



# Handbook on the Rights of Rainbow Families

Rights on the move



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## Foreword

This Handbook is one of the outputs of the ‘Rights on the Move’ Project which is funded by the European Commission within the framework of Fundamental Rights and Citizenship funding programme. The Lead Partner of the project is the University of Trento, Italy. The Project looks at the European protection of the rights of rainbow families, i.e. families where the parental roles are played by persons of the same legal gender - moving and residing within the EU.

This Handbook has been produced by Cara-Friend, Northern Ireland, a family of lesbian, gay, bisexual and trans\* (LGB&T) groups, based in Belfast. A Conference Edition was considered at a conference, “Moving Forward: The Rights of Rainbow Families in Europe”, held in Belfast on 5 June 2014.

The objective of the Handbook is to set out, in a straightforward and accessible fashion, the legal rights and protection of rainbow families in European law as they move across the European Union (EU). The focus is primarily on same-gender couples with children, although the wider issue of the rights of same-gender couples and of LGB&T people more generally will also be considered. These rights will be set out across a range of human activities key to the functioning and development of rainbow families.

This Handbook is divided into four main sections on Free movement and European Citizenship, Recognition of relationships in rainbow families, Reproductive rights of rainbow families and Social and economic rights of rainbow families. A wider range of issues is considered in another Project output, a White Paper, produced by the Peace Institute, Ljubljana, Slovenia. These issues include ‘Property Regimes’, ‘Inheritance’, ‘Intersexuality Recognition’, ‘Transgender Recognition’ and ‘Victims of gender-based and homophobic violence’.



There is a Table of cases and a Glossary at the back of the Handbook, along with an Annex, 'How to use the law'. If you are not fully conversant with issues of European law, you should read the Annex before the sections in the Handbook.

We would like to acknowledge the assistance we have received from our Project partners in the preparation of this Handbook. We would also like to thank those who contributed to the conference (see [www.rightsonthemoveni.eu](http://www.rightsonthemoveni.eu)). We are particularly grateful to Nelleke Koffeman, University of Leiden, who made us aware of the volume, Gallo, D. et al, Same-Sex Couples before National, Supranational and International Jurisdictions, Heidelberg: Springer, 2014, in particular the chapter, Rijpma J. and Koffeman, N., 'Free Movement Rights for Same-Sex Couples Under EU Law; What Role to Play for the CJEU?', pp.455-491 and also her paper, 'Legal Responses to Cross-Border Movement in Reproductive Matters within the European Union', presented at the IXth World Congress of the IACL, 'Constitutional Challenges: Global and Local', Oslo, Norway, 16-20 June 2014.

Within Cara-Friend, we are grateful for the work of our Legal Intern, Rebecca Graham, LLM postgraduate at the University of Ulster, and the tireless work of Tracy Crowe, Cara-Friend Finance and Development Officer.

Barry Fitzpatrick  
September 2014



# 01. Introduction to European rights and Rights of the Child

The objective of this Handbook is to set out, in a straightforward and accessible fashion, the legal rights and protection of rainbow families in European law as they move across the European Union (EU). The focus is primarily on same-gender couples with children, although the wider issue of the rights of same-gender couples, and of LGB&T people more generally, will also be considered. These rights will be set out across a range of human activities important to the functioning and development of rainbow families.

The focus of the Handbook will be on rights already established or acknowledged in European law but it will also include consideration of vital issues for rainbow families on the basis of how European law addresses similar issues, so that rainbow families can see how their challenges can be tackled and resolved. In both cases, the initial focus will be on rights in EU law. However, rights under the human rights instruments of the Council of Europe, particularly the European Convention on Human Rights (ECHR), and under other relevant international instruments, will also be fully considered.

The Handbook is divided into four main sections on Free movement and European Citizenship, Recognition of same-gender relationships, Reproductive rights and Social and economic rights.

## 1.1 Brief introduction to EU legal system

EU law (originally the Law of the European Economic Community (EEC)) is now set out in the 'Lisbon Treaty', the formal title of which is the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFREU). This Handbook is largely concerned with the



TFEU and the CFREU. For example, the TFEU sets out extensive provisions on free movement and European citizenship.

The CFREU, which only applies within the scope of EU law, contains a catalogue of rights relevant to rainbow families, including the rights which are found in the ECHR, such as the right to respect for private and family life (Article 7, CFREU) and non-discrimination rights, including on grounds of sex and sexual orientation (Article 21, CFREU). The CFREU has a wider set of rights than the ECHR. For example, it includes economic and social rights, modelled on the (Revised) European Social Charter of the Council of Europe, such as protection for family and professional life (Article 33), entitlement to social security and social assistance (Article 34) and right to health care (Article 35). It also includes rights found in international law, in particular the rights of the child (Article 24), based on the United Nations Convention of the Rights of the Child (UNCRC).

The TFEU and the CFREU are described as the ‘primary law’ of the EU. In practice, if not in name, they amount to a ‘Constitution of the EU’. They are underpinned by a vast range of EU secondary laws, primarily Regulations and Directives. Regulations are directly enforceable in national legal systems from their date of adoption. More common are Directives which set down minimum standards which all Member States must bring into their national law within a set time limit, normally two or three years.

At the judicial level, the EU legal system is interpreted and applied by the Court of Justice of the EU (CJEU). Most of the case law of the CJEU comes about through references from national courts for preliminary rulings on questions of interpretation of EU law. Rainbow families have to start a case in their national courts and persuade the court to send a preliminary reference to the CJEU. Therefore, the CJEU is not an appeal court but national courts are required, not only to apply the Court’s rulings when they have made a reference to the Court, but also to apply the Court’s rulings in all cases before them concerning EU law. All bodies of



the Member States are bound to apply and give primacy to EU law over national law, including administrative authorities.

## 1.2 Brief introduction to Convention rights

The Council of Europe predates the EU/EEC and has a wider membership of European States than the EU. It is primarily known for European human rights instruments, in particular the EHRC. The EHRC sets out a range of civil and political rights. For rainbow families, the most significant are the right to respect for private and family life (Article 8), the right to marry (Article 12) and the prohibition of discrimination (Article 14).

At the judicial level, Convention rights are enforced by the European Court of Human Rights (ECtHR). Unlike the CJEU, rainbow families can bring cases directly to the Court but only after national judicial processes have been exhausted.

## 1.3 Brief introduction to Rights of the Child

As has been seen, the rights of children are recognised in EU law and in the ECHR. There is also the UN Convention on the Rights of the Child (UNCRC), upon which Article 24, CFREU is based. Amongst a range of rights set out in the UNCRC are priority for the best interests of the child (Article 3), rights to registration, name, nationality and care (Article 7), respect and protection for preservation of identity (Article 8), protection from separation from parents (Article 9), right to family reunification (Article 10) and a central provision of the UNCRC, respect for the views of the child (Article 12).

Unlike EU law and the ECHR, most international human rights instruments are interpreted and applied by a Committee system. So the UNCRC is interpreted by the UN Committee on the Rights of the Child, which largely responds to Reports from the Contracting Parties to the Convention. All EU Member States have ratified the UNCRC and their national courts will take it into account according to their legal traditions. So also the CJEU will



take the UNCRC into account as Article 24, CFREU covers the rights of the child.

This principle of ‘the best interests of the child’ is reflected in numerous international instruments which are relevant to the rights of rainbow families. For example, in relation to the recognition of the relationships of rainbow families, the 1996 Hague Convention, on parental responsibility and protection of children, provides that its provisions “can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child” (Article 22). The Hague Convention is an instrument of private international law which must be taken into account in EU and national law.

In Annex 1, ‘How to Use the Law’, details on how to use these various laws are set out in more detail.



## 02. Free movement and European Citizenship

### Introduction

The ‘fundamental freedoms’ of the EU remain primarily economic in nature, namely, free movement of goods, services, capital and persons. Of these, freedom to provide services and, particularly, free movement of persons are important for rainbow families. From the late 1960s, free movement of EU workers included their families. Today, EU law recognises wider rights to free movement, particularly for EU citizens and their families, which is underpinned by the development of European citizenship and, to a lesser extent, for non-EU nationals. Family law was originally a matter for the Member States and, even today, the EU is only cautiously becoming more involved in family law. The TFEU does refer to family law in Article 81 but, requires unanimity in the Council of Ministers before legislation can be enacted on cross-border family law matters. Nonetheless, free movement inevitably includes the families of those who have a right to move and national family law must be revised if its provisions prove to be an unjustified obstacle to free movement.

### **We want to move from my home Member State to another Member State. Do we need to be economically active in order to do so?**

Originally, EU law was primarily concerned with EU workers, those who wanted to set up a business in another Member State (known as ‘the right of establishment’) and those who wanted to provide services in another Member State. Free movement of workers is specifically protected by Article 45 TFEU. The right of establishment is set out in Article 49 TFEU and the freedom to provide services is set out Article 56 TFEU.

