Can rights of free movement be abused? The saga of marriages of convenience between EU citizens and non-EU nationals

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(Preliminary draft – please do not circulate or quote)

1. Preliminary remarks

The expression "marriage of convenience" is gaining momentum in the context of the relationship between States and foreign individuals. It may be employed in various instances where an alien invokes his/her personal union:

- with a local national in order to acquire the relevant nationality or a residence permit regulated by the applicable domestic legislation[2], or
- with a EU citizen in order to enjoy the mobility and residence rights enshrined in Directive 2004/38 and related secondary EU legislation, or
- with a third country national regularly resident in the territory with the aim to access to family reunification under Directive 2003/86.

In all the mentioned instances, the constitution of a marriage (or eventually of a personal union) may be viewed by Member States as the potential component of a legal construction aimed at circumventing its domestic legislation on entry and residence of foreign individuals.

Before entering into the details of this controversial issue it may be noted that 'convenience', in itself, is an extremely vague and ambiguous term, because practice and experience show that a component of convenience is not so rare in marriages and other personal unions. Marriage is often seen as a means of self-promotion in the social chain or of gaining of stability and personal and economic security. For sake of realism, it must be admitted that authenticity of mutual feelings is present in many variations, or that it is firmly grounded only in the first years of the relationship. Thus convenience, for one side of the couple or even for both, is not an extraneous element in the motives pushing to enter into a marriage or to maintain it in the course of time.

What makes convenience so peculiar in the context of nationality and migration law? It is the fear that the matrimonial institute might be distorted in such a way to transform marriage into a pure fiction, aimed exclusively at circumventing migration law, in cases of entry, stay or prospective expulsion. It is reasonable to say that only peculiar circumstances should authorize an assessment in terms of authenticity, because in many cases this requirement is present only formally in many marriages or

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[2] It may recalled the case of various typologies of residence permits grouped under the heading "family unity" which are usually accorded in domestic statutes to foreign nationals in order to stabilize their family life with a local citizen, irrespective of whether a concomitant application for nationality *iure matrimonii* is filed.

to a very limited extent, without leading any legislator or public authority to refuse the applicability of relevant provisions to the couple.

As a further step, it must be outlined that the three settings that I have outlined above are only apparently susceptible to be treated in a uniform way. On one side, they all impinge on two fundamental rights, namely the right to marry and set up a family (Article 12 ECHR), and the right to have his/her own family life respected from intrusions of the public authorities (Article 8 ECHR): as a consequence, it must be verified if measures to tackle the so called marriages of convenience are generally compatible with the exercise of those individual freedoms and, in the positive, if they are necessary and proportionate, taking also into consideration the need not discriminate against mixed couples. Thus, a first level of scrutiny must be conducted on the ground of human rights law.

On another side, however, such measures enter into a complex relationship with different values protected by the law, each one possessing autonomous foundations and distinct features. In fact, in the first case the choices embodied in a single domestic legal order on acquisition of nationality *iure matrimonii* or on stability of mixed (non-mobile) couples are called into question; in the second case, the expansion of the beneficiaries of advanced free movement rights and its underlying rationale (grounded in the effectiveness of the mobility of EU citizen[3]) are at stake; in the last case, another movement right (embodied in EU law but subject to several conditions)[4] is involved. For these reasons, a unitary reasoning on marriages of convenience does not seem appropriate from a methodological point of view.

In sum, the main situations where the issue of marriages of convenience is raised have something in common (the potential tension with two established universal human rights) and something deeply different (the impingement on distinct legal status deriving from domestic law, EU free movement regime or EU migration law). This setting explains why this essay will focus only on one of these situations, leaving to future studies or to other scholars the uneasy task to conduct a comprehensive research. The topic chosen – marriages of convenience in the context of free movement of persons, according to Directive 2004/38 – is the most intriguing, in my opinion, from the point of view of the complex relationship between human rights, a well-developed part of EU law, State's interests and malice put in practice by interested individuals. Additionally, this issue saw the various EU institutions (the ECJ, the Council, the European Parliament, the Commission) taking a position in the course of time, thus allowing to work on an abundant material.

[3] Notwithstanding this derived mobility freedom is not recognized by the TFEU, it must be emphasized that it was recognized already in the late sixties of the last century in the perspective of the strengthening of the free movement of EU nationals, which is strongly rooted in the primary law.

[4] The right to family reunification is not mentioned as such in the TFEU and is derived from Directive 2003/86, being subjected to a legal regime that is weaker if compared to the one enshrined in Directive 2004/38. Additionally, the right to reside for the main family member is not as such attributed by the TFEU.

In developing the analysis, it may already be underlined that domestic lawmakers or implementing authorities tend to mix the treatment of the different situations above described, risking to apply the solutions that might be admissible for one situation to another one where the systematic data should lead to a diverse outcome. Moreover, many interesting studies have been carried out, but mainly in the perspective of analyzing the challenges posed by the first and the third settings above-mentioned.

2. Situations to which free movement law applies

In order to place correctly the discussion a brief outline of the situations which may call into question the free movement regime is useful, with especial regard to the place where the wedding is celebrated. This factor, indeed, plays an important role in the evaluation of the topic here discussed and of the guidelines emerging from the EU documents.

The basic situation envisaged by Directive 2004/38 is the one of the spouses, married elsewhere (i.e. MS or a third country), who move to a Member State different from the one of nationality of one of them and from the country of previous residence of the couple [situation No. 1].

Other situations may be imagined. For instance a EU national, living in a MS different from his/her own, moves to another MS or to a third State in order to marry a TCN and then comes back with the spouse in the MS of habitual residence, claiming the enjoyment by the spouse of the free movement rights [situation No. 2].

