal care for serious health reasons, under conditions laid down by the Member States, may also exercise their right to residence.

1.5. The rights guaranteed to family members of an EU citizen exercising their right to free movement are of particular importance to **third-country nationals**, insofar as EU citizens have the same type of rights on an independent basis. However, including in relation to citizens of the Union, in certain situations the rights of family members may be of particular importance, for example, as regards the exercise of the right of long-term or permanent residence¹⁹.

1.6. Under the current version of the TFEU and the acts of the related law on the free movement of people, the legal regime of the free movement of people applies to **all citizens of the Union who move to or reside in a Member State other than that of which they are citizens, and for members of their families**²⁰. For the purposes of the case-law of the Court, European Union citizens who have never exercised their right to freedom of movement and have always resided in the Member State of which they are citizens do not fall within the definition of “beneficiary” within the meaning of Article 3(1) of Directive 2004/38/EC, and therefore, the rules in the Directive shall not apply to them²¹. The Court has also held that if a person is not in a situation of free movement, their respective family members also do not fall within the scope of the rules for

19. See Articles 12-17 of the Directive.

20. Judgment on Case C-256/11, *Dereci* e.a., op. cit., paragraph 53.

21. Judgment on Case *McCarthy*, op. cit., paragraphs 31 and 39.

free movement of persons as regards the application of the rights of family members guaranteed when an EU citizen exercises their right to free movement²².

A person shall be deemed to exercise freedom of movement if they pursue or carry out any possible form of free movement towards another Member State other than that of which they are a citizen and in which they reside. This allows them to invoke the rights guaranteed to EU citizens both vis-à-vis that other Member State in respect of which freedom of movement is exercised, and vis-à-vis their own country of origin. Freedom of movement also exists when an EU citizen residing in a third country enters into the hypothesis of exercising their guaranteed rights vis-à-vis a Member State of which they are not a citizen²³. The legal regime of free movement is also applicable in cases where a person returns to their country of origin after exercising the right to free movement²⁴. This allows even non-EU family members to invoke rights deriving from EU law in relation to the European Union citizen's country of origin²⁵.

1.7. According to the settled case-law of the Court of Justice of the EU, reference to elements of the legal regime of the free movement of persons cannot be made with regard to **purely internal situations**²⁶. Purely internal situations are considered these cases which do not disclose any connection with a matter governed by the EU law and therefore are "*outside the scope of the Treaty regulations*"²⁷. In other words, those relationships in which all the elements of both legal and factual nature are entirely within the jurisdiction of a Member State can be defined as purely internal. As far as the free movement of people is concerned, purely internal situations

22. Ibid, paragraph 42.

23. See Guild, E., Peers, S., Tomkin, J. The EU Citizenship Directive, op. cit., p. 53.

24. Judgment of 7 July 1992, Surinder Singh, Case C-370/90, ECLI:EU:C:1992:296, paragraph 21; Judgment of 23 September 2003, Akrich, Case C-109/01, ECLI:EU:C:2003:491, paragraphs 52–58.

25. Judgment of 11 December 2007, Eind, Case C-291/05, ECLI:EU:C:2007:771, paragraphs 35–45.

26. Picod, F. Libre circulation et situation interne. // Revue des affaires européennes, 2003/2004/1, p. 47.

27. Judgment of 28 March 1979, Saunders, Case 175/78, EU:C:1979:88, paragraph 11; Judgment of 17 December 1987, Zaoui, Case 147/87, ECLI:EU:C:1987:576, paragraph 15; Judgment of 16 December 1992, Koua Poirrez, Case C-206/91, ECLI:EU:C:1992:523, paragraph 11; Judgment of 5 June 1997, Uecker and Jacquet, Joined cases C-64/96 and C-65/96, ECLI:EU:C:1997:285, paragraphs 16–19.

are considered to be such cases in which there is no element of the exercise of any right to freedom of movement, nor is there any other question of law which has a determinative effect on the exercise of the right that is related to free movement. At the same time, it should also be stressed that in the recent case-law of the Court of Justice of the EU there is a tendency to mitigate the limits of interpretation of the purely internal situations that the Court has. Interesting examples in this regard are illustrated by a number of cases dealt with by the Court of Justice following the introduction of the institute of European Union citizenship, such as *Garcia Avello and Ruiz Zambrano*²⁸. They illustrate hypotheses in which, without there being any immediate effect on the exercise of a right relating to one or other of the forms of free movement, the Court recognizes the provisions of the free movement regime as regards to disputes, the specific elements of which are entirely limited to one Member State. A similar picture is also drawn by the *Carpenter and Gouvernement de la Communauté française et Gouvernement wallon*²⁹. In all these cases, there is a clear tendency for the Court of Justice to go beyond expressing the objectively presented elements of the case, locked entirely in the territory and jurisdiction of one Member State, when it is necessary to ensure the beneficial effects of the rights conferred by the European Union citizenship and the right to free movement in particular. However, it should be noted that these cases still pose issues that are decisive for the enforcement of rights deriving from the citizenship in the EU, which explains the Court's particular approach and its deviation from the traditionally followed course of jurisprudence.

2. Rights under Directive 2004/38/EC

2.1. Article 4 of Directive 2004/38/EC governs the **right to exit**,

28. Judgment of 2 October 2003, *Garcia Avello*, Case C-148/02, ECLI:EU:C:2003:539; Judgment on Case C-34/09, *Ruiz Zambrano*, op. cit.

29. Judgment of 11 July 2002, *Carpenter*, Case C-60/00, ECLI:EU:C:2002:434; Judgment of 1 April 2008, *Gouvernement de la Communauté française and Gouvernement wallon*, Case C-212/06, ECLI:EU:C:2008:178.

which is the first manifest of the common right to free movement. Every European Union citizen has the right to leave the territory of their Member State of origin or residence by presenting a valid identity card or passport. Article 5 of the Directive, respectively, guarantees EU citizens the **right to enter** freely in any EU country of which they are not citizens, upon presenting an identity card or passport.

EU citizens cannot be subject to visa requirements or any equivalent administrative authorization for exit or enter. The right to enter can be applied both when moving from another Member State and when moving from a third country.

The right to exit and the right to enter are also guaranteed to family members of the EU citizen who exercises freedom of movement. In cases where a family member of a European Union citizen is a third-country national, in order to exercise a right to enter into an EU Member State, they may need a visa. Third countries whose citizens are subject to visas are defined in Regulation 539/2001³⁰. No visa is required for a family member of an EU citizen who holds a residence document under Article 10 of Directive 2004/38/EC. The existence of a short or long-stay visa for a Schengen Member State entitles the third-country national to enter any EU country except the United Kingdom and the Republic of Ireland and stay within the EU for up to 90 days for each period of 180 days.

The terms and conditions for issuing visas are laid down in Regulation 810/2009³¹. Pursuant to Article 5(2) of Directive 2004/38/EC, Member States shall grant an EU citizen's family members every facility to obtain the necessary visas. Such visas shall be issued free of charge as soon as possible and under an accelerated proce-

30. See Regulation (EC) 539/2001 of the Council of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OB L 81, 21.3.2001, special edition in Bulgarian: chapter 19, volume 003, p. 97.

31. Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OB L 243, 15.9.2009.

dure³². Unlike other third-country nationals for whom the issuance of a visa is a matter within the discretion of the Member States, an EU citizen's family members are entitled to a visa, which therefore makes it compulsory for Member States to issue a visa in the presence of the preconditions laid down in the Directive³³. According to the Court, Member States cannot as a general rule undertake a measure of forced return of a third-country national, spouse of an EU citizen, who enters the territory of a Member State without having a valid identity document and a visa, if the person concerned is in a position to prove in another way their identity and the existence of a family relationship with a European Union citizen and, if it does not constitute a threat to the internal order, public health or public security³⁴. In the light of the case-law of the Court of Justice of the EU, it can be assumed that Member States should organize the issuance of visas to EU citizens' family members so that they do not have to leave the territory of the European Union and return to the country, from which they originate. The same meaning is laid out in the provision of Article 7 of Regulation 810/2009.

The high jurisdiction of the EU has also ruled that third-country nationals who are spouses of European Union citizens cannot be included as unwanted persons in the Schengen Information System (SIS) without complying with the requirements for imposing restrictions on the right to free movement as set out in Directive 2004/38/EC³⁵. For the purposes of the Court's case-law, the refusal of a person who is a third-country national and the spouse of an EU citizen to be admitted into the territory of a Member State on the basis of being reported as an unwanted alien by a Member State in the SIS is permissible, insofar as there are sufficient objective ele-

32. According to the Commission, the requirement to issue visas to family members as soon as possible implies that the visa procedure should not exceed four weeks – Communication from the Commission to the European Parliament and the Council on guidelines for better transposition and application of Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States COM (2009) 313 final.

33. Judgment of 31 January 2006, *Commission v. Spain*, Case C-503/03, ECLI:EU:C:2006:74, paragraph 42.

34. Judgment of 25 July 2002, *MRAX*, Case C-459/99, ECLI:EU:C:2002:461.

35. Judgment on Case C-503/03, *Commission v. Spain*, *op. cit.*, paragraph 52.

ments to conclude that the conditions for imposing a restriction on the right to free movement under Article 27 of Directive 2004/38/EC have been met³⁶.

2.2. The right to free movement includes the **right to residence** in a Member State of which the EU citizen is not a citizen. This right is set out in Article 20(2)(a) TFEU as a fundamental right of the citizens of the European Union. Special provisions regarding the right of residence for various forms of economic activity are set out in Article 45(3)(c), Article 49(1) and Article 56(1) TFEU³⁷. In its context as a derived right, the right to residence is subject to detailed regulation in Chapters III and IV of Directive 2004/38/EC. In view of the regulations contained in the Directive, we can distinguish between three different forms of the right of residence: short-term, long-term and permanent residence.

2.3. Article 6 of Directive 2004/38/EC provides that every EU citizen shall be entitled to reside in the territory of a Member State of which they are not a citizen for a period of up to three months without the need to satisfy any other conditions or formalities other than to have a valid personal identity card or passport. This form of residence can be regarded as an immediate expression of the fundamental and personal right of citizens of the European Union provided for in Article 20(2)(a) TFEU. This right covers the entire territory of the Member State and can only be restricted under conditions identical to those applicable to the citizens of the respective Member State³⁸. For the exercise of the right to short-term residence there are no requirements for the availability of sufficient resources for subsistence. At the same time, given Article 14(1) of Directive 2004/38/EC, short-term residence may be exercised provided that the person concerned does not become an unacceptable burden on the social security system in the host country. In addition thereto, Article 24(2) of the Directive provides that the Member States may

36. *Ibid.*, paragraphs 53–59.

37. Judgment of 8 April 1976, *Royer*, Case 48/75, ECLI:EU:C:1976:57.

38. See Article 22 of the Directive.

exclude the provision of social assistance to persons who are in a hypothesis of short-term residence. In that order, it can be concluded that short-term residents must have certain means of subsistence and should not resort to social assistance in the host country.

For the purpose of short-term residence, Member States may set out a requirement that, after exercising the right to enter, citizens of other EU countries must declare their presence on their territory within a reasonable time. Failure to comply with this obligation may entail proportional sanctions, among which there can be no expulsion measure³⁹. At the same time, the obligation to declare short-term residence cannot constitute an unjustified restriction on the right to free movement. This obligation would be of such a nature if it was linked to excessive formal requirements, which in practice hinder the freedom of movement governed by the Treaties or restrict the rights granted to EU citizens to enter and reside in the territory of a country of which they are not citizens. This would be the case if the time limit for declaring entry into the territory of a Member State is not reasonable or if the penalties for failure to fulfill the obligation to declare short-term residence are excessive, for example if a custodial sentence is provided⁴⁰. In such a case, the obligation to declare short-term residence within three days of entry into the territory of the receiving State, coupled with the imposition of a custodial sentence in the event of an offense, is incompatible with the EU law⁴¹. Penalties for violating the obligation to declare short-term residence in one Member State should be similar to those imposed on its own nationals in case of such violations⁴².

Short-term residence rights also benefit an EU citizen's family members, including when they are not European Union citizens. If an EU citizen's family members are third-country nationals, the general requirements of the European Union's visa and immigration

39. Judgment of 7 July 1976, *Watson and Belmann*, Case 118/75, ECLI:EU:C:1976:106, paragraphs 20 and 21.

40. *Ibid.* Judgment of 3 July 1980, *Pieck*, Case 157/79, ECLI:EU:C:1980:179, paragraphs 17–19.

41. Judgment of 12 December 1989, *Messner*, Case 265/88, ECLI:EU:C:1989:632, paragraph 15.

42. Judgment of 21 September 1999, *Wijnsbeek*, Case C-378/97, ECLI:EU:C:1999:439, paragraph 44.

legislation shall apply to them⁴³.

2.4. Detailed regulations of the different hypotheses of the rise of a **right to long-term residence** are contained in Article 7 of Directive 2004/38/EC. It should be borne in mind that Article 7 of Directive 2004/38/EC distinguishes several categories of persons:

- i.** economically active European Union citizens;
- ii.** EU citizens who do not exercise any economic activity but have sufficient resources for subsistence;
- iii.** persons enrolled in a particular form of training in the host country;
- iv.** family members of the first three categories of persons who exercise the right of free movement jointly with the main family member under the conditions laid down in the Directive.

Workers and self-employed persons are the first category of persons to whom Directive 2004/38/EC grants a right to of long-term residence. No other conditions apply to this circle of persons other than the exercise of the relevant form of economic activity. Which persons are considered workers or self-employed persons shall be determined in accordance with the already developed situations in the field of freedom of movement of workers as well as freedom of establishment and provision of services. Article 7(3) of the Directive expressly provides that workers and self-employed persons shall be considered a certain circle of the beneficiaries who are not engaged in immediate economic activity:

- i.** persons who are temporarily unable to work as the result of an illness or accident;
- ii.** persons who are in duly recorded involuntary unemployment after having been employed for more than one year and have registered as job-seekers with the relevant employment office;
- iii.** persons who are in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year

43. See Article 5, paragraph of Directive 2004/38/EC.

or after having become involuntarily unemployed during the first twelve-month period of employment⁴⁴;

iv. persons who embark on vocational training after having been employed or self-employed⁴⁵.

It should be emphasized that persons who have the right to residence as workers, self-employed persons or persons treated as such have the widest range of rights compared to all other categories of persons covered by Directive 2004/38/EC. They may be accompanied by the widest range of family members, they are not subject to the requirement for minimum resources of subsistence⁴⁶, they have equal access to social benefits compared to the own citizens of the host country without applying the exception under Article 24(2) of the Directive and enjoy enhanced protection against expulsion provided for in Article 14(4)(a) of Directive 2004/38/EC. Furthermore, as already clarified, Regulation 492/2011 provides workers who are considered as workers and their family members with additional rights which are not recognized by any other category of EU citizens exercising the right of free movement⁴⁷.

Persons who do not engage in any form of economic activity but have sufficient means of subsistence for themselves and for their family members who exercise free movement with them are also entitled to long-term residence. In respect of this circle of persons, they are also required to have full health insurance coverage in the host Member State. The imposition of these conditions results from the fact that, insofar as the circle of persons concerned does not engage in economic activity, they should not at the same time become an unacceptable burden on the social security system in the host country.

In line with the established case-law of the CJEU, Article 8(4) of

44. In this case, persons are considered to be workers for a period of not less than 6 months.

45. In the event that the person has voluntarily ceased to act as a worker, the subject of the vocational training must correspond to the work previously carried out.

46. Judgment of 11 November 2014, Dano, Case C-333/13, ECLI:EU:C:2014:2358.

47. See Христов, Хр., “Вътрешен пазар и основни свободи на движение в правото на Европейския съюз”, *op. cit.*, pp. 180 et seq.

Directive 2004/38/EC explicitly states that Member States cannot determine a common fixed amount to be considered as the threshold of sufficient means of subsistence. This solution is based on the understanding that, for different people, sufficient means of subsistence differ in size and correspond to different needs, approaches and habits of life. In view of this, the assessment of the existence of sufficient resources should be made on an individual basis, taking into account the particular situation of the persons. In any event, for any person, the minimum required amount for sufficient resources cannot exceed the threshold beyond which persons are entitled to social assistance in the host country or, if such is not implemented, the amount of the minimum resources required for any individual may not exceed the minimum social security pension in the host country.

It is not permissible to lay down conditions regarding the personal possession of the funds. They may be income of the individual themselves, of a member of their family, or be provided by another person⁴⁸. It is also not permissible to require a special form of proof or documents originally issued by the authorities of the country of origin proving that the person has sufficient means of subsistence⁴⁹. National rules which provide for a systematic examination of the existence of sufficient means of subsistence of the persons granted a long-term residence permit also infringe the requirements of Directive 2004/38/EC⁵⁰. As regards the existence of full health coverage, it could result from the person's relationship with the health insurance system of one or another Member State or it could be covered by health insurance. The Court has held that insurance cannot be conditional on its compulsory conclusion in the host Member State⁵¹.

48. Judgment of 19 October 2004, *Zhu and Chen*, Case C-200/02, ECLI:EU:C:2004:639, paragraph 29–33; Judgment of 23 March 2006, *Commission v. Belgium*, Case C-408/03, ECLI:EU:C:2006:192, paragraphs 38–52.

49. Judgment of 25 May 2000, *Commission v. Italy*, Case C-424/98, ECLI:EU:C:2000:287, paragraph 28–37.

50. Judgment of 10 April 2008, *Commission v. the Netherlands*, Case C-398/06, ECLI:EU:C:2008:214, paragraphs 26–31.

51. Judgment on Case C-413/99, *Baumbast*, *op. cit.*, paragraph 89.

The host Member State shall be entitled to establish a procedure for the registration of persons who are in the hypothesis of long-term residence. The deadline for registration under such a procedure may not be less than three months from the date of entry into the Member State. When implementing a registration procedure for persons exercising the right to long-term residence, a current registration certificate should be issued containing the name and address of the person and date of registration. For the purposes of issuing a registration certificate for long-term residence of an EU citizen, only the following documents may be required:

- a valid personal identity card or passport;
- a confirmation of employment by the employer or a certificate of employment (for the workers);
- evidence of self-employed activity (for self-employed persons);
- evidence of sufficient means of subsistence and full health insurance coverage (for economically inactive persons);
- proof of enrollment in an accredited school, existence of sufficient means of subsistence and the conclusion of full health insurance (for those who are enrolled in a certain form of education)⁵².