Article 21 TFEU now states, *“Every citizen of the Union shall have the right to move and reside freely within the territory of the*



*Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.”*

However, those EU citizens who are economically active may have more extensive rights of residence in the host Member State than those who are not economically active. In particular, EU workers enjoy a wider catalogue of non-discrimination rights compared to national workers, which are now set out in Regulation (EU) No 492/2011.

Issues of free movement of all EU citizens are now covered by Directive 2004/38/EC ('The Citizenship Directive') but the rights are derived from the TFEU. Article 20.1, TFEU states, *“Every person holding the nationality of a Member State shall be a citizen of the Union.”* The provisions of the Citizenship Directive cannot limit the rights of EU citizens under the TFEU. So also the rights of families of EU citizens are subject to the provisions of the CFREU and the ECHR.

Every EU citizen has a right to enter and reside in another Member State for a period of three months, subject only to the production of a valid passport or identity card (Article 6.1 of the Citizenship Directive).

According to Article 7, the right of residence is more limited after three months. First, the EU citizen must be economically active (a worker or self-employed) or *“have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State”*. There are also broadly similar provisions for students in education, including vocational training. There are also provisions to protect those who have ceased to be workers or self-employed. Article 16 generally provides for a permanent right of residence after five years.



## Does everyone in our family have to be EU citizens to enjoy free movement?

The TFEU only gives free movement rights to EU citizens but EU secondary law also gives rights of free movement and residence to the families of EU citizens, irrespective of the nationality of the family members. There are separate provisions for non-EU citizens lawfully residing in the EU with their families.

### Who is a ‘spouse’ or ‘registered partner’ of an EU citizen according to EU secondary law?

Issues of access for the families of EU citizens are covered by the Citizenship Directive, which governs access for family members who are not EU citizens. Wider issues of recognition of same-gender relationships are discussed in Section 3. However, the potential scope of family relationships, for the purposes of free movement, is considered here.

There are various categories of spouses and registered partners who have **a right to move with an EU citizen**. These are **‘derived’ rights**, based on the right to move and the European Citizenship of the EU citizen. They are as set out on Article 2.2:

*“(a) the spouse;*

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

Also Article 3.2 sets out two further relevant categories of persons to whom Member States shall *“in accordance with its national legislation, **facilitate** entry and residence”* [of]:

*(a) any other family members, irrespective of their nationality,*



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

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

The category of most initial interest to rainbow families is that in Article 2.2(b). **This provision acknowledges that same-gender partners in registered partnerships shall enjoy free movement rights but only in certain circumstances.** First, the registered partnership must be contracted ‘*on the basis of the legislation of a Member State*’. This would appear to exclude registered partnerships contracted outside the EU. Secondly, the **host** State must recognise registered partnerships. This is not a system of ‘mutual recognition’ whereby the host State must accept partnerships registered in another Member State. Thirdly, it must treat registered partnerships as ‘equivalent to marriage’ in the host State. There is a wide variety of registered partnerships across the EU and it is not clear that all satisfy this requirement.

The wording of Article 2.2(b) is precise and it remains to be seen whether the CJEU finds a way of developing a ‘mutual recognition’ system for registered partnerships.

The second category of interest to rainbow families is that of ‘spouse’. Previous case law of the EJEU is not encouraging on the meaning of ‘spouse’. In a number of cases involving EU staff, the CJEU has taken a limited view of same-gender relationships. In a case decided before the Citizenship Directive, or even the TFEU (D. and Sweden v Council (2001)), the CJEU concluded that ‘married official’ had to be interpreted on the basis that ‘marriage’ referred to a union between two persons of the opposite sex’.

However, **the Citizenship Directive, like all EU secondary**



**legislation, must be interpreted in light of the CFREU.** Article 9, CFREU states, *“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.”* As will be discussed further in Section 3, ‘Recognition of Relationships of Rainbow Families’, the ECHR has a more specific formulation, in Article 12, ECHR, which states, *“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”* (emphasis added).

Therefore this different formulation in the CFREU is significant, in that the ‘right to marry’ is not confined to opposite-sex partners. Article 2.2(b) specifically invokes a ‘host State’ approach to registered partnerships, and Article 2.2(a), on ‘spouses’ does not. It is therefore arguable that the term ‘spouse’ must be interpreted on the basis that **‘the national laws governing the exercise of these rights’ in Article 9, CFREU may refer to the national laws of the home State, or indeed any Member State.**

In an Irish case before the CJEU, Metock (2008), the Court ruled, in a case concerning opposite-sex spouses, that spouses qualify as ‘spouses’ under the Citizenship Directive, irrespective of when and where the marriage took place. Account must also be taken of Article 21, CFREU, which states, *“Any discrimination based on any ground such as ... sexual orientation shall be prohibited.”*

Therefore, it is open to rainbow families to argue, before their national courts and the CJEU, that ‘spouse’ in Article 2.2(a) of the Citizenship Directive should include same-gender married couples, if their marriage satisfied the laws of the EU citizen’s home State or possibly any Member State where they resided. Whether same-gender marriages and registered partnerships conducted outside the EU will be covered by Article 2.2 may depend on the national law of the host State.

The two other routes to recognition of a same-gender spouse or registered partner are through Article 3.2(a) and, more



obviously, Article 3.2(b). Article 3.2 does not give the right of entry and residence. It provides for a duty to **facilitate** entry. In the case of Rahman (2012), the CJEU was considering whether the UK authorities were correct in denying residence permits to the dependant half-brother and nephew of the spouse of an EU citizen. The CJEU stated, at para. 24 of its judgment, that *“each Member State has a wide discretion as regards the selection of the factors to be taken into account. None the less, the host Member State must ensure that its legislation contains criteria which are consistent with the normal meaning of the term ‘facilitate’ ... and which do not deprive that provision of its effectiveness.”*

It is therefore arguable that a same-gender spouse or registered partner have the documentation to show that their relationship is ‘duly attested’ within the meaning of Article 3.2(b). Indeed, many Member States have tests of ‘cohabitation’ for a variety of purposes, including immigration. It may also be possible to show that a same-gender spouse or registered partner are *“dependants or members of the household of the Union citizen”* within the meaning of Article 3.2(a).

Another possibility concerns the rights of EU workers. Although the EU worker’s family is defined in the Citizenship Directive, they enjoy extra rights under Regulation (EU) No 492/2011, including the right to ‘social advantages’ in a non-discriminatory fashion compared to host workers. In Reed (1986), the CJEU concluded that, since The Netherlands allowed entry and residence in the Netherlands for the long-standing unmarried partners of Dutch nationals, it would be discriminatory to deprive an EU worker of this ‘social advantage’ also. It would appear, in light of the development of EU law, particularly in the CFREU, that this approach should be applied to same-gender couples also.

Indeed, Article 24 of the Citizenship Directive provides that EU citizens *“shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.”* It may therefore be



possible to argue that the approach in Reed could be applied to other categories of EU citizens under the Citizenship Directive.

### **Can my partner have free movement rights under EU secondary law even though we are not married or in a civil partnership?**

If you are an EU citizen, Article 3.2(b) and possibly Article 3.2(a) may apply, as outlined above.

If you are an EU worker, the case of Reed (above) may apply, depending on the laws of the host State.

### **Can our children have free movement rights under EU secondary law?**

Article 2.2(c) of the Citizenship Directive provides that *“the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)”* have free movement and residence rights. Recognition of the relationships of children in rainbow families will be dealt with in more detail in Section 3. Although Article 2.2(c) refers to ‘direct descendants’, it can be argued that this includes adopted and other children of the family.

### **Can our family have free movement rights under EU secondary law even though we are not EU citizens?**

There are two other pieces of EU secondary law which are relevant here. These are Council Directive 2003/86/EC on the right to family reunification and Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.

The Family Reunification Directive applies, according to Article 3.1, *“where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent*



*residence, if the members of his or her family are third country nationals of whatever status.”*

‘Family’ is more restrictively defined than in the Citizenship Directive, as being, according to Article 4.1, “(a) *the sponsor’s spouse*”. Article 4.3 gives the Member States discretion to admit unmarried partners and registered partners. Article 4.1(b)-(d) covers minor children of the sponsor or spouse, including adopted children, in a series of scenarios considered in more detail in Section 3.

The Long-Term Residents Directive has the same definitions of family members as in the Family Reunification Directive. Article 4.1 provides that “*Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application.*”

### **What are our rights of residence if we enjoy free movement?**

Detailed rules on rights of residence are set out in the Citizenship Directive, the Family Reunification Directive and the Long-Term Residents Directive.

### **Can my family have free movement rights under EU primary law?**

Although the technicalities of free movement and residence rights are set out in the Citizenship Directive, all EU law is subject to the TFEU (and the CFREU). Article 20.2, TFEU provides for free movement for EU citizens. This right is subject to limitations, that is, “*shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.*” For example, Article 45, TFEU, on the right of free movement of EU workers is “*subject to limitations justified on grounds of public policy, public security or public health*”.

