

Durable Relationship and Family Members “by Analogy” in the European Union

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Abstract

Rights of residence derived from a durable relationship with an EU citizen, are left to a relatively wide discretion of the Member States. Pursuant to Article 2.2 (b) Directive 2004/38/EC (“Directive”), “*the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State*” qualifies as family member. Provided that they have a durable relationship (duly attested) with an EU citizen, pursuant to Article 3.2(b), unregistered partners are as well beneficiaries of the Directive. The durable relationship was expressly excluded from the scope of Article 2(2)(b): “*Unlike the amended proposal, it does not cover de facto durable relationships*” (EU Commission, Document 52003SC1293). Article 3 (2)(a) covers “other family members” (no restrictions as to the degree of relatedness) if material support is provided by the EU citizen or by his partner or where serious health grounds strictly require the personal care of the family member by the Union citizen. Pursuant to Article 3.2, “other family members” and unregistered partners can attest a durable relationship, must be facilitated entry and residence, in accordance to the host Member State’s national legislation. In the light of Preamble 6 Directive, the situation of the persons who are not included in the definition of family members, must be considered “*in order to maintain the unity of the family in a broader sense*”. *The questions discussed in this paper are the following: (i) are Member States genuinely considering the concept of durable relationship in view of maintaining the unity of the family in a broader sense? and (ii) how to overcome legal uncertainty and which criteria, both at EU and at international level, can be taken into account in order to assess whether a durable relationship is genuine and should be granted the rights set forth by the Directive?*

Keywords: durable relationship, family, marriage, partner, spouse, directive 2004/38

1. European Court of Justice (ECJ) Case-Law

Emotional dependence is covered by Article 3(2) (b) Directive, if a durable relationship can be duly attested. The partner with whom the Union citizen has (only) a durable relationship, may enforce derived right of residence, but does not qualify as a family member or “other family member” of the EU citizen. In any circumstances, Article 3(2) is not sufficiently precise to be directly relied on by an applicant. In *Rahman and Others* (ECJ 2001), the European Court of Justice (“ECJ”) has clarified the content of the specific ‘facilitation regime’, applicable to other family members, pursuant to Article 3(2) Directive, namely: (i) absence of an automatic right of entry and residence; (ii) the obligation to enact a facilitation regime according to national law for which Member States enjoy a wide margin of discretion; (iii) the discretion is not unlimited (Peers, S., Hervey T., Kenner J. and Ward. A, 2014).

In *Secretary of State for the Home Department v Rozanne Banger* (ECJ 2017), Advocate General Bobek takes a step forward on the path to enhance unregistered partners’ entry and residence rights. The dispute in the main proceedings concerns unregistered partners of “returning” Union citizens (i.e. Union citizens who return to the Member State of which they are a national). The questions referred to the ECJ for a preliminary ruling, can be summarised as follows: (i) whether the principles set out in the ruling in *Singh* (ECJ 1990) apply *mutatis mutandis* to unmarried partners of “returning” Union citizens (i.e. Directive 2004/38/EC applies “by analogy”); (ii) alternatively, can unmarried partners of “returning” Union citizens, enforce rights of entry and residence directly derived from the Directive (in the capacity of “other family members”)? (iii) is a rule of national law which precludes an appeal to a court or tribunal against a decision of the executive refusing to issue a residence card to a person claiming to be another family member compatible with the

Directive? (Tekofsky A, 2007, Collet B, 2017; Elsuwege P.V. and Kochenov D, 2011; Honohan I., 2009)

AG Bobek takes the view that in interpretation of Article 45 TFEU or on a subsidiary basis of Article 21(1) TFEU, as the case at issue, Article 3(2) Directive applies by analogy. However, it cannot lead to any automatic right of residence (can only reach as far as Article 3(2) itself could have reached, if it were directly applicable). The Advocate General recalls that the notion of ‘family’ under Article 8 of the European Convention on Human Rights (“ECHR”) is not confined to marriage-based relationships and may encompass other de facto “family” ties where the parties are living together out of wedlock’, in situations where children were born out of wedlock (ECHR, Schalk and Kopf v Austria). Finally, AG Bobek underlines that “*with regard to who is effectively ‘close’ to a person, formal box-based generalisations are hardly appropriate*”.