A registration certificate shall also be issued to an EU citizen's family members who are also European Union citizens. For the issuance of this certificate, Member States may require:

- a valid personal identity card or passport;
- a document certifying the existence of a family relationship;
- in the case of Article 3(2)(c) – a document issued by the State of origin certifying that the persons concerned are dependent or are members of the household of the EU citizen, or evidence of the existence of serious health reasons which require personal care for the person;
- in the case of Article 3(2)(b) – evidence of the existence of a

52. Persons enrolled in education in an educational institution in the host country can demonstrate the existence of sufficient means of subsistence by a declaration or another equivalent means, see Article 8(1)(c) and Judgment on Case C-424/98, *Commission v. Italy*, *op. cit.*, paragraphs 44-46.

lasting relationship with an European Union citizen.

It should also be stressed that the belonging of an EU citizen to one or another of these categories is not a static situation. It may vary according to the activity they perform. For example, a person who has initially been enrolled in a particular form of education could start work and consequently move to the category of persons who are staying as workers⁵³.

Family members of an EU citizen who reside with them in the host country also have the right to pursue an economic activity as workers or self-employed persons, as well as to be enrolled in forms of education in private or public educational institutions⁵⁴. In the case where they are also EU citizens, this right is of no particular importance, except that they would not have to submit the full amount of registration elements as long-term residents on an independent basis, but it is sufficient to prove the existence of family relationship with the main European Union citizen. However, where a family member is a third-country national, the right to work or study on an equal basis with the nationals of the country concerned is essential insofar as it is not guaranteed on an independent basis for any third-country nationals.

For third-country nationals' family members, Directive 2004/38/EC provides for a different residence registration regime. According to Article 10 of the Directive, residence cards shall be issued for the purposes of long-term residence of an EU citizen's family members who are third-country nationals. For the issuance of a residence card, Member States may require:

- a valid passport;
- a document proving the family relationship of the third-country national and an EU citizen;
- the registration certificate and, in the absence of a registration system in the host Member State, any other proof of residence in the host Member State;

53. Judgment of 21 February 2013, N., Case C-46/12, ECLI:EU:C:2013:97, paragraph 24–30.

54. See Article 23 of Directive 2004/38/EC.

– a document issued by the country of origin certifying that the third-country national is dependent on the EU citizen (dependent on a member of their family) or proving the existence of serious health reasons that require personal care by the European Union citizen or a member of their family;

– in the cases of Article 3(2)(b) – evidence of a lasting connection between the third party concerned and the European Union citizen.

Directive 2004/38/EC sets a period of six months from the submission of the application for the issuance of a residence card in which there must be a ruling on the request. The Commission states that the period of six months relates to the maximum duration which the procedure may have, provided that it includes an assessment of the existence of any circumstances relating to the protection of the public order and security⁵⁵. A certificate for the submission of an application for a residence card shall be issued at the time of filing the application. The necessary documents required in the Directive for the issuance of a residence card should be regarded as exhaustively defined and the Member States should not require any other documents. The Directive does not regulate a common procedure for the issuance of a residence card, in the light of which the Member States shall remain free to determine the procedure for the application of Article 10 of Directive 2004/38/EC, while respecting equivalence and efficiency requirements. According to Article 11, the residence card shall be valid for a period of five years from the date of issue and its period of validity may be limited to a shorter period if the European Union citizen's intended stay is shorter than five years. The card may be canceled if the third-country national is absent from the host country for a period longer than six months within one year. The validity of the residence card shall not be affected by any temporary absences of shorter duration or absences with a longer duration for reasons of compulsory military service, pregnancy and childbirth, serious illness, training or secondment in another Member State or in third countries.

55. COM(2009)313 final, p. 8.

Directive 2004/38/EC provides for certain specific hypotheses regarding the retainment of the right to residence of a European Union citizen's family members upon their departure or death. According to Article 12(1), the death or departure of the European Union citizen from the host Member State shall not affect the right to residence of the members of their family who are nationals of a Member State. However, in order to acquire the right to permanent residence in this case, they must satisfy the general conditions of Article 7(1)(a), (b), (c) or (d). The death of a European Union citizen shall not entail the loss of the right to residence for members of their family who are not third-country nationals and who have resided in the host Member State as family members for at least one year before the death of the EU citizen. Unless they have acquired the right to permanent residence, the right to residence of the persons concerned shall be determined by the requirement that they be able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and for their family members so as not to become a burden on the social security system of the host Member State, and that they have full health insurance coverage⁵⁶. Finally, Article 12(3) stipulates that the departure of the EU citizen from the host Member State or their death shall not entail the loss of the right to residence of the children or of the family member exercising parental rights over them, regardless of their nationality, if the children are enrolled in an educational institution. In that case, they shall retain the right to residence until the end of their education. It should be pointed out that that provision provides for a right that is analogous to the one resulting from Article 10 of Regulation 492/2011 applicable to all EU citizens. At the same time, Article 10 of Regulation 492/2011 shall retain its effect as an independent right to residence in respect of the children of workers who have exercised free movement, insofar as it provides for more

56. Article 12(1) of Directive 2004/38/EC implicitly includes the right of third-country nationals to engage in an economic activity in the host country on an independent basis. Since the Directive requires the exercise of a certain form of economic activity by those persons, it obviously gives them the possibility of being employed or self-employed.

favorable opportunities than Article 12(3) of Directive 2004/38/EC.

Article 13 of Directive 2004/38/EC provides for the right to residence of family members to be retained in the event of divorce, annulment of marriage or termination of registered cohabitation. In order to acquire the right to permanent residence, the persons concerned must satisfy the conditions laid down in Article 7(1)(a), (b), (c) or (d) of the Directive. Divorce, annulment of marriage or termination of registered partnerships shall not result in the loss of the right to residence of non-EU family members if prior to the commencement of the relevant family termination procedure the relationship has lasted for at least three years, including one year in the host Member State. The right to residence shall also be preserved if, by virtue of an agreement between spouses or partners, or by virtue of a court order, the non-EU citizen holds the parental rights over the children. The retention of the right to residence can also be guaranteed in case of particularly difficult circumstances such as domestic violence against the third-country national. The right to residence of the persons concerned shall remain subject to the requirement that they be able to prove that they are workers or self-employed persons, or that they have sufficient resources of subsistence for themselves and for their family members, and that they have full health insurance in the host Member State, or that they are members of a family already established in the host Member State of a person fulfilling these requirements.

It should be emphasized that in each of the forms of residence regulated by the Directive, EU law exhaustively lists the conditions under which the relevant right arises and is exercised. Member States may not set additional conditions or decide at their own discretion the granting or refusal of any of the forms of residence. The Court of Justice of the EU explicitly states that the documentary evidence provided for in the Directive does not create any rights, nor can it be required as a condition for the exercise of the rights guaranteed to EU citizens and members of their family⁵⁷. In the words of the

57. Judgment of 17 February 2005, Oulane, Case C-215/03, ECLI:EU:C:2005:95, paragraphs 17 and 18.

Court: *“the grant of a residence permit to a national of a Member State is to be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of European Union law”*⁵⁸. By the same logic, Article 25 of Directive 2004/38/EC states that the possession of the certifying documents provided for in the Directive cannot under any circumstances be a prerequisite for the exercise of the rights guaranteed by it.

2.5. Directive 2004/38/EC introduced a new form of residence – a right to permanent residence. According to Article 16 of the Directive, an EU citizen who has resided legally in the host Member State for an uninterrupted period of five years, shall be entitled to a permanent residence in that State. The right to permanent residence also applies to family members of the EU citizen concerned, regardless of whether they are citizens of the European Union or third-country nationals, if they have been residing with the European Union citizen in the host Member State for an uninterrupted period of five years.

The creation of the right to permanent residence is a consequence of the introduction of the status of an EU citizen and, in particular, of the fundamental right to free movement of all EU citizens guaranteed under Article 20(2)(a)⁵⁹. By the same logic, the preamble to Directive 2004/38/EC states that the right to permanent residence of European Union citizens who have opted for long-term residence in the host Member State is a key precondition for strengthening the sense of European Union citizenship and promoting social convergence within the European integration process⁶⁰.

The right to permanent residence permits European Union citizens and members of their family to remain in a Member State of which they are not nationals for an unlimited period of time with-

58. Judgment of 23 March, *Commission v. Belgium*, Case C-408/03, ECLI:EU:C:2006:192, paragraphs 62 and 63.

59. See, in this sense, Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001)257 final.

60. Directive 2004/38/EC, recital 17 of the Preamble.

out being subject to any conditions for exercising a particular form of economic activity, without it being necessary to prove that they have sufficient resources of subsistence, and without using any exceptions from the requirement of equal treatment as compared to the nationals of the country concerned, including in terms of access to the social security system.

Directive 2004/38/EC governs one general and several specific hypotheses of the acquisition of a right to permanent residence. In the general hypothesis, in order to acquire the right to permanent residence in a Member State of which they are not a national, the EU citizen must have been permanently residing there for an uninterrupted period of five years. According to Article 16(3) of the Directive, the continuity of residence shall not be affected by any temporary absences not exceeding a total of six months per year. The continuous nature of the residence shall also not be prejudiced by any absences of longer duration if they have been related to the legitimate reasons expressly provided for in the Directive. Such reasons have been determined to be compulsory military service (without limitation in the period of absence), pregnancy and childbirth, severe illness, training or secondment in another Member State or in a third country (allowance for a maximum of twelve consecutive months). It must be accepted that, insofar as the provision of Article 16(3) of Directive 2004/38/EC introduces the special reasons for a one-time absence of no more than twelve consecutive months after using the phrase “such as”, the reasons given are not exhaustively settled and other hypotheses of important reasons of absence can be considered as valid reasons, such as adoption of a child, care for a relative, a volunteer mission or any other similar commitment⁶¹.

Article 17 of Directive 2004/38/EC provides for a number of specific hypotheses for the arising of the right to permanent residence. In such cases, the right to permanent residence in the host Member State shall be acquired before the end of a continuous five-year residence period. The hypotheses provided for in the Directive

61. See, in this sense, Guild, E., Peers, S., Tomkin, J. *The EU Citizenship Directive*, op. cit., p. 199.

are as follows:

i. the right to permanent residence shall be granted to workers or self-employed persons who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension⁶², as well as to workers who cease paid employment to take early retirement, provided that they have been working in that Member State for at least the preceding twelve months and have resided there continuously for more than three years;

ii. the right to permanent residence shall also be granted to workers or self-employed persons who have resided continuously in the host Member State for more than two years and stop working there as a result of permanent incapacity to work⁶³;

iii. the right to permanent residence shall also be granted to workers or self-employed persons who, after three years of continuous employment and residence in the host Member State, work in an employed or self-employed capacity in another Member State, while retaining their place of residence in the host Member State, to which they return, as a rule, each day or at least once a week.

In all three specific hypotheses under Article 17(1) of the Directive, periods of duly registered involuntary unemployment, periods during which the person has not worked for reasons beyond their control, as well as absences from work or interruption of work due to illness or accident shall be considered to be periods of employment. The conditions for the duration of residence in the special cases of acquisition of a right to permanent residence under Article 17(1)(a) and (b) shall not apply if the spouse or partner of the worker or self-employed person is a national of the host Member State or has lost their nationality in that State by reason of marriage to the

62. If the law of the host Member State does not grant the right to an old age pension to certain categories of self-employed persons, the age condition shall be deemed to have been met once the person concerned has reached the age of 60.

63. If such incapacity is the result of an accident at work or an occupational disease entitling the person concerned to a benefit payable in full or in part by an institution in the host Member State, no condition shall be imposed as to length of residence.

worker or self-employed person concerned.

Right to permanent residence shall also be granted to the family members of a worker or a self-employed person, whether EU or third-country nationals, who reside with them in the territory of the host Member State when the relevant family member acquires the right to permanent residence in this country based on one of the special hypotheses of Article 17(1) of Directive 2004/38/EC.

Article 17(4) of the Directive provides for several specific hypotheses for the acquisition of the right to permanent residence by family members of an economically active EU citizen who dies before acquiring a right to permanent residence. Family members of a worker or a self-employed person shall acquire the right to permanent residence before the expiry of a five-year period of residence in the case of the death of the main member of the family on condition that:

- i.** the worker or self-employed person had, at the time of death, resided continuously on the territory of that Member State for two years;
- ii.** the death resulted from an accident at work or an occupational disease;
- iii.** the surviving spouse lost the nationality of that Member State following marriage to the worker or self-employed person.

The right to permanent residence shall also be acquired by family members of a European Union citizen to whom the permissions to maintain the right of long-term residence under Article 12(2) and Article 13(2) apply and who continue to reside in the host Member State for five consecutive years⁶⁴.

Particular emphasis should be placed on the requirement that the beneficiary of the right of permanent residence should reside “legally” in the host country. Although the wording of the Directive does not contain any clarification as to the meaning of the expression “who have resided legally” in the territory of the host Member State,

⁶⁴. See Article 18 of Directive 2004/38/EC.

inasmuch as it does not refer to national legislation, that expression must be regarded as an autonomous concept of the European Union law and interpreted uniformly throughout the territory of all Member States⁶⁵. According to the Court of Justice of the EU, that concept must be understood to mean residence which meets the conditions laid down in Directive 2004/38/EC for the various forms of residence and, in particular, which qualifies as long-term residence. In view of this, the residence which is in accordance with the law of a Member State but does not comply with the conditions laid down in Article 7(1) of Directive 2004/38/EC cannot be regarded as “legal” residence within the meaning of the legislation on the right to permanent residence⁶⁶. Hence, in order to exercise their guaranteed right to permanent residence, a person should be able to prove that during the period of residence in the host State on the basis of which a right to permanent residence has arisen, it has been in accordance with the conditions laid down in Article 7(1) of Directive 2004/38/EC⁶⁷. By the same logic, as regards family members who are nationals of third countries, the Court points out that, for the purposes of the acquisition by a European Union citizen’s family members who are not nationals of a Member State, of the right to permanent residence within the meaning of Directive 2004/38/EC, only periods of residence fulfilling the conditions laid down in the Directive can be taken into account⁶⁸.

As regards the continuity of residence, it must be held that it can only be infringed in the circumstances provided for in the Directive: absence for a period of more than six months without the presence of an important reason or the imposition of a measure of expulsion of the person concerned from the host State. In this respect are both Article 21 of the Directive, and the regulation under Articles 27 and 28, which subject the imposition of the measure of the expulsion to

65. Judgment of 21 December 2011, Ziolkowski and Szeja, Joined cases C-424/10 and C-425/10, ECLI:EU:C:2011:866, paragraph 33.

66. *Ibid.*, paragraphs 46-47.

67. *Ibid.*, paragraph 62.

68. Judgment of 8 May 2013, Alarape and Tijani, Case C-529/11, ECLI:EU:C:2013:290, paragraph 39.

a number of conditions. On the other hand, as already mentioned, the right to permanent residence is a manifestation of the fundamental right to free movement guaranteed to EU citizens. It is based on the integration of the Union citizen into the host Member State⁶⁹. In view of that, to admit that circumstances outside the ones falling within the scope of the Directive may interrupt the long-term residence that is a condition for the right of permanent residence, would be to violate the rules adopted for a restrictive reading of the exceptions to the fundamental freedoms guaranteed in the EU law and to question the effectiveness of the regulations under Directive 2004/38/EC. Under the same logic, the interpretation given by the Court in the sense that the serving of a custodial sentence in the receiving State is not a circumstance that violates the continuous nature of the residence⁷⁰.

Once acquired, the right to permanent residence shall be unlimited in time. It may only be waived if the person who is the beneficiary of the right to permanent residence is absent from the host State for two consecutive years or if they are the subject of an expulsion measure under the special conditions of Article 28(2) of Directive 2004/38/EC. The hypothesis of absence for two consecutive years involves the person leaving the country without returning to its territory within two years of their departure. Any return to the territory of the receiving State shall terminate the relevant period of absence and shall give rise to the opening of a new period of absence upon departure from the State⁷¹.

As regards the administrative formalities for the exercise of the right of permanent residence, Article 19 of Directive 2004/38/EC provides for the issuance of a document certifying the right to permanent residence of the EU citizens in one Member State. The Directive states that the certificate should be issued at the request of the person concerned once the competent authorities of the Member State have checked the preconditions for a right to permanent

69. Judgment of 7 October 2010, *Lassal*, Case C-162/09, ECLI:EU:C:2010:592, paragraph 37.

70. Judgment of 16 January 2014, *Onuekwere*, Case C-378/12, ECLI:EU:C:2014:13, paragraphs 28–32.

71. See also *Guild, E., Peers, S., Tomkin, J. The EU Citizenship Directive*, op. cit., p. 200.

residence. An EU citizen's family members who are not European Union citizens are respectively issued a permanent residence card. The card shall be issued at the request of the person concerned within six months of the submission of the application. The issued permanent residence card shall be automatically reissued every ten years.

II. FREE MOVEMENT AND RIGHTS OF LGBT INDIVIDUALS

Directive 2004/38/EC does not address directly the issue of the rights guaranteed to LGBT individuals in the European Union. At the same time, both the exercise of the rights to free movement provided for in the Treaties and the application of the specific regime under the Directive inevitably raise the issue of equal treatment of LGBT individuals vis-à-vis other citizens of the Union. The issue is particularly acute with regard to the recognition of family relationships between such individuals, insofar as, in the exercise of free movement of EU citizens' family members, a number of rights are guaranteed which are integral to the full realization of this fundamental element of European unification⁷². If the guaranteed rights of an EU citizen's family members are seen as a necessary and natural condition for deciding and effectively exercising free movement within the Union, then, by the same logic, in order to exercise fully the rights to free movement guaranteed to them within the EU legal order, LGBT individuals should be able to rely on the family relations existing between them and other persons of the same sex, benefiting from the regime provided for in the Treaties and Directive 2004/38/EC equally with the other European Union citizens. The lack of such an opportunity can therefore be seen as a significant obstacle to the full exercise of the right to free movement by EU citizens belonging to the category of LGBT individuals.

In this respect, particular attention should be paid to the regulation of the circle of persons who are considered an EU citizen's

72. See on the importance of the guaranteed rights of family members for the full exercise of the right to free movement – paragraphs 5 and 6 of the Preamble to Directive 2004/38/EC.

family members in the exercise of the right to free movement and, accordingly, the question of the extent to which persons of the same sex between whom a family relationship exists can enjoy the rights provided for in the Directive should be answered.