The CJEU now views EU citizenship as involving free-standing



rights, even where free movement between Member States is not involved. In Zambrano (2011), the CJEU was concerned with a non-EU national, some of whose children were Belgian, and therefore EU, citizens. In a case which would have involved the deportation of the family to Columbia, outside the EU, the CJEU held that “[a] refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant such a person a work permit, has [the] effect” of depriving the children who were EU citizens of their citizenship rights. However, the CJEU, in later judgments (see McCarthy (2011)), has restricted the scope of Zambrano to cases where the EU citizens would be forced to leave the EU.

More generally, the CJEU takes a rigorous view of restrictions on free movement of EU citizens. For example, in Carpenter (2002), the CJEU ruled that an EU citizen living in his own Member State, who provided services in other Member States, was entitled to have his non-EU wife to reside with him in the UK as his business would otherwise be disrupted and also that his right to a family life under Article 8, ECHR would be infringed. The CJEU would, in a case under Article 20, be aware that detailed rules on free movement and EU citizenship are set out in the Citizenship Directive. Nonetheless, it should therefore be possible to develop arguments, taking into account the case law of the ECtHR on ‘family life’, discussed in Section 3, that rainbow families, including one or more EU citizens, are protected by Article 20 from restrictions which impede their free movement across the EU. It would then be for the host Member State to justify such restrictions on grounds of public policy. Any exceptions to EU fundamental freedoms must be interpreted strictly. As the CJEU stated in Carpenter, “[i]n those circumstances, the decision to deport Mrs Carpenter constitutes an infringement which is not proportionate to the objective pursued.” Member States may argue that restrictions on free movement of rainbow families are necessary to avoid the family law of one Member State being ‘exported’ to its State or that there would be knock-on effects on



a wide range of national laws. However, the CJEU has made clear in numerous judgments, including Maruko (2008), discussed in Section 5, that national family law is subject to EU law, to the extent that specific EU legal rights are involved.



## 03. Recognition of relationships

### Introduction

Recognition of relationships in rainbow families, both between the partners and with their children, is a key issue whether or not they move between Member States.

At the time of writing, 8 Member States have provisions for same-gender marriage (Belgium, Denmark, France, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, as have Iceland and Norway) and 14 Member States (Austria, Belgium, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Luxembourg, Malta, the Netherlands, Slovenia, Spain and the United Kingdom, as have Andorra, Iceland, Liechtenstein and Switzerland) have provisions for registered partnerships. Other States also recognise, to some extent, those living in long-term relationships. There is a wide range of situations in which relationships with the children of rainbow families are recognised.

These legal situations are primarily a matter for the national laws of the Member States. One element of European law which comes into play is whether the ECHR gives a 'right to marry' under Article 12, ECHR or gives a 'right to a family life' under Article 8, ECHR. However, private international law can come into play if there is a transnational element to the relationships, depending on the nationality of the members of the family, where marriages or registered partnerships take place or where children are born or are 'habitually resident'.

Some of these situations involve movement between Member States and specific EU laws come into play, along with the TFEU and the CFREU.



## Can we gain legal recognition of our relationship if our Member State does not permit same-gender marriage or registered partnerships?

It may be possible to argue for some recognition of your relationship through the constitutional law and principles of your State or the State in which you reside. However, there are also arguments in terms of rights under the ECHR which will be relevant.

The position of LGB&T people under the ECHR has been significantly enhanced over the past 30 years since the Northern Irish gay man, Jeffrey Dudgeon, won the first success before the ECtHR in Dudgeon v The United Kingdom (1982). Dudgeon established that it was a breach of his right to a private life, under Article 8, ECHR, to criminalise homosexual relations between consenting adults. In Salgueiro da Silva Mouta v Portugal (1999), it was established that Article 14, ECHR (the 'non-discrimination' provision) prevented discrimination on grounds of sexual orientation in the granting of parental responsibility.

Article 14, ECHR does not give free-standing rights but must be considered in conjunction with other Convention provisions. It does not mention sexual orientation but this was considered to be an 'other status' under Article 14.

The ECtHR has considered recognition of same-gender relationships on a number of occasions. In Schalk and Kopf (2010), the Court accepted, for the first time, that Article 12, ECHR ('right to marry') could cover same-gender marriage, even though it refers to '[m]en and women'. However, two of the seven judges disagreed with this view. Furthermore, the Court made clear that the issue of marriage was for the Convention States to decide. It may be, if there is a further significant development of same-gender marriage across Convention States, the ECtHR might review this position but it is unlikely in the foreseeable future.



Schalk and Kopf is a more promising case in relation to legal recognition of some form of registered partnerships. Here, the arguments of the Austrian couple were based on Article 8, ECHR, in conjunction with Article 14. **The Court (at para. 94) accepted that a same-gender couple “living in a stable de facto partnership, falls within the notion of ‘family life’”.** It further stated (at para. 99) that same-gender couples “*are just as capable as different-sex couples of entering into stable, committed relationships.*” Although Austria had introduced registered partnerships shortly before the Schalk and Kopf judgment, the Court concluded that, at the present level of consensus across the Convention States, it was not required to do so. Nonetheless, three of the seven judges dissented from this and concluded that Article 8, in conjunction with Article 14, required Austria to give ‘robust justification’ for its failure to introduce registered partnerships sooner than it did.

In Vallianatos v Greece (2013), the Grand Chamber of the ECtHR took another step towards recognition of registered partnerships. Greece had introduced registered partnerships for opposite-gender couples but not same-gender couples. While restating that it was not deciding whether Greece was under a duty to introduce some form of legal recognition, **it concluded that the exclusion of same-gender couples was discriminatory. It also stated that the sexual orientation of the couple could not, on its own, be a justification.**

Therefore, as the trend towards recognition of registered partnerships continues, there may well be a ‘tipping point’ in the foreseeable future when the ECtHR formally grants legal recognition. This is also significant where EU law applies as the right to respect for private and family life (Article 7, CFREU) and non-discrimination rights, including on grounds of sex and sexual orientation (Article 21, CFREU) mirror Article 8, ECHR and Article 14, ECHR. Indeed, Article 21 is a free-standing non-discrimination provision. **In terms of ‘consensus, the ‘tipping point’ is favour of recognition of registered partnerships is just about to be**



reached.

### **Can we stay married if one of us has gone through gender reassignment?**

In the present state of the case law of the ECtHR, the answer is 'No'. In Hämäläinen v Finland (2014), the ECtHR turned down arguments that a Finnish couple should not be required to divorce and register a civil partnership, at least where the outcome had no adverse impact of a child of the marriage.

### **Can we gain any recognition of our relationship?**

Karner v Austria (2003) is an example of cases in which the ECtHR has used Articles 8 and 14, ECHR to grant *de facto* recognition to same-gender couples. Karner and his partner had been in a relationship for five years before his partner died. The Austrian Supreme Court concluded that he could not take over their tenancy as Austrian law did not treat him as a cohabiting partner. The ECtHR concluded that this was discriminatory. Also in J.M. v The United Kingdom (2010), the ECtHR invoked Article 1 of Protocol No. 1 (property rights), in conjunction with Article 14, to conclude that a State-controlled system of calculating child maintenance, which did not take same-gender relationships into account, was discriminatory.

When full recognition is not possible, there may be recognition for specific purposes and effects. This 'patchwork approach' is unfortunately the current state of affairs in many Member States.

### **We are in a same-gender marriage or registered partnership. Can it be recognised if we move to another Member State?**

Leaving aside issues of EU law for the moment, the question of whether your relationship will be recognised in another State is a matter for the private international laws of that State. These laws vary greatly from one State to another. Although recognition of the position of children is extensively covered by international



conventions, recognition of marriage or other relationships is not. There is the Hague Convention on Celebration and Recognition of the Validity of Marriages 1978 but only six States have ratified it, including Luxembourg, the Netherlands and Portugal. There is also the Convention on the Recognition of Registered Partnerships 2007 but this has only been ratified by Spain. In practice, some States recognise a same-gender marriage as a registered partnership if the latter is recognised in that State.

### **What does EU law have to say about recognition of our relationship?**

Outside of issues of free movement and European citizenship, EU law has provisions on which court system has jurisdiction to determine some matrimonial issues. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (sometimes known as 'Brussels II'). However, in terms of matrimonial matters, it only covers divorce, legal separation or marriage annulment and will be considered below in relation to parental responsibility. Unlike the 2010 Regulation, mentioned below, the CFREU is not explicitly referred to in the Preamble to the Regulation. Nonetheless, Article 7 ('right to family and private life'), Article 9 (right to marry) and Article 21 ('protection from discrimination) all apply to the 2003 Regulation. It is therefore possible that it applies to legal separations of same-gender marriages and of registered partnerships.

Council Regulation (EU) No 1259/2010 of 20 December 2010 implements enhanced cooperation in the area of the law applicable to divorce and legal separation. According to Article 5.1, "*The spouses may agree to designate the law applicable to divorce and legal separation*", in certain circumstances. However, because it has been enacted under 'enhanced cooperation', only some Member States are participating States. These are Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg,



Hungary, Malta, Austria, Portugal, Romania and Slovenia (and later Greece and Lithuania). Once again, the CFREU applies to this Regulation and Article 21, CFREU on non-discrimination is specifically mentioned in its Preamble.