In *Coman and Others* (ECJ 2016), the questions referred to the ECJ by the Romanian Constitutional Court, cover all the relevant options provided for by the Directive 2004/38, recognition as spouse of an EU national who has exercised the right to freedom of movement under the EU Treaties, and recognition as “another family member” or a partner with whom the said Union citizen has a durable relationship, duly attested (Groussot X. and A. Zemskova A., 2019). Although ruled out by the suggested recognition in the capacity of spouse (Battaglia F., 2018), the Advocate General addresses the possible recognition as “another family member” or a partner with whom the (“returning”) Union citizen has a durable relationship, duly attested. The ECJ disregarded the possible recognition as “another family member” or a partner with whom the (“returning”) Union citizen has a durable relationship, duly attested. In the same case, referring to the judgment in *Metock and Others* (ECJ 2008), Advocate General Wathelet emphasises the irrelevance of the fact that the couple did not live continuously together: “*In a globalised world, it is not unusual for a couple one of whom works abroad not to share the same accommodation for longer or shorter periods owing to the distance between the two countries, the accessibility of means of transport, the employment of the other spouse or the children’s education. The fact that the couple do not live together cannot in itself have any effect on the existence of a proven stable relationship — which is the case — and, consequently, on the existence of a family life.*” Such an observation should apply mutatis mutandis to unmarried partners (e.g. the national legislation in Belgium provides for a clear alternative to the cohabitation for at least one uninterrupted year, notably the partners have known each other for a minimum of two years (Arcarazo D. A., 2009 ; Lansbergen A., 2009). Lastly, in *Coman and Others*, Advocate General Wathelet, relies inter alia on the interpretation of the EU law “*in the light of the present-day circumstances*” (i.e. increase in the number of Member States allowing marriage between persons of the same sex). It must be observed that today, more and more couples make the choice of free union. Expressly excluded from the scope of Article 2(2)(b) Directive in 2004, the concept of durable relationship should be reconsidered in the light of the present-day circumstances.

2. Definition of Family Under International Instruments

To consider the concept of *family in a broader sense*, the definition of family under international instruments (Manca L., 2018; Banda F. and Eekelarr J., 2017)) must be briefly overviewed. The U.N. Human Rights Council recently outlined that there is no definition of the family under international human rights law. According to the Human Rights Committee, the concept of family may differ in some respects from State to State and that is therefore “*not possible to give the concept a standard definition.*” Similarly, the UN Committee on Economic, Social and Cultural Rights has stated that the concept must be understood “in a wide sense” and “in accordance with appropriate local usage.” Likewise, the notion of “family environment” in the Convention on the Rights of the Child may encompass children’s social ties in a wider sense. The Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Alston P. and Megret F., 2018)) defines the family as encompassing all relationships that, under applicable law, “*produces effects equivalent to marriage*” (see art. 4 and art. 44(2)). However, international standards set forth at least two minimum conditions for the recognition and protection of families at the national level, namely (i) the respect for the principle of equality and non-discrimination; and (ii) the effective guarantee of the best interest of the child. Art. 1 of the International Labor Organization (ILO) Convention on workers with family responsibilities, set forth that the *Convention shall also be applied to other members of their immediate family who clearly need their care or support*”, and, furthermore, in its Recommendation n. 165/1981, ILO outlines that protection under the ILO Convention must be guaranteed also “*to other members of their immediate family who need their care or support, where such responsibilities restrict their possibilities of preparing for, entering, participating or advancing in economic activity.*” The European Migration Network outlined that when partners are not formally married, other forms of partnership can be proved through a civil union contract or a registered partnership agreement (Guth J., 2011). Where the scope of family reunification has been extended beyond the core members of the family, as a general rule applicant must submit relevant documents that support the existence of the relationship (UNHCR, 2015). Documentary evidence is also required in the case of extended family members who are dependent on the sponsor, for example continuous and long-term wire transfers via a bank to prove material dependency. The OECD Glossary of statistical terms, defines “*foreigners admitted for family formation or reunification*” as foreigners admitted because they are the immediate relatives of citizens or foreigners already residing in the receiving country or