1. The term “spouse” in exercising the rights to free movement

1.1. First of all, with regard to the hypotheses of a matrimonial relationship, which person is the spouse of an EU citizen is determined by the **existence of a formal marriage** concluded under the law of the state to which the marriage is subjected. The EU Court has explicitly determined that the jurisdiction under which marriage was concluded was not decisive for the recognition of its existence if there is a marriage legally concluded under the relevant law⁷³. It is also established that the host Member State cannot impose any additional conditions for respecting the existence of a marriage and the resulting rights of family members⁷⁴. In this sense, it is to be assumed that a person is considered to be the spouse of a Union citizen for the purposes of applying the rights under Directive 2004/38/EC until the possible dissolution of the marriage by formal means through a marriage annulment act issued by a competent authority⁷⁵.

1.2. To what extent are these authorisations issued in connection with disputes concerning the exercise of rights to free movement by family couples of persons of the opposite sexes relevant to the hypothesis of same-sex married couples? Or, in other words, is the **concept of marriage for the purposes of applying Directive 2004/38/EC** and, more generally, for the purpose of exercising the rights to free movement laid down in the Treaties limited to marriage between persons of opposite sexes or does it also include cases of same-sex married couples? The interpretation of the term “spouse” within the meaning of Article 2(2)(a) of the Directive is decisive for answering this question. For the exact reading of this

73. Judgment of 25 July 2008, *Metock e.a.*, Case C-127/08, ECLI:EU:C:2008:449, paragraphs 98-99.

74. Judgment of 8 November 2012, *Iida*, Case C-40/11, ECLI:EU:C:2012:691, paragraph 57.

75. Judgment of 13 February 1985, *Diatta*, Case 267/83, ECLI:EU:C:1985:67, paragraph 20.

term, it is therefore crucial whether it should be regarded as a general and autonomous term in EU law or as a term to be defined in the law of individual Member States.

1.3. In support of the notion that the term “spouse” is a **common and autonomous term in EU law**, several major arguments can be set out. First of all, it is clear from the case-law of the Court of Justice of the EU that provisions of European Union law which do not expressly refer to the law of a Member State with a view to determining their meaning and scope should have an autonomous and uniform interpretation in the EU law⁷⁶. Moreover, such an interpretation must be made taking into account not only the immediate wording of the provision but also its context and the purpose of the legislation at issue⁷⁷. Secondly, while jurisdiction of the regulation of civil status remains jurisdiction of the Member States, in the exercise of that jurisdiction, States should not infringe EU law and, in particular, should not allow discrimination⁷⁸. It should also be borne in mind that the Court of Justice of the European Union has explicitly stated that hypotheses the regulation of which falls within the competence of the Member States may be inextricably linked to the freedom of movement of Union citizens⁷⁹. On the other hand, as regards the application of the rights of free movement, the clarification of the exact meaning of the term “spouse” is a matter not related to the nature of marriage adopted in the law of one or another EU Member State but to the exercise of one of the fundamental rights guaranteed to citizens of the Union. In other words, the definition of the exact meaning of that term does not refer to the discretion of Member States to provide for or not to provide for marriage between persons of the same sex in their legal order but to whether, for the application of the free movement regime established in Directive 2004/38/EC, the term “spouse”, and hence the circle of persons

76. Judgment of 18 October 2016, Nikiforidis, Case C135/15, C135/15, EU:C:2016:774, paragraph 28.

77. Judgment of 18 May 2017, Hummel Holding, Case C-617/15, EU:C:2017:390, paragraph 22; Judgment of 27 September 2017, Nintendo, Joined cases C24/16 and C25/16, EU:C:2017:724, paragraph 70.

78. Judgment of 1 April 2008, Maruko, Case C267/06, EU:C:2008:179, paragraph 59 and Judgment of 24 November 2016, Parris, Case C443/15, EU:C:2016:897, paragraph 58.

79. Judgment on Case C-40/11, *op. cit.*, paragraph 72.

considered to be family members, should also cover spouses of the same sex who have a valid marriage under the legislation of an EU Member State or a third country.

1.4. According to this logic, as regards the meaning of the term “spouse” for the purposes of the application of Directive 2004/38/EC, it must be considered that it does not depend on the sex of the persons and the place of marriage. This is reflected in some judgments already delivered by the Court relating to disputes concerning the recognition of third-country nationals as an EU citizen’s family members as well as in the provisions and context of the adoption of Directive 2004/38/EC. In its judgment in the *Metock* case, the Court of Justice of the EU explicitly stated that Article 3(1) of Directive 2004/38/EC must be interpreted as meaning that “*a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place*”⁸⁰. On the other hand, the context of the adoption of Directive 2004/38/EC makes it possible to conclude that the provision of Article 2(2)(a) does not restrict the rights of family members provided for in the Directive solely to married persons of opposite sexes. In the European Commission’s proposal for a Directive, the term “spouse” is used without further clarification⁸¹. In the course of the legislative process, the European Parliament made a request for the irrelevance of the person’s sex to explicitly be stated by adding the expression “*irrespective of sex, according to the relevant national legislation*”⁸². The Council of the European Union accordingly expressed reservations for the inclu-

80. Judgment on Case C-127/08, *Metock*, op. cit., paragraph 99. See also Judgment of 17 April 1986, *Reed*, Case C443/85, EU:C:1986:157.

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

82. See Report of the European Parliament of 23 January 2003 on the proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (A5 0009/2003).

sion of a definition of the term “spouse” which explicitly provided for marital relations of spouses of the same sex as well, as at the time of consideration of the draft only two Member States had legislation authorising marriage between persons of the same sex⁸³. In this context, the Commission therefore proposed to restrict its proposal to the term “spouse”, which in principle referred to a spouse of the opposite sex, except in case of future developments⁸⁴. On the basis of the elements mentioned in the legislative process, it can be concluded that Directive 2004/38/EC does not restrict the rights of family members only to the spouse in case of marriage of persons of the opposite sexes, but suggests that the term “spouse” should be determined in the context of the specific application of the regulation and taking into account the changing social reality of family relations⁸⁵.

1.5. In the logic of such an evolutionary interpretation of the term “spouse”, it should be borne in mind that in recent years, there has been a significant change in the legislation in a number of EU Member States related to the opening of the possibility of marriage between persons of the same sex. If at the time of the adoption of Directive 2004/38/EC only two Member States allowed same-sex marriage, at the beginning of 2018, such a possibility is provided for in the law of fifteen out of twenty-eight Member States⁸⁶. In this sense, as Advocate General Melchior Wathelet points out, *“That legal recognition of same-sex marriage does no more than reflect a*

83. Common Position (EC) No 6/2004 of 5 December 2003 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States 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, p. 28.

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

85. In this sense, see Opinion of Advocate General M. Wathelet on the case of Coman, C-673/16, delivered on 11 January 2018, ECLI:EU:C:2018:2, paragraphs 33-53.

86. The Kingdom of the Netherlands, the Kingdom of Belgium, the Kingdom of Spain, the Kingdom of Sweden, the Portuguese Republic, the Kingdom of Denmark, the French Republic, the United Kingdom of Great Britain (excluding Northern Ireland), the Grand Duchy of Luxembourg, Ireland, the Republic of Finland, the Federal Republic of Germany, the Republic of Malta and the Republic of Austria.

general development in society with regard to the question ... While different perspectives on the matter still remain, including within the Union, the development nonetheless forms part of a general movement. In fact, this kind of marriage is now recognised in all continents. It is not something associated with a specific culture or history; on the contrary, it corresponds to a universal recognition of the diversity of families”⁸⁷.

1.6. A number of provisions of the Charter of Fundamental Rights of the European Union may be cited in support of such an interpretation of the provisions of Directive 2004/38/EC. In this respect, it should be emphasized that Article 9 of the Charter which provides for the right to enter into a marriage does not make the exercise of this right dependent on the opposite sex of the persons. Accordingly, Article 20 of the Charter proclaims the right to equality of persons before the law, and Article 21(1) explicitly prohibits discrimination within the scope of the EU law, in particular on the grounds of sexual orientation.

1.7. The reading of Article 2(2)(a) of Directive 2004/38/EC as one including the hypothesis of a marriage between persons of the same sex is also consistent with the **objectives pursued by the Directive** and with the established case-law of the Court to interpret various provisions of primary and secondary law relating to the fundamental freedoms of movement in the possible sense which favours the right to freedom of movement to the greatest extent possible⁸⁸. The Preamble of the Directive explicitly states that *“the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members”⁸⁹*. Recital 31 of the Preamble respectively indicates that

87. See Opinion of Advocate General M. Wathelet on the case of Coman, op. cit., paragraph 58.

88. See in this sense Judgment on Case C-127/08, Metock, op. cit.; Judgment of 12 March 2014, O. and B., Case C456/12, EU:C:2014:135, paragraph 35; Judgment of 14 November 2017, Lounes, Case C165/16, EU:C:2017:862, paragraph 31. Concerning the broad interpretation of the provisions relating to the exercise of the rights to free movement, see Judgment of 16 January 2014, Reyes, Case C423/12, EU: C: 2014: 16, paragraph 23.

89. See Recital 5 of the Preamble of Directive 2004/38/EC.

“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”.

1.8. In view of the above, it can be concluded that the adoption of a different reading of the term “spouse” which excludes LGBT individuals who have married an EU citizen of the same sex from the scope of Directive 2004/38/EC, all the more so given the fact that an increasing number of Member States recognize this form of family relations, would constitute a **substantial unjustified restriction to the right to free movement of EU citizens**. Such a reading would be a constant factor of influence for EU citizens not to exercise fully the rights of free movement guaranteed by the Treaty insofar as they are not sure that after returning to their Member State of origin, they will be able to continue their family life which may have possibly started in marriage or family reunification in another EU Member State.

1.9. The interpretation of the primary legislation and the regulations of secondary law under which the term “spouse”, for the purpose of exercising free movement, also includes spouses in a legally concluded same-sex marriage, was expressly confirmed by the Court of Justice of the European Union in the Coman judgment.

Recalling its previous case-law which states that the status of an EU citizen is intended to be the fundamental status of citizens of the Member States, the Court confirmed that any Member State citizen exercising free movement may rely on the rights relevant to that capacity both against the other EU Member States of which they are not a citizen, and against their own State. Among the rights recognized for EU citizens, the EU law also guarantees the opportunity for them to have a normal family life with their family members,

both in the host Member State and in the Member State of which they are a citizen upon their return there⁹⁰.

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, the supreme court of the European Union confirmed that the term “spouse” within the meaning of Directive 2004/38/EC is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned⁹¹. The Court therefore considered that an EU Member State cannot rely on its national law to refuse to recognize in its territory, for the purpose of exercising the right to free movement, the same-sex marriage concluded in another country by an EU citizen⁹². According to the supreme jurisdiction for integration, 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 would vary from one Member State to another⁹³. According to the Court, such a situation was contrary to the essence of the right to free movement and would deprive it of any useful effect⁹⁴. Moreover, in the delivered judgment the Court of Justice of the EU expressly ruled that such a restriction cannot be regarded as an expression of respect for the national constitutional identity of Member States or as a measure of a permissible restriction on free movement justified on grounds of the protection of the public policy⁹⁵. The judgment also emphasized expressly that both the fundamental freedoms of movement and the permissible restrictions to those freedoms should be applied with due regard for the fundamental rights guaranteed in the

90. Judgment on Case C-673/16, *Coman*, op. cit., paragraphs 28-33.

91. *Ibid.*, paragraph 35.

92. *Ibid.*, paragraph 38.

93. *Ibid.*, paragraph 39.

94. *Ibid.*, paragraph 40.

95. *Ibid.*, paragraphs 40-46.

Charter of Fundamental Rights. In particular, the Court expressly stated that the refusal to recognize a marriage legally concluded in another Member State would undermine the right to privacy and family life, referring for a correct interpretation of the scope of that right to the relevant ECtHR case-law⁹⁶.

2. Family member – life partner of an EU citizen

2.1. Since a significant proportion of LGBT individuals who have established family relationships live in a registered partnership or de facto cohabitation, the application of the right to free movement and the regime under Directive 2004/38/EC to situations of registered or de facto partnership should be analysed next.

2.2. Concerning the hypotheses of family relations between same-sex couples **in a registered partnership**, in such a family relationship, EU law guarantees to a family member the same rights as those accorded to a spouse. At the same time, however, three conditions are laid down in Directive 2004/38/EC for the recognition of this status:

- i.** the registered partnership should be concluded on the basis of the legislation of a Member State;
- ii.** in order to be considered equivalent to marriage, it must be recognized in the host Member State's law;
- iii.** the application of this status shall be governed by the conditions laid down by the host Member State's law.

What difficulties could arise in the application of the rights to free movement in the light of the conditions laid down in the Directive for recognition of family relations in the event of a registered partnership? First, Directive 2004/38/EC provides that a family member of an EU citizen is considered to be a person with registered partnership under the legislation of an EU Member State. The question arises whether the regime under the Directive can be ap-

96. *Ibid.*, paragraphs 47-50.

plied for persons who have registered partnership in a third country. The formal and logical reading of the provision of Article 2(2)(c) implies a negative answer to that question. Such a reading would, however, contradict both the above-mentioned practice of broad interpretation of the norms relating to the exercise of the freedoms of movement within the EU, and the rights to found a family and to respect to one's private and family life enshrined in the Charter of Fundamental Rights and the ECHR. In view of this, it must be considered that in order to ensure the effective exercise of the right to free movement while respecting the private life and the right to found a family, persons who have a registered partnership in a third country should benefit from the regime under Directive 2004/38/EC.

2.3. Next, to the extent that several Member States, including the Republic of Bulgaria, still have not provided for any legal form of family relations between persons of the same sex, the following should be clarified: **is it possible for EU citizens with a registered partnership in another Member State of the Union or in a third country to exercise the rights under Directive 2004/38/EC together with their partner?** This question should also be answered in the affirmative, both because of the need to ensure the removal of obstacles to the exercise of the right to free movement and because of the fundamental rights guaranteed by the EU legal order in the field of family relations. Allowing the contrary reading of the provision of Article 2(2)(b) would lead to a situation similar to that of refusing to recognize a marriage between persons of the same sex because registered partnership, albeit different from marriage in respect of the rights it guarantees in some countries, is a legal form of stable family relations the disregard of which would substantially affect both the full realization of an individuals' family life and the making of a decision for or the effective exercise of the right to free movement. From then on, the extent to which family relations between persons of the same sex will guarantee rights equivalent to those resulting from marriage is a matter for the Member States

concerned to decide. However, in the existence of a registered partnership in another EU Member State, they should guarantee LGBT individuals, as a minimum, the rights that Directive 2004/38/EC provides for an EU citizen's family members.

3. Persons who are in a stable de facto cohabitation

3.1. Article 3(2)(b) of Directive 2004/38/EC provides that family members may also be **persons who are in a stable de facto cohabitation** with an EU citizen which is not formally registered in a Member State. This provision reflects the changing reality of family relations across the European Union, where more and more people live as a family without a marriage. It is also the result of the impossibility of reaching a sufficiently broadly supported common position between the Commission, the European Parliament and the Council of the EU when the Directive was adopted in order to regulate the relations of de facto cohabitation as equal to marriage⁹⁷. In the context of the version of Directive 2004/38/EC that is adopted and in force, the requirement to facilitate the entry and residence of persons who are partners in a stable family relationship presupposes Member States to take account of the existence of such a factual situation and to allow for residence and exercise of the rights to free movement to persons who are in such a family relationship without a marriage or a registered partnership.

3.2. The scope of Article 3(2)(b) of Directive 2004/38/EC should also include same-sex couples with stable de facto cohabitation. This reading is necessary, on the one hand, because of the need to ensure respect for the right to private and family life guaranteed by Article 7 CFREU, and the right to found a family guaranteed by Article 9 CFREU and, on the other hand, in order to ensure the protection deriving from Article 21(1) CFREU which prohibits dis-

97. In the original proposal of the European Commission, a provision is included which determines as family members persons who are in a de facto spousal cohabitation without a marriage – see COM (2001)257, final. The European Parliament, accordingly, insisted on the regulation of same-sex family relationships. Within the Council of the EU, however, it was not possible to reach a common position on both issues, given the conservative family policy in some Member States.

crimination on the basis of sexual orientation within the scope of the EU law. The adoption of such an interpretation of Article 3(2)(b) is also needed in the light of the requirement of Article 52(3) CFREU implying that the rights guaranteed in the Charter which correspond to rights set out in the ECHR should be interpreted as a minimum standard in accordance with the Convention implementation practice. Given the judgments delivered by the ECtHR in the cases of *Oliari and Others v. Italy*⁹⁸ and *Orlandi and Others v. Italy*⁹⁹, in the sense of which Article 8 ECHR obliges High Contracting Parties to the Convention to provide to same-sex couples a legal form and protection of the family relations established in such couples, allowing an interpretation in the sense of which Article 3(2)(b) of the Directive does not include cases of de facto cohabitation between persons of the same sex would be contrary to the Charter of Fundamental Rights.

3.3. The application of the obligation ensuing from Article 3(2)(b) would not be a problem in Member States which recognize same-sex marriages or provide for another legal form of family relationships between persons of the same sex. However, it can create **significant obstacles to the exercise of the right to free movement in those several EU Member States that still do not give family couples formed by persons of the same sex any legal status.** However, with a view to guaranteeing rights under the CFREU, these Member States should also treat as EU citizen's family members persons of the same sex between whom there is no marriage or registered partnership, who are in a stable de facto cohabitation, even in cases when the Member State's law does not regulate such a form of family relations¹⁰⁰. What would then be the range of rights recognized to family members of this category beyond the rights expressly provided for in Directive 2004/38/EC is a matter of discretion of the Member State concerned, with that discretion not being in breach of

98. Op. cit.

99. Op. cit.

100. See Guild, E., Peers, S., Tomkin, J. *The EU Citizenship Directive*, op. cit., p. 78; Barnard, C. *The Substantive Law of the EU, The Four Freedoms*, op. cit., p. 443.

the principles of non-discrimination and proportionality¹⁰¹.