Article 5.1 sets out the laws under which the spouses may agree should apply to their divorce or separation, namely:

*“(a) the law of the State where the spouses are habitually resident at the time the agreement is concluded; or*

*(b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or*

*(c) the law of the State of nationality of either spouse at the time the agreement is concluded; or*

*(d) the law of the forum.”*

### **Have we any European rights if we seek to adopt a child as a same-gender couple?**

This is again largely a matter for national law. One scenario is ‘second parent’ adoption, a legal procedure that permits a same-gender parent to adopt her or his partner’s biological or adoptive child without terminating the first parent’s legal status as a parent. A second scenario is single or joint adoption, where the couple, or one of them, seek to adopt a child with whom they have no legal relationship.

In Gas and Dubois v. France (2012), the ECtHR considered a situation in France whereby the mother gave birth in France in 2000 to a daughter, conceived in Belgium via anonymous donor insemination. After entering a registered partnership with her partner in 2002, the partner attempted to have a simple adoption of the child in 2006. This was refused because, in so doing, the biological mother would have been deprived of her rights. The



Court confirmed that the mothers and the child enjoyed a family life but it rejected the argument that the couple should be able to equate themselves with a married couple. It also concluded that there was no discrimination as an opposite-sex unmarried couple would have suffered the same outcome.

However, in X v. Austria (2013), the ECtHR reached an alternative conclusion, based on a distinction between French and Austrian law. In the latter, the Court found the exclusion from second-parent adoption of a same-gender couple, while allowing that possibility in an unmarried different-gender couple, discriminatory on grounds of sexual orientation and contrary to Articles 8 and 14, ECHR.

### **What European and international laws apply to a rainbow family's relationship with our children?**

Unlike recognition of same-gender relationships, there is a range of laws covering recognition of relationships with children. For example, there is the European Convention on the Adoption of Children 1967, which was revised in 2008

There are also private international law instruments, such as the Hague Abduction Convention 1980, concerning the return of a child internationally abducted by a parent from one member country to another, the Hague Adoption Convention 1993, dealing with international adoption, child laundering, and child trafficking and the Hague Convention on Parental Responsibility and Protection of Children 1996. However, the provisions of this Hague Convention, as far as EU Member States are concerned, are now covered by the Brussels II Regulation. As set out in section 1.3, the UNCRC sets out a range of rights which are significant for the children of rainbow families, including priority for the best interests of the child (Article 3), which is also the key concept of the various Hague Conventions.

### **What are the provisions of the Brussels II Regulation?**



The Brussels II Regulation sets out **comprehensive rules on which legal system should deal with a wide range of issues concerning children**. It must be interpreted taking into account the CFREU, in particular, the rights of the child in Article 24, CFREU, which is based as the UNCRC. As set out in section 1.3, the UNCRC includes priority for the best interests of the child (Article 3), which is also the key concept of the various Hague Conventions.

The Brussels II Regulations (Article 1.1(b)) covers *“(b) the attribution, exercise, delegation, restriction or termination of parental responsibility.”* According to Article 8.1, *“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 at the time the court is seised.”* For example, if a rainbow family went on holiday to a Member State where their relationship with any of their children was not recognised, they would still be within the jurisdiction of the courts where the child was habitually resident.

Article 9.1 provides that the courts of the child’s former habitual residence shall retain jurisdiction for a period of three months *“where the holder of access rights pursuant to the judgment on access rights continues to have his or her habitual residence in the Member State of the child’s former habitual residence.”*

Article 10 deals with cases of child abduction. Subject to further conditions, *“the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State.”* Article 12, again under certain conditions, allows for the retention of jurisdiction on matters of parental responsibility by national courts *“exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment”*.

**What are the free movement and European citizenship rights**



## of our children?

The Citizenship Directive 2004 sets out the free movement rights of European citizens, including their families. Article 2.2(c) provides that ‘family member’ includes, *“the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)”*.

Technically, the children of a rainbow family, in which the European citizen is not considered to be a ‘spouse’, or where the parents are not in a registered partnership recognised by the host State, appear not to come within the scope of Article 2.2(c). However, it may well be that the developing case law of the ECtHR, recognising the ‘family life’ of rainbow families, may be adopted by the CJEU in interpreting the Citizenship Directive in light of Article 7, CFREU (‘right to respect for private and family life’) and Article 24 (‘rights of the child’).

It would appear that Article 3.2(a) also applies, which covers ‘beneficiaries’, whose entry and residence the host State is under a duty to ‘facilitate’. Article 3.2(a) provides, *“any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence”*.

Article 3 also states that *“[t]he host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.”* The Preamble to the Citizenship Directive (Recital 31) states that the Directive ‘respects’ the provisions of the CFREU, which includes the rights of the child in Article 24, CFREU and specifically refers to Article 21 on non-discrimination, including on grounds of sexual orientation. In practice, it appears that host States do facilitate the entry and residence of children of a rainbow family, even if its law do not recognise them as children of one or either partner. So also the Citizenship Directive has various measures to protect



family members once they are lawfully resident in the host State. For example, Article 12.3 provides, *“The Union citizen’s departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.”*

So also, Article 13 covers ‘Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership’. Technically these detailed rules appear to only apply to ‘family members’ of ‘spouses’ and those in registered partnerships recognised by the host State. However, once again, the CJEU may develop its case law on rights to family life, as has occurred in the case law of the ECtHR. *Ruiz Zambrano* (2011) did establish autonomous citizenship rights for children who are European citizens where the family would have otherwise been forced to leave the EU. It is likely that the CJEU will develop its case law on the rights of children in rainbow families in terms of free movement and European citizenship. So also the CJEU may be given opportunities to invoke free movement and citizenship law in order to deal with the legal obstacles on recognition of their children which rainbow families encounter when they move between EU States.



## 04. Reproductive rights of rainbow families

### Introduction

Reproductive rights are controversial across the EU Member States. The most controversial issues concern abortion and genetic engineering. However, medically assisted reproduction (MAR) and surrogacy are also sources of controversy. There are many permutations for rainbow families, particularly dependent upon whether you are a female or male couple. For a female couple, one partner can be the genetic mother, involving gamete donation. This may also involve *in vitro* fertilisation (IVF), literally meaning ‘fertilisation in glass’. Alternatively neither partner may be the birth mother and therefore a surrogacy arrangement may be involved. For a male couple, surrogacy will be necessary. In both cases, MAR may be utilised.

The European Parliament has produced a survey, ‘A comparative study on the regime of surrogacy in EU member states’, which defines various forms of surrogacy arrangements, and includes a table setting out an overview of the legal approaches of EU Member States. Member States can apply prohibitions or levels of regulation, including, for example, age restrictions or may leave the matter unregulated.

In EU law, Article 2.1, CFREU (‘Right to life’) states, *“Everyone has the right to life.”* Article 3, CFREU (‘Right to the integrity of the person’) is an innovative provision of significance for reproductive rights. Article 3.1 states, *“Everyone has the right to respect for his or her physical and mental integrity.”*

Article 3.2 provides, *“In the fields of medicine and biology, the following must be respected in particular:*

- (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;*
- (c) the prohibition on making the human body and its parts as*



*such a source of financial gain;*

*(d) the prohibition of the reproductive cloning of human beings.”*

These are important declarations as public policy considerations play a large part in determining which reproductive rights, if any, rainbow families enjoy. Article 3 is partly based on the Council of Europe Convention on Human Rights and Biomedicine (1997, CETS No: 164), but this Convention has not been ratified by all Member States.

EU law on free movement and European citizenship comes into play when there is movement between Member States on any of these matters. There are two Directives which specifically deal with MAR issues and also Directive 2011/24/EU (‘the Patient Mobility Directive’) on the application of patients’ rights in cross-border healthcare, which is relevant to free movement to receive reproductive services. Article 3(a) of the Patient Mobility Directive defines ‘healthcare’ as being *“health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices.”* While it is largely accepted that MAR and surrogacy arrangements amount to ‘services’ within the TFEU, there is controversy over which of these arrangements amount to ‘healthcare’.

The ECtHR takes a cautious view of reproductive rights issues. However, while upholding national prohibitions on MAR, the Court has, in some cases, taken into account whether there is free movement to other States to receive MAR services. Also where MAR is permitted, the ECtHR can place constraints upon its operation, including the operation of the non-discrimination clause (Article 14, ECHR).

### **What EU laws specifically apply to MAR?**

There are two EU Directives which deal with reproductive issues.



One is Directive 98/79/EC on in vitro diagnostic medical devices, which provides for harmonisation of national provisions governing the placing on the market of so-called in vitro diagnostic medical devices, including in vitro fertilisation and assisted reproduction technologies products. However, this is a single market measure which does not seek to regulate each Member State's laws on MAR.

The second is Directive 2004/23/EC on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells ('the Tissues and Cells Directive'). This is a public health measure, setting quality and safety standards. The recitals refer to the CFREU and the Convention on Human Rights and Biomedicine (Recital 22).