because they are the foreign fiancé(e)s or the foreign adopted children of citizens. The definition of immediate relatives varies from country to country, but it generally includes the spouse and minor children of the person concerned. The European Court of Human Rights (Guide on Article 8, 2017) has established that the essential ingredient of family life is the right to live together so that family relationships may develop normally (ECHR, *Marckx v Belgium*, 1979) and members of the family may enjoy each other's company (ECHR, *Olsson v Sweden*, 1988). The notion of family life is an autonomous concept: consequently, whether or not "family life" exists is essentially a question of fact depending upon the real existence in practice of close personal ties (ECHR, *Paradiso and Campanelli*, 2017). The Court will therefore look at de facto family ties, such as applicants living together, in the absence of any legal recognition of family life (ECHR, *Johnston and Others v Ireland*, 1986). Other factors will include the length of the relationship and, in the case of couples, whether they have demonstrated their commitment to each other by having children together (ECHR, *X, Y and Z v United Kingdom*, 1997). In *Ahrens v Germany* (2012), the ECHR found no de facto family life where the relationship between the mother and the applicant had ended approximately one year before the child was conceived and partners had a relationship of a sexual nature only (Basset U., 2012). The EC Commission outlines in the Communication on guidance for the better transposition of Directive 2004/38 that recognition as "durable partners" can be provided by any means but must take into account the need of safeguarding the unity of the family in a broad sense. National rules on durability of partnership can require a minimum amount of time as a criterion for confirming that relations is "durable" but they should take into consideration also other relevant aspects such as a joint mortgage to buy a home. Other criteria to assess the genuinity of a durable relationship, can be also excerpted by analogy from the Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens (2014), that outlines the following to determine whether couples are genuine: (i) the fact that the non EU spouse would could obtain a right of residence in his/her own capacity; (ii) the non EU spouse has lawfully resided in another EU country before seeking EU rights in the host EU country; (iii) whether the relationship has lasted for a long time; (iv) if spouses are sharing parental responsibility together for one or more children; (v) when spouses can prove to have a common domicile or household; (vi) if not living together, they can show to maintain regular and frequent contact; (vii) the circumstance that spouses have entered a serious long-term legal or financial commitment (e.g. a mortgage to buy a home); or (viii) when their marriage has lasted for a long time (Szabados T., 2017, Titshaw S., 2016)).