3.4. The adoption of a **broad interpretation of Article 3(2)(b) of Directive 2004/38/EC** which also includes persons of the same sex between whom factual cohabitation has been established is also consistent with the practice in recent years for obtaining status in the EU citizen's State of origin by a member of their family – a third-country national – after the exercise of the right to free movement by the reference family member in another EU Member State, as well as in the doctrine developed by the Court on “*substance of the rights*” of EU citizens. According to the CJEU, where individuals have settled in an EU Member State or a third country and have formed and developed a family life therein, the beneficial effects of the rights that EU citizens derive from Article 21(1) TFEU requires family life to be extended on return to the State of origin by granting the right to residence to the family member – third-country national. In the absence of such a possibility, EU citizens may be prevented from fully exercising their right to free movement due to their uncertainty as to whether they would be able to continue their family life with their relatives when they move to another EU Member State or after returning to their State of origin¹⁰². Since the CJEU has already recognized the importance of family relations and the respect to private life for the full enjoyment of free movement and, on the other hand, the ECtHR has explicitly stated that Article 8 ECHR also includes the formation of family relations between persons of the same sex to which High Contracting Parties to the Convention are required to give legal form and provide legal protection equivalent to that enjoyed by family relations between persons of the opposite sexes, adopting an interpretation of Article 3(3)(b) which excludes same-sex couples would be a violation of a number of provisions of the Charter of Fundamental Rights. Such a restric-

101. In any case of application of norms from the regime of free movement of persons which concerns the rights guaranteed to the beneficiaries of this regime, a general requirement of non-discrimination against the citizens of the host state is applied, as has already been clarified. On the other hand, any measure that would have a deterrent effect on the implementation of free movement is subject to assessment of compliance with EU law on the basis of the general rules on admissible exceptions and restrictions from the free movement regime.

102. Judgment of 12 March 2014, O., Case C-456/12, ECLI:EU:C:2014:135, paragraphs 41–61.

tive reading of Directive 2004/38/EC would lead to a situation where EU citizens who come from Member States that do not provide for any legal form of family relations between persons of the same sex are systematically discriminated against on the basis of sexual orientation and are treated as a special category of persons who are not granted the full scope of rights under Directive 2004/38/EC. On the other hand, such a restrictive reading of Article 3(3)(b) would in its nature affect their right to free movement insofar as they would be initially unable to exercise this right fully with their partner if the relationship was established or exercised vis-à-vis one of the States which do not recognize any legal forms of family relations between persons of the same sex. In a phase of development of society, of the EU legal system and the of the practice for application of the ECHR in which most countries already recognize family relations between persons of the same sex in one form or another, such a situation should be regarded as incompatible with the fundamental values on which the European legal order is based.

III. APPLICATION OF THE RIGHT TO FREE MOVEMENT AND OF DIRECTIVE 2004/38/EC IN THE REPUBLIC OF BULGARIA

1. Measures on the application of free movement of persons in the Republic of Bulgaria

1.1. In the Republic of Bulgaria, **the regulation under Directive 2004/38/EC has been transposed into several pieces of legislation.** Of particular importance in this respect are the Act on Entering, Residing and Leaving the Republic of Bulgaria by European Union Citizens Who Are Not Bulgarian Citizens, and Their Family Members¹⁰³ and the Labour Migration and Labour Mobility Act¹⁰⁴. The Foreigners in the Republic of Bulgaria Act is also of considerable importance in the issue under discussion¹⁰⁵. Individual issues related to the residence of EU citizens and third-country nationals who are EU citizens' family members in Bulgaria are also governed by the Bulgarian Personal Documents Act¹⁰⁶.

1.2. The main range of domestic measures adopted to implement the European regulation on the free movement of persons **literally follows the requirements of Directive 2004/38/EC.** The **Act on Entering, Residing and Leaving the Republic of Bulgaria by European Union Citizens Who Are Not Bulgarian Citizens, and Their Family Members** reproduces all the general provisions of the Directive on the entry and residence of EU citizens and their family members regarding the different types of residence and the

103. Prom. SG, no. 80, 3.10.2006

104. Prom. SG, no. 33, 26.06.2016

105. Prom. SG, no. 153, 23.12.1998

106. Prom. SG, no. 93, 11.08.1998

conditions under which they occur.

Paragraph 1 of the Additional Provisions of the Act provides a definition of “*a family member of a European Union citizen*”. Under the Bulgarian law governing the free movement of EU citizens who are not Bulgarian citizens, it covers a person with whom an EU citizen who is not a Bulgarian citizen has a civil marriage and a person with whom an EU citizen has a de facto cohabitation certified by an official document from another EU Member State. The scope of family members who can benefit from the free movement regime under Bulgarian law also include descendants of the EU citizen or their spouse or life partner and ascendants who are members of an EU citizen’s family.

According to Article 5(1)(a) of the Act, the right to entry and residence together with an EU citizen who is not a Bulgarian citizen shall respectively be held by other family members outside those expressly defined in paragraph (1)(1) who, in the country of origin of the EU citizen, are members of the EU citizen’s household or are dependent on them, or who, for serious health reasons, require personal care by the EU citizen. The Act on Entering, Residing and Leaving the Republic of Bulgaria by European Union Citizens Who Are Not Bulgarian Citizens, and Their Family Members does not specifically address the hypotheses of same-sex marriages concluded in other Member States or the hypotheses of a registered partnership with a person of the same sex or a de facto cohabitation with a person of the same sex.

1.3. The Foreigners in the Republic of Bulgaria Act regulates entry and residence in the country of citizens of third countries outside the EU and the Member Countries under the European Economic Area Treaty, and the Swiss Confederation, who are a Bulgarian citizen’s family members. Article 2(6) of the Act determines which persons are considered a Bulgarian citizen’s family members for the purposes of its application, not including a person with whom a Bulgarian citizen would have a registered partnership or with whom

they are in a de facto cohabitation. The Act then provides for detailed conditions of entry and residence of a third-country national in line with the requirements of EU legislation on visa policy, the management of the Union's external borders and the long-term residence status of third-country nationals in the EU. The hypotheses of same-sex family relations are not the subject of a specific regulation in the *Foreigners in the Republic of Bulgaria Act*.

1.4. The Labour Migration and Labour Mobility Act regulates the right to free movement in the Republic of Bulgaria to persons who are citizens of other EU Member States and persons treated as such, as well as the access to the labour market of third-country nationals. Subject of regulation is also the employment of Bulgarian citizens in other EU and EEA countries. The Act provides for the conditions under which those persons have the right to access to the labour market or the right to act as self-employed persons in the Republic of Bulgaria. Regarding the exercise of the right to free movement by Bulgarian citizens in another EU or EEA countries or the Swiss Confederation, the Act refers to Article 45 TFEU and Regulation No. 492/2011.

The Labour Migration and Labour Mobility Act introduces an authorization regime for access to the labour market in the Republic of Bulgaria for non-EU third-country nationals and persons treated as such, while Article 9(1)(5) and (6) provides that no permission shall be required for family members of Bulgarian citizens or citizens of the EU, EEA countries or the Swiss Confederation. For defining the content of the term "family members", the Additional Provisions of the Act respectively refer to the Act on Entering, Residing and Leaving the Republic of Bulgaria by European Union Citizens Who Are Not Bulgarian Citizens, and Their Family Members and to the *Foreigners in the Republic of Bulgaria Act*.

1.5. The Bulgarian Personal Documents Act governs the issuance of identity documents to persons who are citizens of the EU, EEA countries, the Swiss Confederation or third countries in cases

where they reside for a long period or permanently in the Republic of Bulgaria. In particular, the Act governs the issuance of a residence certificate to an EU citizen, a residence card for an EU citizen's family member and a residence permit for a third-country national. The Act does not contain any specific provisions addressing the hypotheses of same-sex family relations.

1.6. Finally, although they are not directly related to the application of the right to free movement of EU citizens and Directive 2004/38/EC in particular, **a number of other acts governing elements of family and inheritance relations** are also relevant to the full exercise of free movement. In this regard, it should be borne in mind that Bulgarian law only allows marriage between persons of opposite sexes. According to Article 46 of the Constitution of the Republic of Bulgaria¹⁰⁷, marriage is a voluntary union between a man and a woman. The same authorisation is reproduced in Article 5 of the Family Code¹⁰⁸, which does not provide for any form of cohabitation either between persons of opposite sexes or between persons of the same sex.

The legislation governing family and inheritance relations in the Republic of Bulgaria does not contain any specific regulatory authorisations regarding the consequences in the field of family and inheritance law arising from the conclusion of a marriage or the formation of family relations between persons of the same sex. According to Article 75 of the Code of Private International Law (CPIL)¹⁰⁹, on the other hand, the form of marriage is governed by the law of the State before the competent authorities of which it was concluded, and a marriage concluded in another State should be recognized in the Republic of Bulgaria if the form according to the competent state's law has been complied with. According to Article 76 CPIL, respectively, the conditions for the conclusion of a marriage are determined by the law of the State of which a person is

107. Prom. SG, no. 56, 13.07.1991

108. Prom. SG, no. 47, 23.06.2009

109. Prom. SG, no. 42, 17.05.2005

a citizen at the time of marriage. Article 89 CPIL further states that succession of movable property shall be governed by the law of the State in which the antecessor had a habitual residence upon death, and succession of immovable property shall be governed by the law of the State in which the said property is situated. The antecessor, on the other hand, may designate the law of the State of which the said antecessor was a citizen at the time of the designation to govern the succession to the whole of the estate thereof. However, the designation of applicable law should not affect the part reserved for heirs defined by the law applicable under the general rule of the CPIL. It is also important that Article 45 CPIL provides that the law of another country, determined as the applicable one under the Code, shall not apply if the consequences of its application are manifestly incompatible with the Bulgarian public policy. Incompatibility shall be evaluated while taking account of the extent of connection of the relationship with Bulgarian public policy and the significance of the consequences of application of the foreign law. Where an incompatibility with the public policy is established, another appropriate provision of the same foreign law shall be applied, and in the absence of such a provision, a provision of Bulgarian law shall apply, if necessary for settlement of the relationship.

2. Deficiencies in the Bulgarian legislation in connection with the exercise of the right to free movement by LGBTI individuals and possible violations of EU citizens' rights

2.1. Given the current state of the Bulgarian legislation, several major deficiencies stand out, calling into question the full exercise of the right to free movement by EU citizens from other Member States to Bulgaria and, respectively, by Bulgarian citizens to European Union Member States.

First, the absence of any legal regulation on family relations in same-sex couples and, in particular, the lack of explicit regulation on the consequences of the presence of a concluded same-sex mar-

riage, a registered partnership or cohabitation formed in another Member State, constitutes a primary risk for **systematic discrimination and serious prejudice to the right to family formation, marriage and respect for the private and family life, as well as the right to equality before the law** for any person who has formed family relations or entered into a marriage with a person of the same sex in another Member State. Any person in such a hypothesis cannot be certain whether their family relationship will be recognized in Bulgaria in the exercise of free movement, entry into and residence on the territory of the country. Such a situation undoubtedly also affects the right to human dignity and potentially adversely affects the decision to exercise freedom of movement vis-à-vis our country. It puts LGBTI individuals at risk not to be able to fully benefit from the rights under Directive 2004/38/EC.

In cases where an EU citizen's spouse or life partner also has citizenship in a Member State of the Union, entry and residence can be done on an independent basis. However, when the spouse or life partner is a third-country national, a same-sex couple may face a **substantial difficulty for this person to obtain a permit for entry and residence, with a real risk of being refused an entry visa or a residence permit**. On the other hand, as regards the possibility of engaging in a work activity or other form of economic activity, if EU citizens and their family members are guaranteed the right to access to the labour market and performance of an economic activity on an equal footing with citizens of Bulgaria, such a right is not guaranteed to third-country nationals who are the subject to less favourable and restrictive terms. Thus, in the case of same-sex couples between an EU citizen and a third-country national, the spouse or life partner from the country outside the EU may encounter significant difficulties in being employed or performing an independent economic activity, and in certain circumstances this may be impossible.

It should also be borne in mind that the lack of a legal form of family relations between persons of the same sex puts EU citizens exercising the right to free movement vis-à-vis Bulgaria at risk of

not being able to exercise certain rights under Directive 2004/38/EC even in cases where both spouses or life partners are EU citizens. For example, if the competent authorities do not recognize the existence of a marriage, registered partnership or de facto cohabitation under Articles 2 or 3 of the Directive, a family member of an EU citizen in a same-sex family relationship will not be able to exercise the rights retention of residence under Articles 12, 13 or 14, and will not be able, without independently exercising a right to residence, to acquire the right to permanent residence under Articles 16, 17 and 18 of the Directive.

In cases where citizens of other Member States would exercise the right to free movement vis-à-vis Bulgaria, the lack of legal regulation of same-sex family relationships and the possible refusal by the Bulgarian authorities to recognize the existence of a marriage would also create a situation of **discrimination for LGBTI individuals in the field of taxation and social insurance.** For example, same-sex married couples would not be able to benefit from the reliefs provided for young families under the income taxation regime for natural persons¹¹⁰. They could also not benefit from the preferential treatment of donations under the Local Taxes and Fees Act (LTFA)¹¹¹. They would not be able to exercise a number of rights that social insurance laws connect to the existence of family relations such as the right to one-time assistance and a survivor's pension upon the spouse's death¹¹², the right to compensation for temporary incapacity for work due to a general illness for care or escort for examining, testing or treating a sick family member¹¹³, etc.

LGBTI persons who are citizens of another EU Member State and who have a marriage, registered partnership or de facto cohabitation and exercise the right to free movement vis-à-vis Bulgaria may also have **adverse effects in the field of family and inheritance law** insofar as they are in certain cases subject to Bulgarian

110. See Article 22a of the Income Taxes on Natural Persons Act, prom. SG, no. 95, 24 November 2006

111. See Article 44 LTFA, prom. SG, no. 117, 10.12.1997

112. See Articles 11-13 of the Social Insurance Code (SIC), prom. SG, no. 110, 17.12.1999

113. See Articles 13a in conjunction with Article 45 SIC.

law which does not recognize any legal form of same-sex family relations. At the same time, according to Article 3(1) of Regulation (EC) No. 2201/2003¹¹⁴, in matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State in whose territory the spouses are habitually resident. On the other hand, according to Article 8 of the Regulation, the courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State. In the field of inheritance law, Regulation No. 650/2012¹¹⁵ provides that, as a general rule, the applicable law on matters relating to succession shall be the law of the country of habitual residence of the deceased at the time of death, and national court of the Member State of the deceased's habitual residence at the time of death shall have jurisdiction to resolve disputes concerning the succession. Thus, in cases where EU citizens who have entered into a marriage or have a registered partnership or have formed a cohabitation in another EU Member State and exercise free movement and reside in Bulgaria, they may be in the hypothesis where family or inheritance matters essential for them are settled under Bulgarian law before the Bulgarian courts, with the risk of being denied recognition of the existing family relationship between them, with all the resulting complications and adverse consequences.

The risk of discriminatory treatment of EU citizens exercising free movement with regards to other important areas of legislation such as criminal law, civil procedure law, administrative procedure law and tax law cannot be ruled out. For example, Article 119 of the Criminal Procedure Code provides that a certain number of persons, including the spouse or a person with whom a person accused of committing a crime has a family relationship, may refuse to testify in the criminal proceedings. Article 48 of the Administrative Procedure Code contains a similar authorisation in respect of administrative proceedings. Such an authorisation is also

114. OJ L 338, 23.12.2003, Special edition in Bulgarian: Chapter 19, Volume 006, p. 183.

115. OJ L 201, 27.7.2012, p. 107.

contained in the Tax-Insurance Procedure Code. In the Code of Civil Procedure, it is provided that a spouse may be a legal representative within the civil proceedings among the other persons explicitly listed. In all these hypotheses, the lack of explicit regulation on the recognition of marriages concluded in another country by EU citizens and the refusal to give any legal form to family relations between LGBTI individuals put EU citizens in uncertainty or in clear impossibility to exercise the procedural rights concerned.

2.2. As regards the **situation of Bulgarian citizens who would exercise the right to free movement vis-à-vis another EU Member State**, the lack of legal form of family relations between persons of the same sex in Bulgarian law is of the nature to adversely affect them in several directions. First, Bulgarian citizens who have a permanent relationship with a person of the same sex in Bulgaria may find it difficult to exercise their rights arising from EU citizenship and Directive 2004/38/EC, insofar as they cannot rely on established family relationship in some Member States which also do not regulate the legal form of family relations between persons of the same sex.

Next, the rights of Bulgarian citizens who have exercised the right to free movement vis-à-vis another Member State and got married, created a registered partnership or cohabitation with a person of the same sex there, are potentially affected. These persons may also face a refusal to recognize the existing form of family relations for the purposes of exercising rights in Bulgaria or with a view to the Bulgarian citizen and their spouse or life partner returning to the country. Those persons may also experience adverse consequences from the lack of a legal form of family relations of LGBTI individuals in the field of family and inheritance law. For example, if a Bulgarian citizen has property in Bulgaria, in the event that they die, the refusal to recognize the existence of a marriage in another country or the parentage to the child would also result in the inheritance rights the spouse and child would have with respect to property in Bulgaria being affected. If a person has been engaged in employ-

ment, discriminatory consequences would also arise in the field of social insurance, since their spouse or life partner or their child would not be able to obtain certain benefits related to the existence of a marriage and family relations. In the event of disputes that need to be resolved before the Bulgarian courts, they would not have a guaranteed opportunity to exercise the above-mentioned procedural rights in the civil, administrative, tax or criminal justice system.

PART TWO

**CASE-LAW OF BULGARIAN COURTS
ESTABLISHED IN VIOLATION OF THE PRIMARY
AND SECONDARY LAW OF THE EU,
DIRECTIVE 2004/38/EC AND THE CASE-LAW OF
THE EUROPEAN COURT OF HUMAN RIGHTS
RELATING TO THE RIGHTS OF SAME-SEX
COUPLES FORMING FAMILIES IN BULGARIA**

This second part of the report will examine in detail the case of D. and L. for the recognition in Bulgaria of their marriage concluded in the UK initiated after a refusal by Sofia Municipality to register it, and the case of C. and M. against the Migration Directorate which refused to grant the right of residence to C. – an Australian citizen, who has been legally married to M. – a French citizen. Both cases constitute a violation of Community law and the case-law of the CJEU in the Coman case.

THE CASE OF D. AND L. PENDING BEFORE THE SUPREME ADMINISTRATIVE COURT

Statement of facts

On 15 November 2016, D. married L. in the United Kingdom of Great Britain and Northern Ireland after the two had resided in the territory of the United Kingdom. An entry of marriage was issued for the civil marriage by the civil status authorities in the United Kingdom and Northern Ireland. The marriage was concluded at Watergate House before a Superintendent Registrar and a Deputy Registrar¹¹⁶. Marriage certificate No. RTA 727303 certified by Apostille APO-211208 certified by the Foreign and Commonwealth Office was issued for the marriage. The Apostille was signed by a Registrar for Births, Death and Marriages, East Riding of Yorkshire.