Article 4.3 provides that the Directive *"does not affect the decisions of the Member States prohibiting the donation, procurement, testing, processing, preservation, storage, distribution or use of any specific type of human tissues or cells or cells from any specified source, including where those decisions also concern imports of the same type of human tissues or cells."*

Article 4.2 provides that the Directive *"shall not prevent a Member State from maintaining or introducing more stringent protective measures, provided that they comply with the provisions of the Treaty"*, and that they may introduce *"requirements for voluntary unpaid donation, which include the prohibition or restriction of imports of human tissues and cells."*

### **Is there a right to procreation in European law?**

The ECtHR has had to consider this in a number of cases. In Dickson v United Kingdom (2007), the Grand Chamber considered that MAR issues came within Article 8, ECHR ('right to family and private life'). In this case, a long-term prisoner and his wife sought permission to have IVF treatment, which was regulated under the UK system. The Court accepted that issues



surrounding procreation came within Article 8. Given the moral and ethical issues involved, the Contracting States had a wide margin of appreciation on procreation matters. Nonetheless it concluded that, since IVF treatment was only permitted in exceptional circumstances, the authorisation process was disproportionate and therefore in breach of Article 8.

So, where MAR is permitted, it must be applied proportionately.

### **Can we challenge a prohibition on various forms of MAR in our Member State?**

In S.H. and Others v Austria (2011), the Grand Chamber of the ECtHR was considering a virtually total prohibition on MAR in Austria. This case again involved opposite-gender couples, both of whom were married. It is useful to set out the facts of the case (see para.14 of the judgment). The first applicant submitted that she could not conceive a child by natural means; thus the only way open to her and her husband would be in vitro fertilisation using sperm from a donor. The third applicant submitted that she was infertile. As she suffered from agonadism, she did not produce ova at all. Thus, the only way open to her of conceiving a child was to resort to a medical technique of artificial procreation referred to as heterologous embryo transfer, which would entail implanting into her uterus an embryo conceived with ova from a donor and sperm from the fourth applicant. Both methods were prohibited in Austrian law as only homologous techniques (having recourse to the gametes of the couple) were permitted.

Controversially, the Grand Chamber assessed the State's margin of appreciation on the basis of the state of affairs in 1999, when an Austrian Constitutional Court ruling had been made, rather than in 2011, when the case was decided. The Court appeared to apply a particularly wide approach to the margin of appreciation. It did accept that there was an emerging consensus, but stated (at para. 96), *"That emerging consensus is not, however, based on settled and long-standing principles established in the law of the*



*member States.*” The Court also noted that Austria did not prohibit its citizens from going to another country for MAR treatment. This was similar reasoning to that in an abortion case, A, B and C v Ireland (2010), in which it was decided that a prohibition on abortion in Ireland did not contravene Article 8 as Irish women were free to travel to other States to obtain an abortion.

In S.H., it therefore concluded, by a majority of 13-4, that there had been no breaches of Article 8. However the four dissenting judges questioned whether the ‘European consensus’ should have been assessed in 1999 rather than 2011. They also questioned whether permitting those seeking MAR treatment to travel to another State justified the prohibitions in Austrian law.

This case shows the sensitivity of reproduction issues in the European courts. Nonetheless, the Court is not yet prepared to acknowledge a right to procreation under the ECHR.

### **Can we challenge a prohibition on surrogacy arrangements in our Member State?**

Surrogacy is largely prohibited across EU Member States. As such there is much less of a European consensus than on MAR issues. There are a number of cases, involving non-recognition of children born through surrogacy arrangements, before the ECtHR at present. But there is little prospect of a challenge to a prohibition on surrogacy arrangements being successful in the foreseeable future.

### **Can we challenge a prohibition on MAR which prevents a rainbow family access to the treatment?**

The ECtHR case of Gas and Dubois (2012), discussed in Section 3, concerned the child of a same-gender couple which was conceived through IVF in Belgium. Although the French law on MAR was not directly challenged in the case, the Court nevertheless concluded that *“anonymous donor insemination in France is confined to infertile heterosexual couples, a situation*



*which is not comparable to that of the applicants.*” Therefore the argument that the French law contravened Article 14 (‘non-discrimination principle’) failed.

### **Are we entitled to information on MAR and surrogacy arrangements in other States?**

Once a cross-border element is present, EU law comes into play. The CJEU considered an Irish ban on information about abortion services in the UK in Grogan (1991). The CJEU accepted that abortion services were ‘services’ within what is now Article 57, TFEU, which covers the right to provide, but also to receive, services. It therefore appears that the provision of MAR and surrogacy also come within ‘services’ in EU law. The CJEU in Grogan avoided the issue of the compatibility of the information ban with the law on provision of services by concluding that the student organisations, seeking to provide the information, were not within the scope of Article 57.

However, the ECtHR considered the Irish ban on information about abortion services in Open Door and Dublin Well Women v Ireland (1992). In this case, injunctions were issued against two counselling organisations which provided information about abortion services in the UK. The case was argued under Article 10, ECHR (‘freedom of expression’). The Court took into account the fact that women were not prohibited from leaving Ireland to have abortions, that other sources of information were available in Ireland and that the ban had an adverse impact on the health of some pregnant women, particularly those who did not have the resources to obtain the information elsewhere. In these circumstances, taking into account the constitutional protection for the unborn child in the Irish Constitution, the ECtHR concluded that the ban was disproportionate and therefore a breach of Article 10.



**Therefore, it is arguable that an information ban on MAR and surrogacy services would also contravene Article 10, ECHR.**

It is also arguable that, if the CJEU had to deal with an information ban on MAR and surrogacy services today, it may well find such a ban contrary to free movement to provide and receive services.

There are also issues on provision of information under the Patients Mobility Directive which will be considered below.

### **Can we be prevented from travelling to another Member State to take up MAR or surrogacy arrangements?**

In the Grogan case, although the CJEU did not apply free movement principles to the information ban, the Advocate General did consider the substantive issues in the case. While upholding the information ban, he made the remark that Irish law “*does not extend to measures restricting the freedom of movement of pregnant women.*” So also, it can be seen from cases such as S.H. v. Austria and the Open Door case, that the ECtHR takes into account the freedom to receive MAR and abortion services in other States in deciding whether national prohibitions are permissible under the ECHR.

EU free movement principles have been set out in Section 2. It is very likely that the CJEU will treat MAR and surrogacy services as ‘services’ in relation to the provision of services. It has long been accepted that freedom to provide services also entails freedom to move to receive services (Luisi and Carbone (1984)). The CJEU has also concluded in Geraets-Smits (2001) that pre-authorisation rules restricting free movement to receive healthcare services “*deter, or even prevent, insured persons from applying to providers of medical services established in another Member State and constitute, both for insured persons and service providers, a barrier to freedom to provide services.*”

These issues are now largely governed by the Patients Mobility Directive.



In these circumstances, a prohibition to move to receive MAR or surrogacy services could only be justified on grounds of public policy, public security or public health. The CJEU has yet to deal with issues surrounding MAR and surrogacy in terms of public policy and public health. It will have to take into account provisions of the CFREU such as the right to respect for private and family life (Article 7, CFREU) and non-discrimination rights, including on grounds of sex and sexual orientation (Article 21, CFREU).

The CJEU is as likely as the ECtHR to be aware of the moral and ethical issues which underpin national law on MAR and surrogacy. However, given the ECtHR case law on freedom of movement to another State to obtain reproductive services, it can be anticipated that Member States will find it difficult to justify travel bans to receive MAR and surrogacy services.

### **Can our medical and legal advisers be prohibited from assisting us or travelling with us to another Member State?**

Again, the CJEU has not considered this situation. Your advisers have a right to provide services in cross-border cases under Article 56 TFEU. The same arguments on public policy and public health would have to be considered as in the case of the free movement of the rainbow family itself.

Once again, it may prove difficult for Member States to justify such prohibitions on the provision of these services or professional repercussions for doing so.

### **What rights do we have under the Patients Mobility Directive?**

Article 3(a) of the Patients Mobility Directive defines ‘healthcare’ as being *“health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices.”* It can be argued that the provision of MAR, and indeed abortion, services are within this ‘healthcare’ definition. Whether the provision of surrogacy services



can be considered 'healthcare' is more debateable.

Also, recital 7 of the Directive states, *“This Directive respects and is without prejudice to the freedom of each Member State to decide what type of healthcare it considers appropriate. No provision of this Directive should be interpreted in such a way as to undermine the fundamental ethical choices of Member States.”*

Article 4 sets out the responsibilities of the Member State of treatment. Article 4.2: 2 provides that, *“The Member State of treatment shall ensure that ... (b) healthcare providers provide relevant information to help individual patients to make an informed choice, including on treatment options, on the availability, quality and safety of the healthcare they provide in the Member State of treatment”*.

Article 5 sets out the responsibilities of the Member State of affiliation. These include, in Article 5(b), *“mechanisms in place to provide patients on request with information on their rights and entitlements in that Member State relating to receiving cross-border healthcare”*.