3. The Concept of "Durable Relationship" Across the EU

National legislations should contain on the one hand "*criteria which are consistent with the normal meaning of the term 'facilitate'*" in the sense of *Rahman and Others* (ECJ 2011), and on the other hand, provide for the right to an examination considering any other relevant means of evidence. The Court has ruled that "*the host Member State must ensure that its legislation contains criteria ... consistent with the normal meaning of the term 'facilitate' and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness*" In *Home Department v Rozanne Banger* (ECJ 2017), the Court confirmed that considering the discretion given to the Member States and the facilitation regime provided for by the EU law, Directive 2004/38, must be applied by analogy to unregistered partners of returning EU citizens. However, to qualify under the 2016 No. 1052, Part 2, Regulation 12, granting a Family permit to extended family members, Ms Rozanne Banger must meet the criteria of eligibility under 2016 No. 1052, Part 2, Regulation 8, and notably to bring evidence of a durable relationship (considering the Secretary of State's guidance, a durable relationship normally requires a relationship last for two years and to be one akin to a marriage). In addition, the Entry Clearance Officer needs to consider whether "*in all the circumstances, it appears appropriate to issue the family permit*" In context, different criteria must be assessed, inter alia: (i) "*where refusing the family member would not prevent the EEA national from exercising his / her Treaty rights or would not create an effective obstacle to the exercise of Treaty rights*"; (ii) "*if the applicant would have been refused entry to the UK on general grounds for refusal had they been applying for entry under the Immigration Rules*". It is important to understand how the Directive has been implemented (Carrera S. and Atger Anais F., 2009 ; Chenoy C. 2015)) and it is being interpreted by member states (Walcke A., 2016; Lansbergen A., 2009; Mantu S. 2018; Toner H., 2006). In **Italy**, the Directive was transposed by Legislative Decree n. 30/2007 (Lang A. and Nascimbene B., 2007). The Decree set forth that it applies to the partner with whom the EU citizen has a stable relationship duly attested by the State of origin of the EU citizen, thus adding the requirement of the "*attestation of the relationship by another EU State*" (criterion recently suggested as well by AG Bobek in *Philips and Philips France v Commission*, (ECJ 2017). The Jurisprudence provides for certain criteria to determine whether a stable relationship can be considered "duly attested". The Court of Verona (10.12.2014) has held that the relationship must be registered in another EU member State where such relationship is permitted but did not require the relationship to have lasted any specific duration of time. The Ministry of Health (Circolare 2 agosto 2007, n. 12712) providing instructions on the implementation of the said decree, pointed out that as a consequence thereof, a "domestic partner" whose relationship is not duly attested and recognised by another EU States, cannot be considered as family member. No other criteria, e.g. common household for a certain period, the undertaking of shared long-term legal, social or financial commitments (for example, a mortgage to buy a house), or having a child or children together, are set out in the law, nor have they been