On 15 May 2017, within the 6-month period prescribed by the law, D. entered an application in Sofia Municipality, Lyulin Region, requesting her marriage to be reflected in her personal registration card in the Municipality so as to show her current marital status, namely “married”¹¹⁷.

The applicant’s request for an update of her marital status is linked to civil registration. The Unified System for Civil Registration and Administrative Service of the Population /USCRASP/ is a national system of civil registration of natural persons in RB and a source of personal data therefor¹¹⁸. The USCRASP operates

116. Marriage certificate no. RTA 727303 certified by Apostille APO-211208 certified by the Foreign and Commonwealth Office.

117. Application with ref. no. PJH17-YT01-8406/15.05.2017 of the Mayor of Sofia Municipality, Lyulin Region.

118. Obligation under Article 100 of the Civil Registration Act. Some of the functions of the USCRASP are: creating and maintaining registers of civil status entries, establishing and maintaining a National Electronic Register of Civil Status Entries and creating and maintaining a population register.

at national, regional and municipal level. The procedure, manner and forms of the documents for the functioning of the USCRASP are determined by an Ordinance on the Functioning of the Unified System for Civil Registration¹¹⁹, issued pursuant to Article 113(1) of the Civil Registration Act. According to it, “civil registration” is limited to recording the events of birth, marriage and death in the registers of the civil status entries and entering persons in the population register¹²⁰.

Sofia Municipality, Lyulin Region, refused D.’s request to register her marriage in the Municipality¹²¹. The refusal of Sofia Municipality, Lyulin Region was appealed and upheld by Administrative Court Sofia-City¹²². The Court justified its refusal with the lack of the elements of the complex circumstances needed to update the marital status in the person’s personal registration card¹²³. In addition, the Court stated that: “In this case, first, according to the Bulgarian law, there is no civil marriage concluded in the form and according to the requirements of the Family Code. The lack of marriage under Bulgarian law excludes the possibility to update D.K.’s family status, i.e. to carry out other elements of the circumstances.

119. Ordinance no. ПД-02-20-9/21.05.2012 on the Functioning of the Unified System for Civil Registration, prom. SG no. 43/08.06.2012.

120. Under the Civil Registration Act, the latter shall include a set of data for a person which distinguishes it from other persons in society and in the family as a bearer of subjective rights, such as name, nationality, marital status, kinship, permanent address, etc. Civil registration of natural persons in the Republic of Bulgaria shall be based on the data their civil status entries and in the data in other acts specified in the law. Civil status entries shall be: an entry of birth, an entry of marriage and an entry of death.

121. Refusal under an application with ref. no. ПИИ17-УГ01-8406/15.05.2017 of the Mayor of SM, Lyulin Region.

122. Administrative case no. 7538/2017, 58th Panel of the ACSC, was initiated pursuant to the application and Judgment no. 180/08.01.2018 was delivered thereunder.

123. In accordance with Ordinance no. ПД-02-20-9/21.05.2012 on the Functioning of the Unified System for Civil Registration, prom. SG no. 43/08.06.2012, the requirements for updating the marital status in a person’s personal registration card shall be, as follows: the existence of a civil marriage concluded abroad in accordance with Bulgarian laws; registration of this marriage on the basis of a transcript or extract of the civil status entry drawn up by the foreign local authority (Article 4 of the Ordinance), by drawing up an entry of civil marriage in the Republic of Bulgaria; issuance of an original certificate of civil marriage under the approved form (Article 22 of the Ordinance); creation of an electronic equivalent of the entry of civil marriage in the National Electronic Register of Civil Status Entries with entering the last status of the data in the entry of civil status (Article 60(1) of the Ordinance); processing of the update document – electronic document – entry of marriage; recording in the electronic personal registration card of the current marital status of the person through the data from the National Electronic Register of Civil Status Entries or through the processing of the update document by an official.

The marriage concluded by the applicant in the United Kingdom of Great Britain and Northern Ireland with L.P.B. does not give rise to the consequences that the law connects to marriage (Article 4(1) FC). The same sex of the persons constitutes an obstacle to entering into a civil marriage under the Bulgarian law on the grounds of the provisions of the first sentence of Article 46(1) of the Constitution of the Republic of Bulgaria and of Article 5 FC, according to which marriage is a voluntary union between a man and a woman. This regulation of marriage is not contrary to the provisions of European Community law. According to Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”¹²⁴.

The case is pending before the Supreme Administrative Court seeking remedy against a violation of the EU law, a violation of the Code of Private International Law due to non-recognition in the Republic of Bulgaria of an administrative act issued by another state, and a violation of the European Convention on Human Rights and Fundamental Freedoms.

Violation of the Code of Private International Law

In addition to a violation of European Union law, the Administrative Court Sofia-City’s judgment was delivered in violation of private international law¹²⁵. The form and conditions for conclusion of the marriage between D. and L. are not subject to the Bulgarian Family Code. Article 6(3) of the Code of Private International Law (CPIL) regulates a marriage concluded between Bulgarian citizens before a competent authority of a foreign state. In this provision, the Code outlines clearly the rationale for international competence of foreign state authorities, namely: firstly, the competence of the foreign authority to conclude marriages in general, i.e. to have the capacity of

124. Judgment no. 180/08.01.2018 on administrative case no. 7538/2017, 58th Panel of the ACSC.

125. Article 6(3) of the Code of Private International Law (CPIL).

a civil status body; secondly, this capacity should be derived from the foreign state's law. If these requirements are met, such jurisdiction shall be established and the marriage at issue shall be recognized in the territory of the Republic of Bulgaria. The grounds are the Bulgarian citizenship of the two persons entering into a marriage abroad. In addition, the CPIL also introduces a condition for the establishment of international competence, namely the eligibility of such a marriage under foreign law, that is, to find that the marriage between two Bulgarian citizens in the respective foreign state is admissible under its law. Consequently, what is subject of proof in the case of L. and D. is the provision in English law allowing for marriage between persons of the same sex and that such marriage was concluded before a competent foreign official¹²⁶. Civil marriage between persons of the same sex is legally regulated and permitted in England¹²⁷.

Violation of the European Convention on Human Rights (ECHR)

The right to marry is governed by Article 12 ECHR: *“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”*¹²⁸, and the right to private and family life is enshrined in Article 8(1): *“Everyone has the right to respect for his private and family life, his home and his correspondence”*¹²⁹.

The development of law in the Council of Europe largely rests on the jurisprudence of the European Court of Human Rights (ECtHR). The first case before the ECtHR which raises the issue of recognizing the right of a same-sex couple to marry is the case of *Schalk and Kopf v. Austria*¹³⁰. In this case, the ECtHR found no violation of the Convention but examined the importance of the right to marriage

126. Code of Private International Law.

127. Information can be found on the official website of the Government of the United Kingdom of Great Britain and Northern Ireland: <https://www.gov.uk/marriages-civil-partnerships>.

128. Article 12 of the European Convention on Human Rights.

129. Article 8(1) of the European Convention on Human Rights.

130. *Schalk and Kopf v. Austria*, Application no. 30141/04, judgment of 24 June 2010.

under Article 12 of the Convention in accordance with Article 9 of the Charter of Fundamental Rights of the European Union: “*The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*”¹³¹. The norm explicitly omits the reference to the terms “man” and “woman” specifically for the purpose of expanding its scope, and the Commentary to the Charter makes it clear that “*it can be assumed that there is no obstacle to the recognition of same-sex relationships in the context of marriage*”¹³². In *Schalk and Kopf v. Austria*, the ECtHR explicitly recognized that same-sex couples should be able to benefit from the concept of “*family life*” under Article 8 ECHR and equates same-sex with opposite-sex couples in considering their relationship as one falling within the concept of a family¹³³.

In the case of *Vallianatos and Others v. Greece*¹³⁴, the Court recognized the right of same-sex couples to be officially recognized by the State. The Court found that couples of the same sex are as capable as couples of opposite sexes to enter into stable and long-lasting relationships¹³⁵. In view of this, it was logical that it was in the interest of these couples to have legally recognized relationships¹³⁶.

The law of the Council of Europe also evolves in a direction binding the present case, namely the right of individuals to register a marriage as recognition of a person’s legal civil status, which undoubtedly affects both the personal and the family life of individuals¹³⁷. A violation of this right according to the European Court of Human Rights is a violation of Article 8(1) of the Convention¹³⁸. The European Court of Human Rights held that the refusal to recognize marriages between persons of the same sex legally recognized in

131. *Ibid.*, paragraph 94.

132. *Ibid.*

133. *Ibid.*

134. *Vallianatos and Others v. Greece*, Applications nos. 29381/09 and 32684/09, judgment of 7 November 2013, paragraph 81.

135. *Ibid.*

136. *Ibid.*, paragraph 90.

137. *Dadouch v. Malta*, Application no. 38816/07, paragraph 48, Judgment of 20 July 2010.

138. *Ibid.*

another Member State, and the subsequent refusal to grant same-sex married families the right to reunification when they move within the EU may constitute a violation of Article 7 of the Charter of Fundamental Rights of the European Union which governs the right to private and family life¹³⁹. The Court examined Article 7 together with Article 20 of the Charter, saying that every person was equal before the law and, in this connection, when the provision of Article 7 was read in conjunction with Article 20 of the Charter, it was necessary to allow spouses of the same sex to be admitted to the territory of the host State under the same conditions as were imposed on spouses of the opposite sex (i.e. automatically)¹⁴⁰.

The ECtHR goes even further in the case concerning the recognition of same-sex couples' right to personal and family life in *Orlandi and Others v. Italy*¹⁴¹. **In this case, the ECtHR found that Italy had committed a violation of Article 8 ECHR in refusing to recognize marriages concluded abroad for six couples – five couples of Italian citizens and one couple of an Italian and a Canadian citizen.** Before the Court, the applicants complained that the Italian authorities' refusal to register their marriages concluded abroad as a marriage or as any other form deprived them of the legal protection and rights resulting from marriage¹⁴². Since the ECtHR has already held that Article 12 ECHR was applicable to same-sex couples wishing to marry, as is clear from the case-law cited above, therefore Article 12 ECHR is also applicable to same-sex couples who have already married under the domestic system of another country (*argumentum a fortiori*)¹⁴³.

The Court stated that the Member States were free, according to Article 12 ECHR as well as Article 14 in conjunction with Article 8 ECHR, to restrict same-sex couples from access to marriage¹⁴⁴. Nev-

139. Pajić v Croatia, Application no. 68453/13, Judgment of 23 May 2016.

140. *Ibid.*

141. *Orlandi and Others v. Italy*, Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, Judgment of 14.12.2017.

142. *Ibid.*

143. *Orlandi and Others v. Italy*, Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, Judgment of 14.12.2017, paragraph 145 of the judgment.

144. *Schalk and Kopf*, paragraph 108, and *Chapin and Charpentier*, paragraph 39. The same is confirmed by the ECtHR in *Oliari and Others v. Italy*, paragraph 193.

ertheless, the Court recognized that same-sex couples needed legal recognition and protection of their relationships¹⁴⁵. In that regard, in the judgment in *Oliari and Others v. Italy*, the Court concluded that the Italian Government had exceeded its discretion and had failed to fulfill its positive obligation to guarantee to the applicants specific legislation which provided for the recognition and protection of their unions, thus violating Article 8 ECHR.¹⁴⁶

The ECtHR drew particular attention to the fact that before its judgment in *Oliari and Others v. Italy*, the Italian State had not granted any protection to same-sex partnerships, and the Court held that such partnerships required legal recognition and protection. The ECtHR noted that the legal status given by the so-called partnerships was similar to that of marriage, that such a system would satisfy the requirements of the Convention and Italy would meet these requirements if, instead of refusing to register marriages concluded abroad, had equaled them to the partnerships recognized by the Italian legislation¹⁴⁷. It should be stressed that in Italy, before the legislator authorized the conclusion of same-sex partnerships, there was a gap in the legislation and same-sex marriages concluded abroad could not obtain any recognition within the Italian legal framework. This put the applicants in legal vacuum, leading to the situation that the Italian Republic had failed to take note of developments in the law and social reality in the field of same-sex partnerships and marriages in the Contracting States for the ECHR and had been lagging behind in recognizing any form of cohabitation. Therefore, the Court for the Convention found that Italy cannot with legally valid arguments deny the existence of a “family” within the meaning of Article 8 of the Convention in the case of the applicants and offer them no opportunity to legalize their relationship. In view of this, the Italian Republic had breached the balance between the public and the private interest by not adopting a specific legal framework that would grant recognition and protection of same-sex relation-

145. *Oliari and Others v. Italy*, Applications nos. 18766/11 and 36030/11, Judgment of 21.07.2015, paragraph 165.

146. *Ibid.*, paragraph 185-187.

147. *Orlandi and Others v. Italy*, paragraph 194.

ships, thereby violating Article 8 ECHR¹⁴⁸.

The case of D. and L. puts Bulgaria in a situation similar to that of Italy before it recognized same-sex family relationships. In view of this, Bulgaria violates D. and L.'s right to personal and family life, as guaranteed by Article 8 ECHR, by failing to provide legal protection for the marital status of the couple. The norms of the international legal acts to which Bulgaria is a party and which it has ratified are a part of the domestic law and have priority over the norms which contradict them, in accordance with Article 5(4) of the Constitution. At the same time, the ECtHR's judgments are binding for the states that have ratified the European Convention on Human Rights, even if the state itself is not the defendant in the specific case concluded with a judgment.

A consequence of the non-recognition of D. and L.'s marriage is the refusal of the Center for Assisted Reproduction (CAR) to finance an IVF procedure, as in the documents submitted, D. indicated in an explicit statement that her partner was a woman, and she submitted her wife's names¹⁴⁹. The refusal of the Center for Assisted Reproduction is entirely discriminatory, and the specified reason for the refusal is the inability of two persons of the same sex to perform their reproductive functions naturally and to create offspring. At present, the case has not yet been completed with an effective judicial act¹⁵⁰.

148. Ibid, paragraph 210.

149. Order no. ПД-04-38673 – 33150/24.11.2017 of the Ministry of Health, Center for Assisted Reproduction.

150. Administrative case no. 81/2018 of Administrative Court Sofia-City.

THE CASE OF C. AND M. PENDING BEFORE THE SUPREME ADMINISTRATIVE COURT

Statement of facts

M. is a citizen of the Republic of France and C. is a citizen of Austria. The two got married in France in 2014. In 2016, the two women moved to Bulgaria with the intention of settling on the territory of the Republic of Bulgaria for a long time. In December 2016, they filed an application for long-term residence of an EU citizen (M.) and a family member of an EU citizen (C.). Among the required documents, the certificate of marriage between the two was submitted. At the end of December 2016, C. was granted a long-term residence permit as a family member of a European Union citizen, with the grounds for issuing this permit being Directive 2004/38/EC. The long-term residence permit was issued for a period of one year. In November 2017, C. filed a new application for an extension of the period for her long-term residence on the same basis, namely a family member of an EU citizen¹⁵¹. The Director of the Migration Directorate issued a Refusal to issue a permit for long-term residence of a family member of an EU citizen in the Republic of Bulgaria¹⁵². The reasons for the refusal were: the Bulgarian law, namely that according to the laws of the Republic of Bulgaria, only a civil marriage concluded between a man and a woman is legitimate, and in addition to the Family Code and the Civil Registration Act, the legal basis of the refusal also referred to the definition of “marriage” in the Constitution of the Republic of Bulgaria¹⁵³. In the refusal, the

151. The submitted application was filed with reg. no. 53936/30.11.2017 on 26.01.2018.

152. Refusal of the Director of the Migration Directorate with Reg. no. 5364 p – 1715/ 26.01.2018 on an application with reg. no. 53936/30.11.2017.

153. Ibid.

Director of the Migration Directorate specified: “At present, the applicable law in the Republic of Bulgaria does not recognize same-sex marriages, as a result of which the submitted document of a marriage concluded in the Republic of France by persons of the female sex contravenes the provisions of the first sentence of Article 46(1) of the Constitution of the RB and Article 5 of the Family Code, therefore, the norm of Article 9a AERLRBEUCBCTFM cannot be applied to them. The same sex of the persons constitutes an obstacle to entering into a civil marriage under the Bulgarian law under the argument of the aforementioned provisions according to which marriage is a voluntary union between a man and a woman”.

Thus, within one year, from December 2016 to January 2018, the Migration Directorate completely changed its position and its legal argumentation, ruling in January 2018 in violation of Directive 2004/38/EC.

The refusal of the Migration Directorate was appealed before Administrative Court Sofia-City by C. In its judgment, Administrative Court Sofia-City found that the refusal of the Migration Directorate was contrary to the substantive law and accordingly, the act of the Migration Directorate was subject to revocation, as the competent authority must issue a new administrative act in accordance with the guidelines on the application of the substantive law¹⁵⁴. That is, the court reasoned its judgment with Judgment of 05.06.2018 on Case C-673/16 CJEU and held that in cases where an EU citizen had used their freedom of movement by going to a Member State other than that of which they are a citizen, and actually residing there in accordance with Article 7(1) of Directive 2004/38/EC, and during that time they had created and strengthened a family life with a third-country national of the same sex with whom they are bonded by a marriage legally entered into in the host Member State, Article 21(1) TFEU should be interpreted so that the competent authorities of the Member State not to allow a refusal to grant the third-country national a right of residence in the territory of that Member State on

154. Judgment no. 4337/26.06.2018 of Administrative Court Sofia-City.

the grounds that the law of that third country does not provide for same-sex marriage. In addition, the ACSC added that the refusal of the Migration Directorate to recognize a marriage between EU citizens of the same sex was a violation of Article 21(1) TFEU and accordingly restricted C.'s right to move and reside freely on the territory of the EU¹⁵⁵.

For the first time with this judicial act, a Bulgarian court issued a judgment recognizing the legal consequences of a marriage between persons of the same sex concluded abroad. In violation of the EU law and the case-law of the Court of Justice of the European Union and its mandatory application, the Migration Directorate appealed against the Administrative Court Sofia-City's judgment¹⁵⁶. In its appeal on points of law, the Migration Directorate claimed that Administrative Court Sofia-City had violated the substantive law and, as a ground for this, it indicated the constitutional norm of Article 46 of the Constitution of the Republic of Bulgaria. The Migration Directorate motivated its appeal with the inadmissibility of same-sex marriages in Bulgarian law according to which the Constitution and the Family Code defined marriage as a voluntary union between a man and a woman. "Persons of the same sex have no legal right to enter into a civil marriage under Bulgarian law", the Migration Directorate added in its appeal¹⁵⁷.