Article 7.1 provides that *“the Member State of affiliation shall ensure the costs incurred by an insured person who receives cross-border healthcare are reimbursed, if the healthcare in question is among the benefits to which the insured person is entitled in the Member State of affiliation.”* Article 8 covers healthcare that may be subject to prior authorisation for reimbursement costs.

These provisions are of interest to rainbow families seeking MAR treatment in another Member State, so long as their State of affiliation permits the MAR treatment. However, where your Member State does not permit the MAR treatment in question, it is doubtful whether these provisions can apply to you. It has been seen that the CJEU has not addressed reproductive issues to any great extent. While your rights to free movement may well be protected, any rights to be reimbursed may not be, if you are



not entitled to the healthcare in your own State. So also it remains to be seen whether your State is under an obligation to provide you with information on MAR services in another States if it is prohibited in your State.

This situation will develop as the case law of the CJEU, and the ECtHR, addresses issues of reproductive rights.

### **Can we be refused follow-up care if we move to receive MAR services?**

Article 5(c) of the Patients Mobility Directive provides that “(c) *where a patient has received cross-border healthcare and where medical follow-up proves necessary, the same medical follow-up is available as would have been if that healthcare had been provided on its territory*”. It is unclear whether this obligation applies if the MAR treatment is prohibited in your home State. In the ECtHR case, A., B. and C. v Ireland (2010), the issue of aftercare in the home State, after an abortion in another State, was addressed by the ECtHR. It is therefore possible that a refusal of follow-up care may be a breach of Article 8, ECHR.

It is also the case that EU free movement law can be invoked against a home Member State if free movement rights have been exercised. So there are arguments that a failure to provide after care, for both the child and the mother, may not be permissible.



## 05. Social and economic rights of rainbow families

### Introduction

In this section, rights relevant to rainbow families in the labour market will be considered. EU workers and their families enjoy a right to equal treatment, compared to workers in the host State, across a wide range of areas in which social and economic rights apply. These rights are now set out in Regulation (EU) No 492/2011 on freedom of movement for workers within the Union ('the Free Movement Regulation'). Recently, a further free movement of workers Directive was adopted, namely Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, which provides access to judicial process for EU workers who consider that their equal treatment rights have been infringed ('the Free Movement Directive'). This Directive requires national equality bodies to protect equal treatment rights.

Directive 2000/78/EC ('the Framework Directive') provides protection for all workers from discrimination on grounds of sexual orientation in employment and training. However a draft Directive which extended this protection to the provision of goods and services has not been adopted. Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ('the Recast Directive') provides protection from discrimination for trans\* workers.

Other social measures are also relevant to rainbow families, such as Directive 92/ 85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding ('the Pregnant Workers Directive') and Directive 2010/18/EU implementing the revised Framework Agreement on parental leave ('the Parental Leave Directive').



## What rights do we enjoy as EU workers in another Member State?

The concept of a ‘worker’ in EU law is a wide one and includes many working relationships beyond those who work under a contract of employment. Article 7.1 of the Free Movement Regulation sets out the principle of equal treatment in the labour market. It provides that, *“A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.”* Taking into account Article 21, CFREU, this would include LGB&T EU workers being treated differently than LGB&T national workers.

Article 9 gives EU workers the same access to housing as national workers. Article 10 also provides a right to access to education for the families of EU workers. It states that *“The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.”* This provision is subject to the discussion in Section 3 on the scope of ‘families’ in EU free movement law.

## Are we protected from discrimination in the workplace?

The Framework Directive provides extensive protection for workers in rainbow families on grounds of sexual orientation from both direct and indirect discrimination, harassment and victimisation in the workplace. Its scope includes a wide range of employment relationships and the full scope of the employment relationship. According to Article 3.1, it applies to *“all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to*



*self-employment or to occupation ... [and] (c) employment and working conditions, including dismissals and pay.”*

The Directive also covers all forms of vocational training and work experience. Article 3.1(b) covers *“(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience”*.

### **How are we protected from discrimination on grounds of sexual orientation?**

Article 2.1 provides, *“the ‘principle of equal treatment’ shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 [including sexual orientation]”*. Article 2.2(a) states that direct discrimination *“shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1”*. So this provision covers situations in which a member of a rainbow family is discriminated against because of their sexual orientation.

The Framework Directive also includes protection from discrimination on grounds of age, disability and religion or belief. A significant case on discrimination against family members is Coleman (2008), where the CJEU held that the term ‘on grounds of disability’ included discrimination or harassment against a family member who was disabled. In that case, a mother complained about discrimination and harassment because her son was disabled. This case would cover two situations. The first is where a member of a rainbow family is discriminated against because they are in a same-gender relationship. For example, if an employer provided access to a social club for workers and their opposite-gender partners, but not same-gender partners, this would be direct discrimination.

**The second situation is where the children of a rainbow family are discriminated against because of the sexual**



**orientation of their parents.** In light of the Coleman decision, direct discrimination might also apply, depending on the circumstances, if the children of a rainbow family were excluded from an employer-run crèche or kinder garden. So also if the children of a rainbow family were old enough to work or take part in vocational training, they would be protected from discrimination because of their parents' sexual orientation.

The second non-discrimination principle in the Framework Directive is indirect discrimination. It is defined, in Article 2.2(b) as being *“taken to occur where an apparently neutral provision, criterion or practice would put persons having ... a particular sexual orientation at a particular disadvantage compared with other persons”*. This is intended to cover less obvious forms of discrimination where working conditions, in practice, place LGB workers at a particular disadvantage. For example, if an employer's social club was only open to workers and their married partners, this could place same-gender couples at a particular disadvantage.

There are very limited grounds upon which direct discrimination can be justified. However, because indirect discrimination involves an 'apparently neutral' provision, the employer can justify it, according to Article 2.2(b), by showing *“that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”* This sounds complicated but, in the example, the employer would have to show that it had a legitimate aim in restricting access to the social club to married partners, perhaps to control the numbers using the facility. But it would have to show that it was appropriate and necessary to do so. Could access to be extended to those in civil partnerships or to any cohabiting couples?

### **How are we protected from harassment in employment and training?**

Article 3.3 defines harassment as *“when unwanted conduct*



*related to [sexual orientation] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”.* This covers conduct which could include physical violence, insults, refusing to work with someone or even the sort of ‘jokes’ which could be considered offensive.

Because harassment involves conduct ‘related to’ sexual orientation, it is also arguable that it can be covered when it is committed by those who are not workers in the workplace if the employer allows that environment to be created.

### **One of our family is trans\*. How are they protected?**

The Framework Directive protects against discrimination on grounds of sexual orientation. However, the CJEU has ruled that the equivalent EU gender discrimination provisions can apply to trans\* people. In a number of cases, such as P. v S. and Cornwall County Council (1996), the CJEU decided that to discriminate against a worker because they are undergoing gender reassignment involves discrimination on grounds of sex. This is also set out in Recital 3 of the Recast Directive.

### **How do these rights work in practice?**

There are many CJEU decisions on other areas of non-discrimination, for example of grounds of sex. There have been three cases before the CJEU on sexual orientation discrimination.

In Maruko (2008), the applicant took a case over the refusal by a pension fund to recognise his entitlement to a widower’s pension as part of the survivor’s benefits provided for under the compulsory occupational pension scheme of which his deceased life partner had been a member. The CJEU confirmed earlier case law on equal pay for women and men that a survivor’s benefit, on the facts of this case, was ‘pay’ for the purposes of the Framework Directive. From 2005, the German legislature has placed life partnership and marriage on an equal footing, in particular in the



## Social Security Code.

The Court rejected the argument that issues of marital status were outside the scope of the Directive even though Recital 22 states, *“This Directive is without prejudice to national laws on marital status and the benefits dependent thereon.”* The Court concluded, at para.72, that *“If the referring court decides that surviving spouses and surviving life partners are in a comparable situation so far as concerns that survivor’s benefit, legislation such as that at issue in the main proceedings must, as a consequence, be considered to constitute direct discrimination on grounds of sexual orientation, within the meaning of [the Framework Directive].”*

In Maruko, the Court was saying that national courts had to look at the particular benefit or particular working conditions, in this case, a survivor’s benefit and consider whether the life partnership was comparable to marriage. If so, direct discrimination on grounds of sexual orientation can be established.

In Römer (2011), the applicant wanted his pension entitlement recalculated on the basis that, as he entered into a life partnership in 2001, he should be treated in the same way as ‘married, not permanently separated, pensioners’. Leading on from the Maruko decision, the CJEU confirmed that even the constitutional status of marriage in the German legal order could not justify a breach of the principle of equal treatment. It stated, at para. 42, that *“it is required not that the situations be identical, but only that they be comparable and, second, the assessment of that comparability must be carried out not in a global and abstract manner, but in a specific and concrete manner in the light of the benefit concerned.”*

As far as the supplementary retirement pension was concerned, the Court concluded (at para. 46) that *“[i]t aims to provide, on retirement, a replacement income which is deemed to benefit the recipient, but also, indirectly, the persons who live with him.”* So the Court decided, at para. 52, that *“there is direct discrimination*



*on the ground of sexual orientation because, under national law, that life partner is in a legal and factual situation comparable to that of a married person as regards that pension. It is for the referring court to assess the comparability, focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as they are governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.”*

The case law of the Court moved beyond pensions to work benefits in Hay (2013). In 2007, Mr. Hay concluded a PACS with a person of the same sex. On that occasion, Mr. Hay applied for the days of special leave and the marriage bonus granted to employees who marry, in accordance with his employer’s national collective agreement. The employer refused him those benefits on the ground that, under that collective agreement, they were granted only upon marriage.