identified in practice (Di Filippo, 2008). In **the Netherlands**, the national legislation's requirements are: cohabitation for at least six months proven by a registration with a municipality or a child together proven by a birth certificate. These criteria are not exhaustive and other means of evidence of a durable relationship will also be considered. In **Malta**, the concept of durable relationship is not defined by the national legislation. It is however custom that in order to prove a long and durable relationship, the government department requires that the applicants bring proof that they have been in a relationship for at least two years. This can be proven by providing evidence of joint bank accounts, joint lease/purchase of properties, affidavit by bankers/lawyers to this effect. **Poland** did not fully (correctly) implement the Directive, as it does not provide for a statutory definition of "durable relationship" (Polish law does not recognise same-sex partnerships or marriages). However, such a definition has been created by the Polish jurisprudence. Each case is assessed individually. The following criteria are relevant: emotional, financial, economic and physical link between the partners. These criteria are not exhaustive. All evidences can be used to prove existence of a durable relationship (e.g. lease agreement signed by both partners, photos, ticket/hotel bookings from holidays, common bank account etc.)(Grzeszczak R. and Gniadzik M, 2015). In **Portugal**, a partner is someone who lives with an EU citizen, under a partnership concluded in accordance with the law or with whom the EU citizen maintains a permanent relationship duly certified by the Member State where he/she resides. The national legislation requires a cohabitation for more than two years. In the absence of any legal provision which requires specific documents / evidences to be provided, the partnership can be evidenced by any legal way. In **Romania**, the national legislation does not expressly provide for the definition of "durable relationship" with regard to the partnership with an EU citizen. However, in case of the unregistered partnership, the partners must bring proof of a "long-standing relationship". In order to prove such a relationship, the partners must bring evidence of a long-standing cohabitation. (no indication of minimum time) All means of evidence proving a "long-standing cohabitation relationship" are accepted. In **Spain**, a definition of durable relationship is provided for by art. 2.bis.1.b and 2.bis. 4 b Royal Decree 249/2007. The national legislation's requirements are: common child and cohabitation or cohabitation for more than one year. The national legislation does not provide for specific documents that must be provided to evidence the cohabitation. In **Sweden**: the national legislation does not provide for the definition of a durable relationship. However, according to Swedish jurisprudence, durable relationships may at first hand bear reference to common law spouses. Sweden has voluntarily granted the same rights to common law spouses and spouses (i.e. common law spouses are covered by the definition of a family member and thereby granted the same right of residence). Common law spouses are two people who steadily live together as a couple and have a common household. A couple is deemed to steadily live together if they have a common permanent house, they have been living together for a while, and intend to continue doing so. There is no minimum duration provided for. A common household means that the couple co-operate in everyday work and have certain economic co-operation. In the **Czech Republic**, the national legislation does not provide for a definition of a durable relationship. A strong and intense relationship would determine derived right of residence. Possible means of evidence: photos, affidavits, common possession of property (such as real estate property, cars, house equipment, etc.). **Denmark** has been partially implemented the Directive into the Danish Alien Act and Executive Order 474 of 12 May, 2011. Pursuant to the Executive Order, a "durable relationship" is deemed to exist if a person over the age of 18, is in a permanent relationship of a long duration and live together in a joint residence, with an EU citizen over the age of 18. If these criteria are met, the person living with the EU-citizen is granted the same rights as a spouse (see Section 2 of the Executive Order, which corresponds to Article 3 of the Directive). There are no strict criteria in regard to the duration of the permanent relationship, however, an individual case by case assessment is required. Pursuant to the guidance provided by the Danish Immigration Service, emphasis can be placed on the duration of the parties' acquaintance and their possible cohabitation abroad and in Denmark. In general, it is assumed that 18 months to 2 years of cohabitation in a joint residence is sufficient to establish a permanent relationship of a long duration. As means of evidence, the partners may present a jointly signed lease, proof of a joint loan or public records. As Denmark allows same-sex marriage that part of the Executive Order is only applicable to unmarried couples, of the same or opposite sex. In **France**, the national legislation does not provide for the definition of durable relationship. The national legislation's requirement is cohabitation for at least five years, in France or in any other country. Other "relevant" criteria can be considered (e.g. common child). In **Greece**, the partners are required to bring proof of a stable and continuous joint (living) relationship, by any means of available evidence. Thorough examination of the personal status of the relevant persons is undertaken and acceptance or denial must be justified. The assessment criteria are determined considering the principles of proportionality and fairness. In **Hungary**, the national legislation does not provide for a distinctive definition of a durable relationship. The concept is encompassed by the 'civil partnership' definition provided for by Section 6:514 of the Act V of 2013 on the Civil Code. Civil partners mean two unmarried partners living together in an emotional and financial community in the same household, provided that neither of them is engaged in marriage or partnership with another person (registered or otherwise), they are not close relatives, and they are not sisters, or brothers. Pursuant to the Hungarian Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence implementing Directive 2004/38, the partner with whom a Hungarian citizen or an EEA national has contracted a