The case is currently pending before the Supreme Administrative Court.

The legal consequences of the Judgment of the Court of Justice of the European Union in Case C-673/16 Coman

The judgment of the Court of Justice of the European Union in Case C-673/16 Coman stated how Member States must interpret and implement the Treaties of the European Union and European legislation. The judgment is not limited to the specific case brought before

155. Ibid.

156. Appeal on points of law of the MoI, Migration Directorate, URI no. 536400-11471/13.07.2018, Copy 3.

157. Ibid.

the Court of Justice of the European Union but is a general statement on what the European law currently in existence is. The Coman judgment has an *erga omnes* effect and not just an *inter partes* effect, which means that it concerns all people, not just the parties to the dispute. In other words, this means that the Coman judgment is applicable immediately and generally everywhere in the European Union and there is no need for further transposition into national law. In this regard, the principle of the primacy of EU law requires Member States and their domestic courts to directly apply the judgments of the Court of Justice of the European Union, even where the application of such judgments would be contrary to national law. As a result of the Coman judgment, other married couples who submit documents for long-term residence in any EU Member State will benefit from the rights guaranteed to them in the judgment on the Coman case¹⁵⁸.

What would the legal consequences be for a Member State that does not comply with the Court of Justice of the European Union’s requirements represented in the judgment on the Coman case?

In the event that a Member State fails to comply with the Court of Justice of the European Union’s requirements represented in the judgment on the Coman case and continues to create obstacles to the free movement of EU citizens residing with their spouses of the same sex, this would be a violation of the EU law. Citizens affected by this violation could justify their claim to the domestic courts with the judgment and the reasoning of the Court of Justice of the European Union in the Coman case. The obligation of the domestic courts to implement the Coman case directly follows from the principle of the primacy of the EU law over national law.

158. According to Article 19 of the Treaty for European Union, the role of the Court of Justice of the European Union is to “ensure that in the interpretation and application of the Treaties the law is observed”. The judgment in the Coman case is the result of a reference for a preliminary ruling by the Romanian Constitutional Court requesting the Court of Justice of the European Union to clarify whether Romania has an obligation to guarantee the right of residence under the EU law to same-sex couples. This right stems from Article 267 of the Treaty on the Functioning of the European Union.

If there is a violation of the EU law and a refusal to implement the judgment of the Court of Justice of the European Union on the Coman case, the European Commission may also initiate an infringement procedure against a Member State¹⁵⁹. The purpose of this infringement procedure is for it to be brought to an end, that is, the Member State should be penalized for breaching its obligations to comply with the European law. The infringement procedure begins with a letter of formal notice through which the European Commission allows the Member State to submit an opinion on the violation. If an opinion on the letter of formal notice is not received or if the opinion submitted is unsatisfactory to the European Commission, the latter may move on to the next stage of the infringement procedure, a “reasoned opinion”, which the European Commission sends to the Government of the Member State which has violated the European law. If deemed necessary, the European Commission may refer the case to the Court of Justice of the European Union.

Conclusion

Recognition of a legal form of family relations between LGBTI individuals is essential not only in order to ensure the full exercise of one of the fundamental rights of EU citizens on which the functioning of the internal market and, more broadly, the development of a European integration system rests. It is not just a question of respecting the obligations arising from Bulgaria’s participation in the European unification and strengthening the mutual trust between our state and the rest of the EU Member States, but rather a necessary step towards guaranteeing human dignity, individual freedom and equality of citizens before the law. Recognition and protection of family relations between persons of the same sex is a key step in overcoming one of the last serious discrimination situations in our country, and without it, Bulgaria cannot claim to genuinely be a state governed by the rule of law. In this sense, the attitude of Bul-

¹⁵⁹ Article 258 of the Treaty on the Functioning of the EU allows the European Commission to initiate an infringement procedure against Member States where there is a violation of the EU law.

garian society and of competent institutions of the public authorities towards the recognition of same-sex family relations is critical for the future direction of the development of democratic order and the rule of law in our country.

PART THREE

(NON-)EXERCISE OF RIGHTS AND ITS REPERCUSSIONS ON THE LIVES OF SAME-SEX COUPLES

The topic of the difficulties encountered by same-sex couples with recognized marriage or registered partnership in another EU Member State during their stay in Bulgaria is being studied for the first time in our country. This part of the report is based on qualitative data collected between April and May 2018. Data are collected through semi-structured interviews with representatives of twelve same-sex couples, of which four gay couples and eight lesbian couples. Six of the couples are Bulgarian citizens, two couples are foreign citizens (both EU Member States and third countries) and four of the couples are mixed (a Bulgarian citizen and a citizen of another EU Member State). Eight of the couples have entered into a civil marriage, three couples have a registered partnership, and one couple lives as life partners. The interviews were conducted by representatives of the LGBTI organizations GLAS Foundation, Bilitis Resource Center Foundation and Youth LGBT Organization Deystvie.

Marriage and same-sex couples: (lack of) opportunities, motives and consequences

The motivation to marry a loved one may vary depending on a number of factors and circumstances, both personal and social. For the overwhelming majority of same-sex couples interviewed, the step of legalizing their relationship is the result of **careful consideration** rather than of a spontaneous and emotional decision. This is valid for all interviewed Bulgarian, foreign and mixed couples. The reasons for this are several. Often, the idea of legal commitment to a partner comes along with the **decision to have children**. For same-sex couples, this decision is always accompanied by many other decisions, including addressing the issues of parental rights and ensuring the future of children, ensuring a healthy social environment for

children and many others. For people coming from countries where there is no legislation regarding childcare in same-sex couples, it often means seeking alternatives in other EU Member States. Therefore, once they made the decision to get married, people in same-sex couples from countries like Bulgaria have to make **research the legislation of various European countries** and learn about the rules for entering into a marriage in those that allow people from the same sex to get married. The inability to get married in Bulgaria often forces people in a same-sex relationship to become some kind of experts in law, devoting much time and resources to studying European and Bulgarian legislation in search of the best possible solutions to ensure the stability of their families. Other couples decide to turn to law experts, in particular human rights lawyers specialized in LGBTI people's rights who can assist and advise them.

Given these prerequisites related to deciding to have offspring and studying legislation across countries, it is not surprising that most of the couples interviewed say that the **legal consequences** that arise from marriage and registered partnership are **the main reason** to decide on this step. The interviews show that the reasons are different for the individual couples – obtaining official status in order to accompany their partner while performing their diplomatic service abroad, full exercise of parenthood, the right to inherit the family property, meeting a requirement for access to a particular type of medical service for conception, etc. However, what is common for all couples is the conscious need to take this step.

The two foreign citizens' couples interviewed shared very similar reasons for concluding their registered partnerships – settling the partner's status in relation to the execution of work commitments abroad and providing the opportunity for accompanying and obtaining official status. For both interviewed couples, there was no option for same-sex couples to get married in their countries of origin at the time of the decision and therefore, they did not have to choose a form of commitment. Consequently, after the introduction of the possibility of marriage for people in a same-sex couple, one of the

couples got married.

For citizens of countries like Bulgaria, where a marriage concluded abroad has no legal consequences, the decision to legalize the relationship very often goes hand in hand with a **decision to emigrate from Bulgaria**. The desire of couples for their relationships to be legal largely predetermine their decision to settle permanently in another EU Member State, most often the country where they choose to enter into a marriage or registered partnership. While for some couples these two steps are logically linked and feasible, the decision to leave their homeland is a great challenge for others. Some of these couples say that the main reason to leave Bulgaria is exactly the inability to legalize their family here. Setting this circumstance aside, many couples say that they feel good in Bulgaria and like their way of life here, which makes their choice whether to stay in their home country or to continue their lives in a country where they could have a legitimate family especially difficult. In addition, the fact that the legal consequences are the leading motive to get married is also a prerequisite for some couples to feel compelled to legalize their relationships due to the lack of other alternatives for their settlement (for example, by recognizing a child).

... Of course, we needed a lot of time to research things, to see how it would be best for us, creating a family, having a child, and so on. In this regard, we decided ... These were not the only reasons for us to go abroad, but they were the main reasons. The idea was the following – to create a normal family and not to worry too much about the public attitude towards such a couple, just to live more peacefully. We had two options – to enter into a marriage or a registered partnership, but we decided that marriage is something that we needed to do in our own way and not at the moment, almost forcibly, so we chose a registered partnership.

~ A lesbian couple, with a registered partnership, living in the Netherlands

Although the decision to marry is often not taken spontaneously, for many couples, the **emotional charge** that getting married has is also of great importance. Considering the legal stability that a signature brings, many couples attach importance to the symbolism of this act as well. According to this criterion, the experiences of heterosexual couples and same-sex couples are not particularly different – for both getting married can have a deep emotional meaning.

I am a lawyer and while studying Roman law, we learned that marriage is making a commitment to the other person. You say: "I'm here and I'm beside you," and that's it. And this has many legal consequences, of course... It's just a little bigger commitment with a little more legal and other consequences. But it's also an emotional commitment, it's a complex of things. I like Shall We Dance very much, Susan Sarandon has a great line: "Your life will not go unnoticed because I will notice it. Your life will not go un-witnessed because I will be your witness".

~ A gay couple, married, living in the Netherlands

Same-sex couples in marriage: in Bulgaria or abroad?

Interviewed couples **living abroad** generally do not find any particular difference in their lives before and after entering into a marriage or registered partnership. The attitude of society and institutions towards the people in a same-sex couple in countries where the legalization of this relationship is possible is mostly positive and is not influenced by whether the relationship is formally recognized. At the same time, they share a number of legal and emotional implications that result from the formalisation of their relationships.

Three of the interviewed couples live in **the Netherlands**. In the Netherlands, for example, partnership and marriage are immediately reflected in electronic systems at the local and national level. Of these, many practical legal consequences arise, including joint property, family-law relationships, inheritance relationships, and so on, since all family and inheritance relationships are also applicable to

same-sex couples in a marriage or partnership. From the moment of reflecting the changed civil status, all administrative actions (such as paying taxes, completing declarations, filing annual statements of companies, concluding an insurance) are carried out only with the knowledge and written consent of the partner or spouse of the person performing the administrative action. Also, when being admitted in a hospital or receiving medical services, employees of medical establishments are required to notify the person's spouse/partner on the phone. By law, the surviving spouse is entitled to insurance in the event of their partner's death. In addition, entering into a marriage allows for dual citizenship. There is also a very important consequence of marriage with respect to parental rights over children, as the presence or absence of marriage is essential in recognizing or adopting children. Respondents say it took them a while to become accustomed to the administrative practical consequences in their daily lives, but that they also "bring satisfaction because they create normality" and "the feeling that you are a part of a family".

Another interviewed couple says the situation in **France** is very favourable to same-sex families as the state guarantees them a number of rights. The situation in **Ireland** is similar, as couples in registered partnership and married couples have the same rights, and the change in civil status brings many practical consequences. For the interviewed Irish partners, the change was mainly manifested in the status of the accompanying partner of an official performing duties abroad – obtaining an official status of the accompanying partner, changing the amount of payment, covering the expenses for a certain number of flights of the accompanying partner for the purpose of joining the two spouses, etc.

The women in the Bulgarian-British couple participating in the study say their lives in the **United Kingdom** have changed radically after getting married. Their status of a family has allowed the Bulgarian partner to accompany her wife to a two-year medical specialisation in Canada in 2011. The couple says they have decided to allocate the family roles so as the British partner takes care of secur-

ing the financial situation of the family and the Bulgarian partner takes household duties:

However, such allocation would not have been possible if we did not have a marriage guaranteeing a right over the family home, a right to a spouse's pension, a right to health care, a right to property, a right to receive insurance dividends in the event of the partner's death, for example. These are just some of the rights we have as legitimate partners in the UK, as we also had in Canada.

~ A lesbian couple, married, living in the UK

At the same time, the experiences of families **living or residing on the territory of Bulgaria** are radically different. Respondents say that **none of the spousal and partner rights they have in other EU Member States is recognized in Bulgaria**. This circumstance has both practical and a number of emotional and psychological dimensions on the members of these couples, including uncertainty about the future of the family and children, the family property, the financial stability, and a general feeling of inferiority and unequal treatment compared to heterosexual couples in Bulgaria. In terms of practical dimensions, for couples who have lived abroad for a long time, this is also a huge change in lifestyle. At the same time, the couples of Bulgarian citizens who have chosen to live in Bulgaria say that there is no tangible practical change in their daily lives, as their marriage does not have any consequences on the territory of our country. Families tell about the different aspects of their daily life in Bulgaria and how this affects their way of life and thinking.

Refusal of right of residence

The interviewed French-Australian couple shares their bitter experience in connection with their attempts at getting a **right of residence** in Bulgaria as a family. In 2016, under the Free Movement Directive, the Australian citizen accompanying her French partner

received a one-year right of residence in Bulgaria, but she got a refusal while submitting the same set of documents at the end of 2017. The couple turned to lawyers to seek their rights through the courts, not hiding their disappointment with the way the Bulgarian authorities had responded to the case:

Bulgaria totally ignored the application of Directive 2004/38/EC! We were discriminated against on the basis of our sexual orientation. This has a direct impact on our lives. First of all, we bought a house in Northern Bulgaria, but now we do not know whether we will be able to stay in Bulgaria because your state is undermining European law. Second, appealing the Migration Directorate's refusal costs us nerves, going to court, costs us money and time.

~ A French-Australian lesbian couple, married, living in Bulgaria

Inability for exercise of parental rights and access to reproductive services

Nearly all interviewed couples comment extensively on the situation with **the rights to their children** when they are in Bulgaria. According to Bulgarian law, two women or two men cannot be registered as parents of a child, which worries many of the respondents because they are forced to enter only one of the two partners as a legitimate parent:

I'm not okay with the fact that when I go home to Bulgaria, I have to actually register my child, with an apology for the expression, as a bastard. According to these obsolete Bulgarian family traditions which are blared forth so much right now, that's what my child is called. And I do not feel comfortable with this, because in the Netherlands, this child has two legitimate parents.

~ A lesbian couple, Bulgarian citizens, with a registered partnership, living in the Netherlands

Concerns about the care of children of those couples who have chosen to live in Bulgaria have a purely practical dimension. **Every-day situations** such as taking a child to a doctor or the kindergarten, signing a school note, sending the child to a school trip, or the like become a real challenge for a family in which only one of the parents has rights over the children. It is quite logical that parents in such families have to consider a variety of scenarios, including the darkest ones, in an attempt to prepare themselves, including in the event of the biological parent's death. This, of course, can be a traumatic experience, and that is why people usually avoid thinking about such options. For same-sex couples who want to secure the future of their children, however, this is inevitable:

The situation in our case is that if one of us gives birth to a child, since we are not a family in Bulgaria, she will be a single parent, the other will be no parent and will have no legal connection at all with the child in question, the same way she does not have a legal relationship with her wife. And if something bad happens to this child's biological parent, the child will have no parents at all. Thus, in an exceptional situation, there may not be a parent or relative of the biological mother to take care of them, and then the child will enter the system for children deprived of parental care. Even unlikely, these are realistic possibilities, and we have to think about them and look for a loophole because there is no official way.

~ A lesbian couple, married, living in Bulgaria

Other couples in which the partners have different nationalities also raise the question of parental rights in the case of the death of one parent, especially in the case where the Bulgarian partner is the children's biological parent and he/she dies. According to Bulgarian law, children should go to the deceased parent's immediate family, which creates the danger for "the grandparents to kidnap them in Bulgaria and say that these are their grandchildren who will no longer see their other parent".

Families worry that the inconsistency of Bulgarian law with European law can lead to a number of **legal absurdities**. It is unacceptable to them that under the laws in Bulgaria, it is possible for them to enter into other marriages in Bulgaria. Moreover, it would be possible for the spouse they married in Bulgaria to adopt the child and so in Bulgaria, this child would have a legitimate mother and father. In this case, in the Netherlands, for example, this child will have two legitimate married parents, and in Bulgaria, they will have two different legitimate parents, also married. There is no case-law¹⁶⁰ in Bulgaria to deal with such cases, and it is not possible to guess how a Bulgarian criminal court would treat a situation of bigamy in which the first marriage is a same-sex one and the second is an opposite-sex one, and therefore it cannot be stated whether persons in a situation of such bigamy would bear criminal responsibility.

Taking into account all aspects of the subject of parental rights, one of the interviewed couples has already decided that their children will only be granted British **citizenship**, although they would also be entitled to Bulgarian citizenship from the biological parent:

I do not want officials to tell my wife that she is not their parent because they are Bulgarian citizens! No matter how hard this is to me, because I love Bulgaria infinitely and as every emigrant, I often cry that my own country is my stepmother, not my mother, I will choose the best for my family and at the moment, it is not Bulgaria.

~ A lesbian couple, married, living in the UK

Another married couple, consisting of two Bulgarians living in Bulgaria, has filed a case for **refusal of financial aid** from the Center for Assisted Reproduction (CAR) at the time of the interview. The couple says that according to the rules of the CAR, aid is granted to a woman with proven reproductive problems, whether she has a spouse, a partner, or she is single. However, heterosexual couples are recommended to fill in the names of the spouse/partner as this

160. As of November 2018

relates to parental rights at a later stage. At the same time, in its refusal, the institution commented in detail on the marital status of the two women which they mentioned in the application form, using it as a reason not to provide funding. In addition, the institution's employees repeatedly advised the couple to submit the form again, this time not mentioning the name of the other partner, and the applicant to apply as a single parent to "save themselves the trouble" and get the funding. For the couple, this approach is unacceptable and offensive, and that is why they initiated the case.

Property and right to inheritance

The issue of **property and right to inheritance** is of particular importance to same-sex couples. Often, these issues are among the main reasons for couples to move on to legalizing their relationships. The interviewed Bulgarian-British couple, for example, says that their property in the UK is in the name of both spouses, while the property purchased in Bulgaria is owned only by the Bulgarian citizen. The partners say that this situation is very unpleasant for both, as it is clearly unfair. That is why the family is in doubt whether to make new investments in Bulgaria at all.

Meanwhile, a couple of Bulgarian citizens are considering buying a family home in Bulgaria and expect to soon be confronted with a lack of recognition of their family status by banks and credit institutions. The couple plans to draw a **housing loan**, and according to the rules, the income of married couples is calculated cumulatively, and young families are given tax breaks. However, due to the lack of recognition of their marriage, the couple expects that they will not be able to benefit from either of the two favourable conditions. The partners have made calculations according to which the losses from the inability to benefit from the tax breaks for young families would amount to between BGN 10,000 and 15,000.