The Court again stated that the comparability of marriage and, in French law, PACS depended on the benefits in question, in this case, special leave and a marriage bonus. The Court stated (at para. 40) that *“In that context, it should be noted that [the] national collective agreement grants those benefits on the occasion of marriage, irrespective of the rights and obligations arising from marriage.”*

In Maruko and Römer, the Court considered the comparability of a life partnership, into which only same-gender couples could enter, and marriage, into which only opposite-gender couples could enter. But, in French law, PACS is available to both. This did not deter the Court in Hay. At para. 44, it stated, *“The difference in treatment based on the employees’ marital status and not expressly on their sexual orientation is still direct discrimination because only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed.”*



The French court had referred the case to the CJEU on the basis of whether the restriction of these benefits to married couples was indirect discrimination. But the CJEU converted the question into whether it was direct discrimination and answered in the affirmative.

The full significance of this ruling has yet to be determined. **At least, it means that where marriage and a form of registered partnership are comparable for the purposes of that benefit, there is still direct discrimination, rather than indirect discrimination, because the worker in a same-gender partnership cannot satisfy the requirement to be married.** This is so even if a worker in an opposite-gender registered partnership is at liberty to enter into a similar registered partnership. In other words, having decided on comparability for the purposes of the benefits in question, the Court took a final step by pointing out that a worker in a same-gender registered partnership was excluded from the benefit.

### **What rights do we enjoy under the Pregnant Workers Directive?**

The Pregnant Workers Directive provides pregnant workers with rights such as maternity leave (Article 8), time off for ante-natal examinations (Article 9), protection from dismissal (Article 10) and maternity pay (Article 11).

In two recent decisions, the CJEU has decided that a mother who was having her baby through a surrogacy arrangement is not entitled to maternity leave either under the Directive or in gender discrimination law. In *C.D. v S.T.* (2014), the intended mother had a baby through a surrogacy arrangement and her employer refused to grant her paid leave following the birth of the baby. The Court emphasised that the Directive is a health and safety measure and stated, at para. 35, that *“it follows from the objective of Directive 92/85, from the wording of Article 8 thereof, which expressly refers to confinement ... that the purpose of*



*the maternity leave provided for in Article 8 of that directive is to protect the health of the mother of the child in the especially vulnerable situation arising from her pregnancy.”*

The Court accepted (at para. 36) that the Directive also had the objective to ensure that the special relationship between a woman and her child is protected but that, even if the mother was breastfeeding the baby, the protection of the relationship “*concerns only the period after ‘pregnancy and childbirth’*”. The Court also pointed out the Directive set down minimum standards and that Member States were free to apply higher standards.

The Court also rejected the argument that there had been a breach of the Recast Directive on gender discrimination. In the second case, Z v A Government Department (2014), arguments were made under gender and disability discrimination law that an intended mother should be entitled paid maternity leave but these were also rejected.

### **What rights do we enjoy under the Parental Leave Directive?**

The Parental Leave Directive, which replaces an earlier Directive (Directive 96/34/EC), is based on an EU system of negotiation between employers and trade unions, known as ‘social dialogue’. The Parental Leave Directive brings into effect a Framework Agreement on Parental Leave (2009) which is appended to the Directive and sets out rights to parental leave. The Directive (and Agreement) can be brought into law by national laws or collective agreement.

Recital 3 of the Framework Agreement refers to Article 33, CFREU and Article 23 (‘Equality between women and men’).

Article 33, CFREU (‘Family and professional life’) states:-

*“1. The family shall enjoy legal, economic and social protection.*



2. *To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.*"

For rainbow families, the two key provisions are Clause 2 (Parental Leave) and Clause 4 (Adoption). Clause 2.1 states:-

*"This agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners."*

Clause 4.1 states:-

*"Member States and/or social partners shall assess the need for additional measures to address the specific needs of adoptive parents."*

The main issue for rainbow families is the meaning of the phrase *"to be defined by Member States and/or social partners."* Is the phrase 'the birth or adoption of a child' subject to national family law, including private international law, on MAR, surrogacy and adoption law? Clause 1 of the Agreement ('Purpose and scope') refers to *"requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents, taking into account the increasing diversity of family structures while respecting national law, collective agreements and/or practice."*

It is significant that Article 33, CFREU does not refer to 'national law and practices', unlike other CFREU provisions. So there is plenty of scope for discussion, particularly within collective bargaining structures, on whether any birth or adoption brings about rights to parental leave or whether the birth or adoption has to be subject to the national family law of each Member State.



## 06. Conclusion

The rights of LGB&T people and of rainbow families have increased dramatically in the past 30 years, since Jeffrey Dudgeon brought the first case to the ECtHR on sexual orientation issues. With gathering pace, the ECtHR has begun to recognise the existence of rainbow families within the context of the EHRC, particularly Article 8, ECHR ('respect for the right to private and family life'), upon which Dudgeon based his case.

So also, EU law recognised the non-discrimination rights of LGB people in the labour market in the Framework Directive 2000 and the CJEU has recognised the rights of trans\* people within gender discrimination law. The elevation of the status of the CFREU to one complementary to the Treaties, through the Lisbon Treaty, has ensured that the rights of rainbow families must be considered in relation to all aspects of EU law.

In this Handbook, we have sought to concentrate on the law as it is, with some signposting of issues upon which further developments may well take place, both in EU law and under the ECHR. The White Paper, produced as part of this project, will examine in more detail the prospects for the rights of rainbow families. Despite this quickening pace, there are many challenges facing rainbow families, given a spectrum of approaches in national law to issues such as recognition of relationships and reproductive rights. It is the purpose of this Handbook to give rainbow families a clear statement of where they stand at the moment and to provide them with analysis which will enable them, and their advisers, to tackle these challenges in the years ahead.



## Annex: How to use the law

In this Annex, a straightforward explanation will be given on how to use EU law and Convention rights in legal action on behalf of rainbow families.

### Sources of EU law

Throughout this Handbook, there have been references to the EU Treaties, particularly the TFEU, which is the primary law of the EU. The TFEU sets out the fundamental principles of the EU across its areas of competence and also sets out the legislative procedures whereby EU law is enacted in relation to each area of competence. The EU started out as the European Economic Community in 1957 but many areas of EU competence have been added since.

EU secondary law is enacted by the Council of Ministers and the European Parliament, although the initial proposal is made by the European Commission. Most of the EU secondary legislation relevant to rainbow families is set out in directives, for example, the Citizenship Directive (Directive 2004/38/EC) referred to in Section 2. Some of the legislation is set out in EU regulations, such as the Brussels II Regulation (Council Regulation (EC) No 2201/2003) which is discussed in Section 3. Since all secondary law is derived from the Treaties, they must be interpreted and applied subject to the relevant Articles of the TFEU.

The TFEU is complemented by the CFREU which sets out the fundamental rights of EU citizens and non-EU citizens who reside in the EU. Some of its provisions, for example, the right to respect for private and family life (Article 7, CFREU), the non-discrimination rights, including on grounds of sex and sexual orientation (Article 21, CFREU), and the rights of the child (Article 24, CFREU) have been referred to many times in the Handbook. It is therefore a powerful source of interpretation of the TFEU and particularly EU secondary law. Therefore there are frequent references to the CFREU in terms of how EU law, which applies



to rainbow families, will be interpreted by national courts and particularly the CJEU.

### **How can we use the TFEU to advance the rights of rainbow families?**

These sources of EU law are also part of the national laws of each Member State. The CJEU has been adamant since the early 1960s that EU law **must take precedence over national laws**, where they are inconsistent. This 'supremacy' of EU law applies to national authorities, including the courts.

Most of the key provisions of the TFEU are described as 'directly effective', for example all the provisions on free movement, including Article 45 (on free movement of workers) and Article 56 (on freedom to provide services). What does this mean? It means that **these key Treaty provisions create individual rights in the national legal systems and are directly enforceable in the national courts, whether the case is against a public body but also a private person or organisation**. Although it will be seen that secondary EU law also can be directly effective, Treaty rights are paramount.

For example, in the Court of Justice of the EU case of Zambrano (discussed in Section 2), the Court effectively said that Article 20 ('European citizenship') had this effect in national law. At para. 42, the CJEU stated, "*In those circumstances, Article 20 Treaty on the Functioning of the European Union **precludes** national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union*" (emphasis added).