registered partnership before the relevant Hungarian authority or the authority of another Member State of the European Union, shall be considered a family member as well. Therefore, while the de facto civil partnership (includes durable relationship) could exist, for the purpose of the application of such Act it also has to be registered in the Record of Civil Partnership Statements. It must be distinguished between the registered de facto civil partnerships and the registered partnerships. In **Switzerland**, the national legislation does not provide for a definition of durable relationship. This provision is unlikely to be considered as Switzerland does not directly implement the Directive. EU/EFTA nationals are usually granted residence on their own merit and intentions (such as employment, studies, job-search etc.). In the event of a non-EU/EFTA national accompanying or joining an EU/EFTA national to Switzerland, the criteria follow those which are applied for non-EU/EFTA nationals seeking family reunification with another non-EU/EFTA national. In **Germany**, under the Freedom of Movement Act for EU Nationals ("Freizügigkeitsgesetz-EU"), any EU national is fully entitled to free movement within Germany. Therefore, they do only have to keep their passports or any accepted alternative documents with them and to produce such document on request to the responsible public officials. Further, they will have to keep their passport with them when crossing the border and to show it to public officials if requested so. The same goes for their family members, e.g. spouses, registered partners in life (of same sex), children up to 21 years of age as well as parents and grandparents if the EU national has maintenance obligations for them. Hence, the Act applies to spouses and family members but does not include common spouse partnerships and does therefore not seem to recognise the principle of durable relationship. However, it is common sense that the authorities in applying their discretion on how to apply the laws have to take the Directive into consideration and shall facilitate the entry and residence of the partner with whom the Union citizen has a durable relationship, duly attested. Despite of this obligation there is no statutory definition of "durable relationship" in the Act and the commentaries do not specify how these requirements can be proven. There is no minimum duration of such a durable relationship that is required by law and at the end of the day it all comes down to the discretion of the person in charge. In **Belgium**, unmarried partners of EU citizens, may enforce particular rights provided for by the national legislation pursuant to Article 3.2 (b) Directive and settled case law of the ECJ. Firstly, unmarried partners have registered a legal partnership recognised by the national legislation as equivalent to marriage in Belgium, qualify as family members. Unmarried partners that have not concluded a legal partnership recognised by the national legislation as equivalent to marriage, must bring proof of a durable and stable relationship, by any means of evidence. Unless they have a common child, they must submit proof of legal cohabitation in Belgium or in any other country, during an uninterrupted period of at least one year preceding the demand or proof that they: (i) have known each other for a minimum of two years, during which time they have maintained regular contact (by phone, courier or email) and, (ii) have met at least three times in the two years preceding the demand, spending a minimum of 45 days in aggregate together. Providing that the criteria below mentioned are met, the relationship is deemed to be durable and stable. On the contrary, the application will be assessed on its merits, considering the duration, intensity and stability of the relationship. In **Austria**, legislation does not provide any definition, but case law and commentary say that cohabitation and having children in common are a strong evidence of a relationship similar to a marriage. Evidence can include: registration at the same address, witnesses, shared assets/property. Emotional connection with mere plans to live together and spending vacations together is considered to fall short of the durable relationship threshold.

4. Conclusions

From Germany where common spouse partnership is merely not recognised by the national legislation, to Sweden has voluntarily and almost unconditionally granted the same rights to common law spouses and spouses, Member States are eventually facilitating entry and residence to the partner with whom the Union citizen has a durable relationship, duly attested. However, apparently, all Member States undertake an extensive examination of the personal circumstances and justify any denial of entry or residence to unmarried partners. Most of the Member States attach little importance to the maintenance of the unity of the family in a broader sense. In the light of the above considerations, to facilitate a fair and genuinely extensive examination of their case, unmarried partners should: (i) find out, assess and insofar as possible understand the criteria laid down by the national legislation in the host Member State; (ii) lodge applications on grounds of the national legislation and case-law rather than directly enforcing the EU law; (iii) verify whether a "last moment" partnership concluded in accordance to the law of the country where the family was constituted, would be a mandatory or useful step; (iv) verify whether families constituted in third-countries, will be subject to the same conditions given to families constituted in a Member State; (v) consider that unmarried partners of "returning" EU citizens are beneficiaries (by analogy) of Article 3.2(b) Directive. Often, applicants must decide whether to provide merely evidences (sometimes doubtful evidences), to satisfy the criteria laid down by the national legislation, or substantial evidences "*more than a mere scintilla*. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion", not necessary qualifying under such criteria, but stating a genuine durable relationship. The latter option must be chosen. Member States are given wide discretion to assess such circumstances. However, the concept of "facilitation" cannot be deprived of its effectiveness and finally: "*qui potest majus potest et minus*".

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