With regard to inheritance rights between spouses, most couples have similar concerns and raise the same issues related to the conse-

quences for children from the inability to settle the parental rights. When only one of the parents has rights over children legally, children are legally entitled to inherit only this one parent. Thus, the lack of legislation in the field of parental rights disadvantages children in same-sex families by depriving them of property rights and the possibility to inherit both parents. Uncertainties also exist when it comes to who would have the right to inherit the property in Bulgaria of a Bulgarian partner in a mixed marriage after he/she dies.

Emigration

The decision for **emigration** often goes hand in hand with the decision to get married for same-sex couples from Bulgaria. The inability to get married in Bulgaria causes many couples to settle permanently in another EU Member State where they would have the right to enter into a civil marriage. Some of the interviewed couples share that, in addition to their rights as a couple, factors such as lifestyle, financial stability and peace have also contributed to making a decision to settle abroad. However, some of them say that if our country provided them with the same family rights, they would probably have chosen to stay. A couple of Bulgarian citizens tells us about the difficulties in deciding to emigrate to Spain. The two partners feel forced to emigrate and take this decision together, even though one of the spouses says it has been difficult for her to take this big step:

I want to live in Barcelona because she wants to live there. She wants to live there because it is legal there, also for children, etc., she wants to be ... she wants to be a normal citizen in the country she lives in. Obviously, this cannot happen at present in Bulgaria, and we cannot wait. I was okay here, however, even if I'm okay, it does not matter because you get together with someone who is not okay and from that moment on, you have to change your life or break up with this person, which again is a change in your whole life. I disagree with all these additional conditions that I have to cover to be with someone.

~ A lesbian couple, married, in the process of emigrating to Spain

A sense of injustice

The feeling that the rules for homosexual and heterosexual couples in our country are different is shared by all interviewed couples. This difference, as well as the need to take many extra steps in an attempt to provide peace to their families, creates a **sense of injustice** in same-sex couples. Its manifestations are different, as are different the techniques that the respondents use trying to deal with it. Among the emotions caused to LGBTI people by the unequal treatment they receive in Bulgaria is disappointment, anger, a sense of inferiority, fear, shame, alienation from their Bulgarian roots, unwillingness to live in Bulgaria.

Most interviewed mixed couples and couples of Bulgarian citizens say that they feel very tangible **discrimination** against themselves in Bulgaria. For most couples, this feeling has been reinforced by a comparison of the situation in the home country and other countries in the European Union where they have resided or where they currently reside:

At the beginning, when we came to the Netherlands, and seeing the state of affairs here... I accumulated extremely great anger towards Bulgaria. Anger, because you actually pay taxes, you live, you fight, you develop a business... You are obliged to observe all the rules, but I am told "You are a freak, you will not create freaks, you have no right to create a child in this way". And we are absolutely normal people, with the same emotions and needs that others have, and this discrimination towards us is not normal to me.

~ A lesbian couple, Bulgarian citizens, with a registered partnership, living in the Netherlands

The interviewed Bulgarian-British couple emphasizes that none of the rights guaranteed to them in the UK is available to them in Bulgaria. The couple also commented on the upcoming situation of Britain leaving the European Union and the British spouse's inability

ity to obtain **European citizenship** on the grounds of a marriage to a citizen of the European Union, as Bulgaria does not recognize the two women's marriage. This leaves a deep sense of frustration in the family, as European citizenship is something the couple is keen on. All the more so, because of the disorder in terms of parental rights in Bulgaria, the couple envisages that their children will only have British citizenship, which will mean that they will not be European citizens after the country leaves the European Union.

Another interviewed Bulgarian couple, recently married in Gibraltar, share its indignation that for same-sex couples, getting married could also be a big **financial challenge**. The women say that the costs of organizing their wedding are not small and that the minimum package of services is BGN 450, whereas, for comparison, a marriage for Bulgarian heterosexual couples is on average between BGN 50 and 150. This puts LGBTI couples in an even more difficult position, as not all who would like to get married can afford to cover travel, stay and administrative costs abroad.

The couple commented on the attitude towards parents and children of LGBTI couples in Bulgaria, opening up the subject of discrimination directed not only at homosexual people themselves, but also at their relatives:

It is not only us who feel repressed – our parents actually do, too. They do not realize this, but they are socially exiled as we are socially exiled. In the same way, our children will be socially exiled unless our family is recognized. It's just extremely unfair because I'm repressed in my own country, in my own city, and I actually perform all my obligations to the state, right? It's about very simple things, for example when you go to take your child from the kindergarten, not to be asked the question: "Who are you?"

~ A lesbian couple, married, in the process of emigrating to Spain

A Bulgarian couple, who at the time of the interview have a case for recognition of their marriage in Bulgaria pending, say that **their**

lives have changed radically, but not as a result of the legal consequences of their marriage but rather because of their choice to go on a quest for legal recognition. After marrying in the UK and returning to Bulgaria, they went to their municipalities by residence and, in keeping with the law, they wished to indicate their changed marital status. Once they were refused, they decided to initiate a case. The two respondents say the decision to initiate a case was the only possible step for them. In the couple's opinion, however, this type of attitude is rather an exception, especially among people in the LGBTI community:

Because we are married, for Christ's sake, what does a refusal mean?! Surely I would not feel okay with myself to just accept it and say: "Well, this is the country we live in, these are the times we live in, what could we do?". Because there is actually something that can be done. This type of attitude is widespread throughout society, but it is also really widespread in the LGBTI community – some kind of complete helplessness and, in a sense, an excuse: "We do not do anything because nothing can happen, things cannot be improved so it is better to stay low, to cover ourselves in some way, to try to make our own islands of peace."

~ A lesbian couple, married, living in Bulgaria

The couple is subject to enormous **emotional and psychological pressure** as a result of the case on the one hand, but also to public interest in their story on the other hand. As their case is a precedent for Bulgaria, the two girls find themselves into the spotlight almost immediately after the filing the case, and for the next few months, they are the subject of massive hate speech, especially online. The negative attitude of Bulgarian society towards same-sex couples and their right to marry and the institutional response have a serious impact on the couple:

The emotional burden of this is really great and there is no way not to be so – these are things that are crucial to our lives. When

there is a difference in the attitude towards us solely because of our sexual orientation, there is no way for our sense of justice not to be hurt. It's not exactly a sense of helplessness because we obviously try to do some things, but there is this feeling that the system is a priori not on your side and you need to try and persuade it all the time that you have the right to exist in the way you exist.

~ A lesbian couple, married, living in Bulgaria

Parallels between life in Bulgaria and abroad

The interviewed couples share the opinion that **a parallel between their lives in Bulgaria and in the EU Member States** where their families are recognized **cannot be drawn**. Respondents discover and share differences in all areas of life – public environment and attitudes, legislation, education, health, social services and others. The greatest difference is found in the levels of acceptance by and the attitude of society:

Everything is different! The recognition of marriage is essentially an admission that you may exist! That you are equal to everyone else. That you have a right to relationship and that you can make certain commitments to your partner. Marriage after all is an official recognition of the commitment you make to your partner, and it has a tremendous amount of legal and social consequences.

~ A gay couple, married, living in the Netherlands

Respondents say that, unlike in other EU countries, they have doubts about the extent to which they can be public and **open about their personal lives** on a daily basis in Bulgaria, and that they constantly have to adapt to different situations they find themselves in. Depending on the context, they present themselves as married and share their partner's sex openly or share that they are married but do not say what their partner's sex is, or directly prefer to declare themselves single. They say that they often have to make this choice

when they communicate with the administration, the health system or other institutions in Bulgaria because it is there where they are most often confronted with discrimination. Often couples choose not to share what their marital status is because they fear that it may harm them, or just because they want to save themselves reproaches, comments or questions. While some couples perceive the fact that they can make a choice about how to present themselves in different situations as an opportunity and rather look at it positively, for other couples the constant need to choose which part of themselves to reveal and how much can be a very challenging process:

These constraints I am putting myself are dictated by some sense of complex. In a situation you are in, not to do something that is quite natural to you because, firstly, there is a risk of disapproval, and secondly, because people who will express this disapproval are right not only in their own eyes but in the eyes of the whole society and the state. You are the person who violates some norm, or so it is believed, and we know that this is believed by a sufficiently large part of the Bulgarian society. But the fact that, purely legally, we are non-existent people as a family and as a couple, mean that the state encourages this kind of thinking.

~ A lesbian couple, married, living in Bulgaria

At the same time, respondents say that in the Netherlands, for example, it is not impossible for a person to be a **subject of discrimination**, not only on the basis of sexual orientation but also on the basis of their gender identity. One of the interviewed women says that her wife, who works in the construction business, often encounters astonished looks while on the job. The couple stresses that these moods have nothing to do with attitudes in Bulgaria, but that discrimination is still possible.

At the same time, most couples say that in **their personal contacts** in Bulgaria, as well as abroad, they are met mostly with good-natured or neutral reactions and do not report ever being subjected

to aggressive attitude.

Only one of the interviewed couples say **they cannot find any difference between their lives in other EU Member States and in Bulgaria**. This is the couple made up of a working diplomat and his partner. However, they specify that this is due to the fact that one partner is a working diplomat which gives him a different legal status. The couple says that thanks to the diplomatic status of one of the partners, the Bulgarian government has recognized their status as a family, although they are of the same sex, and gives them the same rights and attitude as all heterosexual diplomats and their families. The men say that their personal situation would not be different whether they are in a Western European state that recognizes same-sex marriages or not, but that is entirely due to the fact that they “live in a different category of people”. The diplomat comments that his life would probably be quite different if he had another profession and came to live in Bulgaria.

At the same time, one of the interviewed couples shares a number of difficulties encountered during their **residence in a third country**. The French-Australian couple says that although they are married, they have been discriminated against by UN structures. The interviewed French citizen is a diplomat who was sent to a mission in Morocco and, as a member of her family, her spouse with Australian citizenship accompanied her. However, the UN administration failed to settle the Australian spouse’s permanent residency status, which made it necessary for the couple to leave the country every 3 months over a period of 2 years in order to comply with statutory residence periods. The family shares that the United Nations did not take care of respecting their rights as a couple, even though they had this duty and did so for heterosexual couples. The women even share that, in an attempt to resolve the situation, the UN have offered to register the diplomatic officer’s wife as a maid in her house, which would entitle her to permanent residence. The couple, however, refused, defining this offer as humiliating. Shortly thereafter, the Moroccan authorities received an anonymous letter outing the

two women as lesbians and describing in detail how they look and how they live. After this event, the couple started to fear for their lives, so the diplomatic officer resigned and, together with her wife, settled in Bulgaria.

Family and social environment of same-sex couples in marriage

Getting married is one of the key events in a person's life and is usually accompanied by great interest and positive emotions on the part of the **family and relatives** of the newlyweds. However, this is not the case for all same-sex couples. Half of the interviewed couples say that the parents and relatives of at least one of the two partners do not support or disapprove of their relationship because they do not accept their child's sexual orientation. Other respondents say they have never shared with their family about their marriage or have told only chosen relatives, for the same reasons of non-acceptance and rejection. One of the couples say that they do not see much support from either family:

In the family in Bulgaria, we only informed the members that we thought would support us – my mother and my brother. My dad even now does not want to look at things as they are, and he accepts us as just friend living together. We have shared with other relatives over the years, but not with those for whom it was clear that they would neither support us nor make family meetings easier. We do not need their blessing. The situation in the UK with the Scottish relatives is similar due to the hardcore religiosity of my wife's family. Fortunately, though very religious, her closest relatives have always supported us, but both they and my wife prefer to keep it secret from the extended family because they do not want stupid questions, attacks or insults from people with minds set in the 19th century.

~ A lesbian couple, married, living in the UK

Respondents say the factors that may lead to negative attitudes of relatives to them getting married can be different – not perceiv-

ing same-sex marriage as “real” and “sufficiently serious”, religious motives, unwillingness for this to be known among the parents’ extended family and friends, etc. Many couples, though disagreeing with these arguments, often comply with their relatives’ demands not to comment openly on their marital status. This puts them in a difficult situation because it is necessary for them to constantly take into account and remember with whom they can act freely and from whom they have to hide parts of their lives, and which parts.

In addition, some of the relatives express concerns about the legal commitment resulting from a marriage or partnership. This is a paradox of a sort, as for the couples, this is often the reason for taking the step towards formalising the relationship. It turns out, however, that for some parents and relatives, the legal consequences may be an obstacle. For example, a couple says that one partner’s mother has expressed concerns about the effect of the legal commitment between the two women in the event of their possible separation, especially with regard to children’s rights:

My mother was afraid that maybe in the future, we could break up or have some misunderstandings, something could happen. And that the registered partnership and these rights my partner would receive were not according to her notions. And that if something happened to me or we broke up, the child had to stay with me and I had to raise it alone... And if something happened to me, they had to take the child, not my partner.

~ A lesbian couple, with a registered partnership, living in the Netherlands

At the same time, another part of the respondents say that their relatives who know about the wedding are very positive, happy for them, support them and are proud of them. An interviewed couple tells of the reaction of one partner’s parents when her wife asked for her hand from her father:

We were just about to start dinner and as a joke, she decided she would ask my hand from my father. So he took my hand, made a ges-

ture of cutting it off and gave it to her! (laughs) It was so much fun and it felt nice, and after my father's little scene, my sister played a very traditional wedding folk song. We made swung and danced around the room a bit.

~ A lesbian couple, married, living in Bulgaria

The families of some of the couples even took part in the wedding preparations and attended the event. A married gay man, for example, says he bought the engagement ring for his partner with his mother's help in Varna. Several of the interviewed couples say that the parents and close relatives of at least one of the newlyweds attended the ceremony and, for some couples, both families took part in the wedding. One couple even shares that because of the bad weather, the parents of one of the newlyweds could not travel to Amsterdam where the marriage was held but watched the whole ceremony online.

Most of the couples say that they were met with a lot of support and understanding from their **circle of friends** when they told them about the upcoming marriage/partnership. Respondents largely explain this support by the fact that they maintain a circle of friends consisting of people who are aware of their sexual orientation and have also accepted and supported them before the marriage. At the same time, some couples say that although their friends have accepted their relationship well, they do not always understand why they want to marry, and express concern about raising their future children. Among the questions that some interviewed couples have heard from their friends are "Whom the child will call mommy/daddy?", "Are not you worried about their development?", "Don't you think they will bully them at school?", etc.

When it comes to **the colleagues and the working environment** of same-sex couples, two main trends can be outlined – some respondents say they are fully open at their workplaces, but another part chooses not to talk about their personal life at work. Respon-

dents who are open to their colleagues say they have chosen their place of work because it was inclusive and have previously known they will not be in a hostile environment. Others have chosen to reveal their sexual orientation during their job interview, thus eliminating the possibility of falling into a homophobic working atmosphere, as well as the need to hide later. Respondents who are not open at the workplace most often share the notion that personal life must remain personal, which is why they make this choice.

Almost all interviewed couples say they **talk about their marital status in different ways** depending on the interlocutor or the situation in which they need to comment on this. On a daily basis, they have to assess whether and how to disclose information about their sexual orientation and their marriage/partnership. This applies particularly to the territory of Bulgaria, where their marriage or partnership is not legally recognized. Among the interviewed Bulgarian couples, there is a trend to hesitate to whom and how to provide information about their marital status, and some of them even choose not to comment on the subject with their parents and relatives. Couples share that they make this decision each time based on several factors, including how close their interlocutor is, whether coming out to them can lead to various negative consequences, incl. whether there is a potential risk for them to be physically attacked if they are open about their personal lives, etc.:

While Bulgaria does not recognize our union, a marriage or as they want to name it, I will continue to answer in Bulgaria that I am not married to a man because I am married to a woman (TN: омъжена/женена. In Bulgarian, there are different words depending on the gender of the person one is married to). It's a grammatical detail, but even without it, until my marriage is officially recognized, I will decide, as I do now, who deserves to know the truth and whom I do not care about.

~ A lesbian couple, married, living in the UK

For example, almost all married couples say that when filling in documents in Bulgaria where they should indicate their marital status, they choose to write that they are not married. The main reason for this is that their marriage/partnership does not have a legal weight in our country, so entering their real marital status can make the document contain a false statement and they may potentially bear criminal liability.

At the same time, most interviewed couples share that in private conversations they talk more openly about their family and do not hide that they are married to another person. Such openness occurs mostly, but not only, in couples with mixed citizenship or entirely composed of foreign citizens. Respondents say that the reactions of individuals to their families are usually neutral to positive. Many couples note that personal contact is often a very powerful tool for dealing with discrimination and hatred and that they are usually met with understanding on a purely human level.

Personal stories: “My Family”

Each of the twelve same-sex couples shared many of their thrills, joys, challenges and disappointments during the interviews. Their stories are both ordinary as they include elements inherent in most love stories, as well as unusual, revealing many challenges that most heterosexual couples do not even suspect about. Below are the stories of four of the families who participated in the study, presenting clearly the mix of experiences through which same-sex couples pass.

A lesbian couple from Bulgaria, with a registered partnership, in the process of moving to Barcelona

A: We have known each other since 2011, we met through mutual friends.

B: I had a birthday, but I did not plan to celebrate it, however, a friend of mine was visiting and we decided to go out. There, we saw

some of our friends with another group and that's how the two of us met. At some point in the evening, I looked at her and I felt the butterflies in my stomach!

A: Over the next few months, there was courtship, and at one point things happened. After 4 months, however, we broke up. This break-up came very surprising to me, very surprising. I was in a very difficult period at work, I had a lot of work, a lot of stress, and that made the situation very tense. Obviously, I had not handled it very adequately, and she had not known how to react, and at one point she just broke up with me! It was the shock of my life! After a few months of total silence, she decided to Skype me and we renewed our relationship.

B: I personally realized that she was my person when we got together for the second time in 2012. It was the first time that I wanted to get back together with a person with whom I had broken up, and that was a clear sign for me.

A: I proposed to her about two years ago, it was about the time of the anniversary of the first time we met, in March 2016. It was clear to me that this was some kind of logical continuation of our relationship, it's just the way I felt it. I think we had reached a point in the relationship, where we had to make the next step strategically, because I noticed that she did not see any development, and development was very important to her. And also, because we think of having children in the long run, the idea was to get married before that so we can move to Spain and give birth to them where our marriage is recognized and we can both be registered in the birth certificate. The moment I decided it, I prepared everything very quickly, I did not hesitate at all. It took some time to buy the ring, about 45 days, because it could not be just any engagement ring. I proposed to her here, on this sofa.