So, in legal proceedings involving the rights of rainbow families, the TFEU is effectively a 'Constitution for the EU'. Its provisions can be utilised in legal proceedings to advance your rights and the rulings of the CJEU are binding on national courts.

### **How can we use EU secondary law to advance the rights of rainbow families?**



An EU regulation is a more powerful EU legal instrument than an EU directive. According to Article 288, TFEU, “A *regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*” **This means that the provisions of a regulation become law in each Member State on the day that it is published.** Its provisions can therefore be used in legal cases from that date. It is also supposed to take precedence over national law which is inconsistent with its provisions. For example, Article 42 of the Free Movement Regulation states, “*This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.*” It then repeats the Treaty definition by stating, “*This Regulation shall be binding in its entirety and directly applicable in all Member States.*”

Most of the EU law considered in this Handbook is set out in EU directives. Article 288, TFEU also defines a directive. “A *directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*” **A directive is a harmonising measure which sets down minimum standards which must be enacted into the law of each Member State. Directives set out a time limit within which national law must be amended, if necessary, to satisfy the provisions of the directive.** For example, Article 40.1 of the Citizenship Directive states, “*1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive [within t]wo years from the date of entry into force of this Directive.*”

Because a directive is “*binding as to the result to be achieved*”, its provisions play an important role in deciding what the national law means and how it should be applied. This happens in two ways. **First, the CJEU requires national courts to do everything possible to interpret national laws in conformity with the provisions of a directive.** Although Member States are free to choose how they bring the terms of a directive into national law,



many repeat the wording of a directive. In this case, national courts are expected to apply the rulings of CJEU to the statutory wording in national law.

Even if the wording is quite different, perhaps because pre-existing laws have been amended, or are considered to satisfy the terms of a directive, **the national court must do all in its power to find a meaning for the national law to make it compliant with the terms of the directive.** This principle of judicial interpretation is sometimes described as 'indirect effect'. While the direct effect of a Treaty provision or of a regulation means that the EU law directly creates individual rights in national law, the indirect effect of a provision of a directive also creates individual rights but through interpretation of the national law rather than independently of it.

Secondly, the CJEU has also lessened the distinction between regulations and directives by giving **direct effect to some provisions of directives.** The Court's approach is to examine the provisions of a directive to see if the wording used is clear enough to be applied by a national court. But **directives can only be directly effective against State bodies**, although this is widely interpreted to include organisations to which public functions are contracted out. This distinction is less important in relation to the application of the Citizenship Directive as most of its provisions apply only to the actions of the Member States. But it can be more important in relation to the application of the Framework Directive, discussed in Section 5, as it applies to both the public and private sectors, but its provisions can only be directly effective against public bodies.

Finally, if it is impossible to apply the terms of a directive, perhaps because it has been brought into national law after the deadline for doing so, it is possible to take a separate civil action against the Member State which has failed to fulfil the obligations in the directive.

The European Commission, as 'Guardian of the Treaties', can



also take a Member State directly to the CJEU if it considers that the Member State is not abiding by EU law.

In any area of EU law, the provisions of the CFREU have taken on great significance since the Lisbon Treaty came into effect in 2009. As a result, the CFREU has equal status with the TFEU and it must be taken into account in the interpretation of any EU law.

The CJEU, based in Luxembourg, is made up of judges from each of the Member States. It is different to many others courts. Although it is possible to bring cases involving EU administrative law directly to the CJEU, most of its case load comes from **references to it from the national courts**. The CJEU is therefore not an appeal court but rather a court of reference. A rainbow family starts a case in a national court and that court decides that there are issues concerning the interpretation of EU law which need answering, because the law is not well-settled. Any court or tribunal can refer a case to the CJEU but the highest national courts are expected to refer issues of EU law to the CJEU, unless they are well-settled.

The case is effectively adjourned in the national court and **the national court sends a series of questions on EU law to the CJEU for a 'preliminary ruling' on these questions**. Most cases are heard by a chamber of the Court of five or seven judges although particularly significant cases are heard in a plenary session of thirteen or fifteen judges. The European Commission and any Member States, including the State from which the reference has come, can make submissions. In most cases, a judicial officer of the Court, called the Advocate General, gives his or her Opinion on the questions asked. This Opinion can be extensive and a recent Opinion is often a useful exposition on the current state of EU law in that area. The CJEU is not bound to follow the Advocate General's Opinion but it frequently does so.

The preliminary ruling of the CJEU is its answer to the questions posed by the national court. CJEU rulings are normally shorter than Advocate General Opinions, although the CJEU will refer



to its previous case law in reaching its conclusions. This ruling is then returned to the national court which is expected to apply the ruling in the case before it.

## **The European Convention of Human Rights**

Officially called the Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR is the product of the Council of Europe. Both pre-date the original European Economic Community. The ECHR dates from 1953 and applies to the 47 Contracting States of the Council of Europe, including the 28 Member States of the EU. The original Convention has been added to by a number of Protocols but these Protocols have not been ratified by some Contracting States.

The Convention sets out civil and political rights, rather than social and economic rights which are set out in another Council of Europe human rights instrument, the (Revised) European Social Charter. The Convention is a more powerful human rights instrument as the ECtHR, based in Strasbourg, was set up to adjudicate on potential breaches of the Convention. Most European and international human rights instruments are adjudicated upon by a committee system, based on national reports from the Contracting States.

Cases can be brought to the ECtHR by individuals but only after they have been taken through the national courts of the Contracting State. The ECtHR is also made up of chambers and important cases can be referred to the Grand Chamber or it can rehear cases decided by the original chamber. The ECtHR decides whether breaches of the ECHR have occurred and can indicate if national laws require amendment to avoid future breaches. It can also make an award of damages to a successful applicant. National authorities and courts are expected to abide by rulings of the ECtHR. A failure to do so can be referred to the Committee of Ministers of the Council of Europe which oversees whether the measures necessary to satisfy the ECtHR's judgments have been adopted.





# Table of Cases and Glossary

## Cases before the CJEU

C.D. v S.T., C-167/12 (18 March 2014)

Carpenter, C-60/00 (11 July 2002) [2002] ECR I-6279

Coleman (Social policy), C-303/06 (17 July 2008)

D. and Sweden v. Council, Joined Cases C-122/99 P & C-125/99 P [2001] ECR I-4319

Geraets-Smits and Peerbooms, C-157/99 (12 July 2001) [2001] ECR I-5473

Grogan, C-159/90 [1991] ECR I-04685 (4 October 1991)

Hay, C-267/12 (12 December 2013)

Luisi and Carbone v Ministero del Tesoro, Joined Cases 286/82 and 26/83 (31 January 1984) [1984] ECR 377

Maruko v Versorgungsanstalt der deutschen Bühnen), C-267/06 (01 April 2008) [2008] ECR I-1757

McCarthy, C-434/09 (5 May 2011) [2011] 3 CMLR 10

Metock, C-127/08 (25 July 2008) [2008] ECR I-6241

P. v S. and Cornwall County Council, C-13/94 (30 April 1996) [1996] ECR I-2143

Römer v Freie und Hansestadt Hamburg, [2011] C-147/08 (10 May 2011) [2013] 2 CMLR 11

Secretary of State for the Home Department v Islam & Anor, C-83/11, (5 September 2012) (known as 'Rahman')

State of the Netherlands v Ann Florence Reed, Case 59/85, (17 April 1986) [1986] ECR 1283

Ruiz Zambrano, C-34/09, judgment of 8 March 2011 [2011] 2 CMLR 46

Z. v A Government Department, C-363/12 (18 March 2014)

Cases before the ECtHR

A, B and C v Ireland (2010), 25579/05 (16 December 2010)

Dickson v United Kingdom 44362/04 (4 December 2007) (2008) 46 EHRR 41

Dudgeon v The United Kingdom, 7525/76 (22 October 1981) (1982) 4 EHRR 149

Gas and Dubois v France - 25951/07 (11 March 2011)

Hämäläinen v Finland - 37359/09 (13 November 2012)

J.M. v The United Kingdom, 37060/06 (28 September 2010) (2011) 53 EHRR 6

Karner v Austria, 40016/98 (24 July 2003) [2004] 38 EHRR 24

Open Door and Dublin Well Woman v Ireland, 14234/88 and 14235/88 (29 October 1992)

S.H. v Austria 57813/00 (1 April 2010)

Schalk and Kopf v Austria, 30141/04 (22 November 2010)

Salgueiro da Silva Mouta v Portugal, no. 33290/96 (21 December 1999) (2001) 31 EHRR 47

Vallianatos v Greece, 29381/09 32684/09 (7 November 2013)

X v Austria, 19010//07 (19 February 2013) (2013) 57 EHRR 14

Glossary

CFREU: Charter of Fundamental Rights of the European Union

CJEU: Court of Justice of the European Union (Luxembourg)

ECHR: European Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe)

ECtHR: European Court of Human Rights (Strasbourg)

EU: European Union

TFEU: Treaty on the Functioning of the European Union

UNCRC: United Nations Convention on the Rights of the Child











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