B: Yes, here is where she proposed me, she fell on her knees and I... I started crying! (*both laugh*)

A: It was very simple and at the same time exciting. At that point

in my life, we did not have much options for some very original elaborations, and she had waited enough in her head for me to do it, so I just proposed to her. We are pretty much the same in these things, it turns out that we have both been strained by the idea of a big wedding with dresses and many guests. In fact, I enjoyed very much a wedding where it was just us and the witnesses at a place far away. We just ran away and did it.

A: The ceremony was in Gibraltar, there are a lot of agencies that organize weddings there. You can even marry at the notary's office where Yoko Ono and John Lennon married, but weddings can only be done from Monday to Friday, and we had to get married on Saturday so as not to take much time off from work. (*laughs*) And we actually chose a huge hotel – yacht which was anchored in the harbour. The ceremony was in one of the conference rooms of the hotel, and we could see the sea through the windows. The room was small, and it was just us, the official from the notary's office, the witnesses, the wedding agent, and the photographer.

B: We wanted to play David Bowie's Absolute Beginners during the ceremony, but we could not to it. (*both laugh*)

A: It was huge hysteria – this wedding and the preparation. But as soon as the ceremony was over, we got into the car and left for Malaga on our honeymoon trip. We did not have any relatives with us, we took two different approaches towards our families. Just before we left, I told my mother that we were going for that. It was important for me to tell her and also get her approval. But she answered me with: "No, I'm reserving judgment." My brother responded in a similar way: "I'm reserving judgment, but I support you." We recently had a quarrel again with them, I left angry, so the fight with them continues.

B: Now that we are 30 years old... it does not matter that much, you know, the problem is theirs rather than ours.

A: Yes and no, because it still affects us, it is our problem too, to some extent. At least it affects me.

B: I actually told my parents about 10 days ago, around Easter time, the family was in Teteven. In fact, I did not say anything because my mother saw the ring and I decided to deflect the subject, as my brother and all relatives were there and I did not need my “Spanish gay issues” being discussed all the time. This always becomes the main topic of conversation. A little later that evening, however, I went for a smoke and my father ambushed me:

“Did you get married?”

“Well, yes, I told you she was my person.”

“Now, take this ring off and put it aside not to bother your mother.”

I took it off for the evening, but I had it back on in the next few days. The question was not raised anymore, but I suspect that at some point, the information will be passed on to my mother.

A: I already talk absolutely directly about my marital status, I do not feel any reason to hide what is a fact. In general, I do not come out, but now things have changed. I have not told some of my colleagues because I know they are ill-disposed to this, but as a whole, if someone asks me, I answer directly. After all, I will not hide that I got married! For me, our marriage is like a team work, as if the team has already been enrolled and playing at the Olympics. (*laughs*) If you look at it from the very beginning, with this slow start of our relationship, with the break-up, then how we got back together... In time, we have actually gone through many phases, and we have not yet reached this phase in which when one of us says something, the other one understands it without the full work being said. At the same time we know very well how to support one another in difficult situations and how to push one another forward. We both have the same values, we look at the world in a very similar way, despite our quite different characters, and in general, the fact that we got married is just a confirmation of the fact that we keep looking in the same direction.

A lesbian couple from Bulgaria, married and with two children,
living in Sofia

We met back in 2007, we had the same crowd and friends. We have been together since December 2014. We liked each other the first moment we met, but due to different circumstances, fate did not bring us together until a casual meeting at a common friend's birthday party and a not-so-random joke that one was always the other one's "soft spot". Right then, when the remark of the "soft spot" slipped away, I realized that this was my person when that feeling of sharing, happiness and total harmony between us appeared; right then, when you cannot imagine how you could live a day without her.

Contrary to the logic of "marriage then children", the step of getting married came after having children. The formal approach to this step is yet another way to show your love and intentions to your partner. Marriage is a formal union before the law, but at the same time it also has a great emotional charge. After all, it gives a sense of security and shows the seriousness of a partner's intentions. Besides, we wanted our children to know that they were not the result of just an affair, but rather the opposite. We got married after their birth and they attended the ceremony. Everyone who knows about our marriage is very happy and supports us. The way they have always accepted our relationship, then our children, they now accept our marriage. We got married in Copenhagen, Denmark. The ceremony was traditional, nothing different than the standard ones that are being performed in the municipal ceremonial room.

In Bulgaria, we have never been asked questions about our marital status. But it is a fact that people – some of them close, some of them not so much – are always surprised at first.

Our family consists of two working mothers and two-year old twin boys – very naughty, playful and unruly, whom we raise in Sofia with the help of half our building. Our neighbors help us a lot and have never ignored or discriminated against us, but rather the

opposite. We pay our taxes, we try to travel more in the country and abroad, to live in harmony with ourselves and the world around us.

A gay couple from Bulgaria, married and with two children, living in Amsterdam

I saw him at a gay party during a gay pride in Amsterdam, we spoke a bit and then started going out. And we've been together for five years now. Even on the first or second date, I was sure that this was my person, and back on the first date, we were already talking about children. I proposed to him half a year after we had gotten together. In fact, it had not even been six months, but on New Year's Eve we were at the same party in Amsterdam. The place is called Paradiso, it is a former church and it has been a nightclub for the last 30-40 years. And I thought it was a very appropriate place, and it had been six months, and it was New Year's Eve, and everything. In principle, I am not very open, I am now more open because there is no other way, you know, but at the time, I did not mention it to many colleagues, mostly to former colleagues. But the friends and family were very enthusiastic about the engagement. Our friends were very funny, especially those with whom we were together at the New Year's party. We had separate home parties before 12 pm and then we all gathered at the party at Paradiso. At the home party, I deliberately barely drank because I thought it was not a good idea. But I managed to get my friends drunk, as it should be. And we went to Paradiso where I proposed, and, of course, we immediately told everyone. Six months later – and it was not a joke – I had the following conversation with two of my friends who attended the event:

“That ring, why do you wear it?”

“Because I am engaged.”

“Engaged?! When did that happen? This is great news!”

“On New Year's Eve, and you were there.”

“Oh! Now I think I remember...”

And I see it in their eyes that they remember absolutely nothing! *(laughs)* So that's how the friends were, but in general, everyone was very enthusiastic and very supportive. My mother helped me choose the ring, I bought it in Varna. Try to explain that your wife's fingers are a little big when they ask you "Why is the female ring so big?". *(laughs)* So it was then that I proposed and one year later, we got married on 9 February 2015.

Our ceremony was very simple at our choice. At first, we were thinking of something a little bigger, but we both did not feel comfortable with big pompous ceremonies, and the children were already on their way, so we wanted to save money for them. And what did we decide? We decided to get married for free, Monday morning at nine o'clock! *(laughs)* It's very funny because we lived very close to the municipality building, and just imagine us coming out of the house with wedding suits at 8.30 on a Monday morning! We walked along the canal, and we saw people coming home after a night of drinking or going to work, and we were going to get married! *(laughs)* We had a very small circle of guests, only twenty people, a little more from his family. My parents eventually decided not to come, mainly because it was February, and they were worried that the weather would be very bad. But they watched the whole thing on Skype. After the ceremony, we hired a boat along the Amsterdam canals and then lunch. Then we got home about three in the afternoon and put our sweatpants on. It was really funny!

So far, we may have been lucky when being in Bulgaria for having either positive or "neutral" reactions – at least to our faces. We get a lot of questions about the kids – what the process is exactly, "who will they call mommy?", whether we are worried about their development or whether they will be bullied in school, etc. But my relatives and close friends for now are okay with our family. Our life is as normal as it can be, even a bit boring! Because of the children, we are in contact with many other parents, most of them in the usual heterosexual configuration, and we do the exact same things and we face the exact same problems as them: who will do the shopping,

who will clean the house, who will take the children to the kindergarten, who will take them home, why they have a fever and are they teething, whether their poo is the right color, whether they eat enough vegetables and so on.

A Bulgarian-Scottish lesbian couple, married, living in the UK

We were introduced by a mutual friend in 2005 in Glasgow. We've been together for 12 years, and we've been happily married for 11 years now.

In the beginning, our relationship was limited by the visa regime between Bulgaria and the UK. Once they even refused to give me a visa, so my partner traveled to Bulgaria every two months, until I received a visa and the right to work in the UK a year later. We started living together and 6 months later, we decided to enter into a civil union. The main reasons were not only emotional but also practical. A new phase of our lives was beginning and we were looking for security.

We entered into a civil union in 2007 in Glasgow, in a narrow circle under the sound of bagpipes. Scottish and Bulgarian. At our choice. Most of our guests were British and we had a few friends from Bulgaria and Austria. The neighbours also paid their respect and the party continued until the morning. In the family in Bulgaria, we only informed my mother and my brother. My dad even now does not want to look at things as they are, and he accepts us as just friends living together. We have shared with other relatives and friends in Bulgaria over the years, but not with those for whom it was clear that they would neither support us nor make family meetings easier.

The situation with the Scottish relatives is similar due to the conservative religiosity of my wife's family. Fortunately, though very religious, her closest relatives have always supported us, they understand that God loves all his children. Both they and my wife do not consider it necessary to inform relatives with minds set in

the 19th century, and they think it's none of their business. For my wife's nephews, it is quite normal that we are together. They were born when we were already married. My nephew in Bulgaria was 14 years old when I just sat down and talked to him about love, about people and about what family really was. Now he is 23, he likes our friends, he likes to travel with us and to discuss life. No, he's not gay. He understands that people are different and there is nothing wrong with that. The bad thing is when they are evil against one another.

And the similarities end here.

The state policy, expressed in equality of rights and obligations before the law and respect for human rights in the UK, is the main reason why we chose to live here and not in Bulgaria.

We divided our family responsibilities according to our personal situation. I took the household and invested my time to make our home cozy, and to build another one in Bulgaria, my wife focused on her career and took the financial responsibility for the family. It sounds like stereotypical 19th-century role models, doesn't it? Only it's a free choice, not an obligation. This choice we made together would not have been possible and secure without a marriage guaranteeing us both the right to our family home, the right to the spouse's pension, the right to health care, property rights, including the right to receive insurance dividends in the event of one partner's death, and the right to mutual children, whether adopted or biological.

A few years later, my wife, who is a doctor and a British citizen, was given an opportunity for a two-year specialization in Canada. I accompanied her, and this was only possible because both countries recognized our marriage. I was entitled to medical assistance, a right to work... in short, everything to which a heterosexual family is entitled.

And in Bulgaria – the law separates us!

She is no one, she is not my wife. Her name does not appear in any document.

In the state of absurdities, it would not be a surprise if one day someone accuses me of lying when filling out a declaration of marital status, for example.

We have decided that our future children will be British citizens only, until Bulgaria recognizes the right to a legal union for gay people.

A sad and very difficult decision for me. I am proud to be a Bulgarian. I am a patriot. I love my homeland, but I am ashamed of our state and the lack of interest and understanding that Bulgarians have about the problems of LGBT people.

I hope that Bulgarian politicians will find the strength for political decisions that will unite people rather than spread hate.

Conclusion

This third part of the analysis presents data from the first survey on same-sex families and the exercise of their right to free movement in Bulgaria. The analysis of the collected qualitative data points to several main trends. First, the leading motive for entering into marriage or registered partnership for same-sex couples, regardless of the partners' nationality and citizenship, are the legal consequences, especially in terms of parental and inheritance rights, as well as acquiring official status. Second, due to the importance of legal settlement and recognition of family status, for many Bulgarian couples, this also means making the decision to leave Bulgaria and settle permanently in another EU Member State where same-sex marriages are recognized. Third, when comparing their lives abroad and in Bulgaria, all families except the one of an acting diplomat share the view that none of their rights as spouses and partners they have in other countries are recognized in Bulgaria, among them the right of residence, the exercise of parental rights, property rights and the right to inheritance. Respondents say there is no parallel between their lives abroad and their lives in Bulgaria. Fourth, same-sex families associate Bulgaria with a strong sense of injustice due to the

systemic discrimination they face by institutions, and the negative public attitude and stigma towards same-sex relationships.

Regarding family and social environment of same-sex couples, there are two equally pronounced trends. On the one hand, the negative attitude, non-acceptance and rejection of LGBTI people and their families by their parents and relatives is still a serious factor in the lives of many respondents. This inevitably leads to a number of negative consequences for the emotional and mental state of the respondents. On the other hand, many respondents say they enjoy great support and understanding from their parents, relatives and friends. Regardless of the degree of acceptance in their personal circle, however, all LGBTI people are confronted daily with the need to choose whether to disclose information about their sexual orientation and their marital status in the workplace and in communication with institutions and representatives of the administration.

RECOMMENDATIONS AND POSSIBLE SOLUTIONS

Taking into account the findings of this report, it must be concluded that, in order to ensure the full exercise of the right to free movement of EU citizens, the ensuing rights, as well as the fundamental rights regulated in the CFREU, the Bulgarian legislation should provide for regulatory solutions in two directions.

Firstly, as regards **marriages between persons concluded in other EU Member States or third countries, an explicit basis and procedure for their recognition should be provided for the purpose of exercising the right to free movement in the Republic of Bulgaria**, and the persons who have concluded such marriages should be guaranteed the full scope of rights provided for spouses under Bulgarian law. Secondly, although there is no obligation for it to authorize marriages between persons of the same sex under its jurisdiction, **the Bulgarian State is bound by both the ECHR and the EU law to protect family relationships between individuals from the same sex in a certain form**. The most appropriate solution in this respect is the introduction of a registered partnership or a de facto spousal cohabitation in the regulation of family relations. What specific nature of rights should be included in the scope of this regime is a matter of further judgment, but in order to achieve compliance with Article 8 ECHR, individuals should be guaranteed at least those rights which, according to the ECtHR, are inherent in the protection of family relations within the meaning of the Convention.

In the absence of explicit arrangements for the recognition of

marriage, a registered partnership or a de facto cohabitation between persons of the same sex, in the light of the Coman judgment, the competent national authorities should **guarantee the full exercise of the right to free movement and all other ensuing rights for EU citizens by ensuring the direct application of those rules of EU law that have direct effect and by safeguarding the rights provided for therein, regardless of the authorisations existing in domestic law.** In this respect, it should be borne in mind that both the general right to free movement and the arranged specific forms of free movement linked to economic activity are characterized by a vertical and horizontal direct effect. A significant part of the provisions of Directive 2004/38/EC are also capable of giving rise to a direct effect. On the other hand, on the basis of the principle of relevant interpretation, national authorities should also interpret broadly domestic provisions conferring rights on spouses and persons in family relations by allowing the exercise of these to LGBTI individuals who have entered into a marriage, a registered partnership, or a spousal cohabitation in another EU Member State.

The fulfillment of these obligations arising under the EU law would lead to a substantial change in the legal situation of a significant circle of LGBTI individuals who are citizens of other Member States and citizens of the Republic of Bulgaria and who have entered into a marriage or a registered partnership or have established family relations in another country. Under such circumstances, **a refusal to recognize a legal form of same-sex family relations formed in Bulgaria would constitute discriminatory treatment based on sexual orientation within the meaning of Bulgarian law and the ECHR.** Such a situation would also constitute a continuing violation of Article 8 of the Convention, in the light of the well-established case-law of the Court in Strasbourg.

The lack of an adequate response to the outlined problems related to the exercise of the right to free movement by EU citizens who have family relations with persons of the same sex creates **prerequisites for allowing a significant range of violations of these**

rights with different associated consequences for Bulgaria. On the one hand, the outlined situation is not a favourable factor in the choice of our country as a destination for the exercise of the right to free movement which deprives the Bulgarian society and economy of the opportunity for maximizing the positive effect of our participation in the European Union and the Union's common internal market. On the other hand, the existing situation has no positive effect on the return to Bulgaria of Bulgarian citizens who have formed family relations in other countries of the European Union or in third countries. In cases where the recognition of an existing marriage, registered partnership or cohabitation in another EU country has been refused for the purpose of exercising specific rights guaranteed by the Treaty and Directive 2004/38/EC, there may also be pecuniary or non-pecuniary damages for which our country is liable in line with the Francovich principle¹⁶¹. Finally, it cannot be ruled out that, at a certain stage, the lack of a legal framework for the recognition of family relations between LGBTI individuals formed in another EU country or a particular case of violation of the rights to free movement due to the lack of such legal framework can be the subject of an infringement procedure before the Court of Justice of the European Union and lead to our country being convicted of violating some of the fundamental elements of the legal order of European integration.

161. Judgment of 19 November 1991, Francovich, Joined cases C-6/90 and C-9/90, ECLI:EU:C:1991:428.

LIST OF ABBREVIATIONS

ACSC	Administrative Court Sofia-City
AERLRBEUCBCTFM	Act on Entering, Residing and Leaving the Republic of Bulgaria by European Union Citizens Who Are Not Bulgarian Citizens, and Their Family Members
APC	Administrative Procedure Code
SAC	Supreme Administrative Court
CAR	Center for Assisted Reproduction
CCP	Code of Civil Procedure
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CPC	Criminal Procedure Code
CPIL	Code of Private International Law
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community

EU	European Union
FC	Family Code
LGBT	Lesbian, Gay, Bisexual and Transgender
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LTFA	Local Taxes and Fees Act
OJ	Official Journal of the EU
RB	Republic of Bulgaria
SG	State Gazette
SIS	Schengen Information System
SM	Sofia Municipality
TFEU	Treaty on the Functioning of the EU
USCRASP	Unified System for Civil Registration and Administrative Service of the Population

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Treaty on the Functioning of the European Union

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Homophobia and unfair treatment of LGBTI people are still widespread in the European Union. Indicators of their level in individual Member States vary and the situation is seemingly better in some countries, but the data show that full equality for this group has not been achieved in any of them. Bulgaria is one of the countries where the situation is most unfavourable. In order to shed light on one of the contributing factors, this analysis presents the results of a study on the application of the Free Movement Directive to LGBTI couples on the territory of the Republic of Bulgaria. The analysis includes a review of the rights guaranteed to EU citizens and an analysis of the measures and deficiencies in the implementation of the Directive in Bulgaria, a review of administrative and judicial practice in the country and data from a national survey of same-sex couples with recognized status in other EU Member States who reside temporarily or live in Bulgaria.

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