In another setting, the same EU national marries the TCN in the MS of habitual residence, claiming the enjoyment by the spouse of the right to residence under the ECJ case law and Directive 2004/38 [situation No. 3].

Finally, it may happen that a EU national moves to another MS for a certain period, marries there a TCN and then comes back to his country of nationality claiming the application of the Singh case law[5] of the ECJ for his/her spouse [situation No. 4].

As it is apparent from this exemplification, only situation No. 3 regards a marriage celebrated in the same MS potentially affected by an abuse of free movement rights. In all the other potential settings, the authority of the host State are tackling a marriage which is legally formed in another State, be it a MS or a third country, and a personal history of the spouses which took place elsewhere. In this perspective, it is really hard to imagine how a serious enquiry can be conducted by those authorities about the decisive phases such as the previous contacts between the spouses, the wedding and the period immediately following the celebration.

This being said, let us have a look at the indications coming from EU law.

3. The legal framework

[5] ECJ, judgement 7 July 1992, case C-370/90.

Article 35 Directive 2004/38 allows Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience, provided the requirements applicable to any other limitation to free movement rights (such as public order, public security, public health) are respected.

No specific definition is given of abuse or of marriage of convenience: nevertheless, Recital 28 of the Directive interestingly stipulates that "[t]o guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted *for the sole purpose* of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures".

With time, the generous case law of the ECJ on some "borderline" situations and the patterns of exploitation of the free movement regime[6] started to worry MSs, until asking expressly to the Commission to clarify, even though non-binding documents, the margins for national authorities in tackling dubious situations and fight against abuses of the movement rights as interpreted by the ECJ.

At its meeting of 27-28 November 2008, the Justice and Home Affairs Council adopted several conclusions on "Abuses and misuses of the right to free movement of persons", urging the Commission to publish guidelines for the interpretation of that Directive.[7] Amongst the topics therein evoked, stands the issue of marriages of convenience.

In 2009, the Commission issued guidelines for better transposition and application of the Directive (hereinafter referred to as the Guidelines),[8] *inter alia*, to help national authorities better understand what constitutes abuse to free movement and how to prevent or tackle cases of abuse under national law while complying with EU law.

At its meeting of 26-27 April 2012, the Justice and Home Affairs Council approved the Roadmap on "EU action on migratory pressures - A Strategic Response", which refers to marriages of convenience as a means of facilitating illegal entry and residence of non-EU nationals in the EU. One of the actions listed in the Roadmap is the preparation of "a handbook on marriages of convenience, including indicative criteria to assist in the identification of sham marriages".

In a Communication of November 2013 ("Free movement of EU citizens and their families: Five actions to make a difference"),[9] the Commission already recalled that EU law contains a series of robust safeguards allowing Member States to fight abuse. Nevertheless, it also announced the upcoming drafting, in cooperation with Member States, of a handbook on addressing marriages of convenience.

[6] See for instance ECJ, judgement 22.9.2003, C-109/01, *Akrich*; judgement 25.7.2008, C-127/08, *Metock.*

[7] Doc. 16325/1/08, p. 28.

[8] COM (2009) 313, 2.7.2009.

[9] COM(2013) 837, 25.11.2013.

Finally in 2014, the Commission adopted a Communication on "Helping national authorities fight abuses of the right to free movement",[10] to which is annexed an "Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens".[11] This document is especially important insofar it tries to strike a balance between competing legal standards and States practices, a mission that however appears to be in many instances as virtually impossible.

4. A survey of critical issues

At this stage of the research, some outstanding issues may be single out.

The Communications and the Handbook issued by the Commission are not binding: nevertheless, they represent an attempt to establish a common understanding of inherently ambiguous concepts, such as abuse or convenience, and of relevant standards of proof. In doing so, a strict respect of current rules and principles is due.

In general terms, it must noted a great sensitiveness towards the centrality of the free movement and the need to reduce to the minimum the room for exceptions, such as the one concerning the marriages of convenience.[12] For example, it is repeated in various instances that significant hints of abuse must always be checked against concurrent hints of no abuse, that no automatic presumption of abuse must be drawn by the occurrence of some hints of abuse, and that in any stage an overall and non-biased evaluation must be carried out.[13] In doing so, the Commission shows a clear resilience to the pressures coming from several MSs in order to receive a sort of official endorsement or "EU green light" to some doubtful practices.

However, on some occasions the Commission seems to take doubtful steps.

Definitional aspects

A definition of marriage of convenience is proposed: a marriage contracted for the *sole purpose* of conferring a right of free movement and residence under EU law on free movement of EU citizens to a spouse who would otherwise not have such a right, whereas there is no intention of the married couple *to create a family as a married couple* and to *lead a genuine marital life*.

Three aspects deserve attention.

Firstly, it is specified the notion of "sole purpose" is an autonomous concept of EU law, to be interpreted according to EU law, taking into account primarily the purpose

[10] COM (2014) 604, 26.9.2014.

[11] SWD (2014) 284, 26.9.2014.

[12] Handbook, pp. 16-19.

[13] Handbook, pp. 32-35.

of this concept in the wider context of the fundamental freedom to move and the fight against abuse. Based on this consideration, the Commission goes on stating that that notion "should not be interpreted literally (as being the unique or exclusive purpose) but rather as meaning that the objective to obtain the right of entry and residence must be the *predominant* purpose of the abusive conduct".[14] Here a serious question of adherence to the rule of law arises: the language of the Directive (Article 35, read in conjunction with Recital 28) is very clear, and it is firm that exceptions to the general rules on free movement must be interpreted strictly.

The same ECJ emphasized once again this concept, rightly with regard to a national policy elaborated by UK to fight against presumed marriages of convenience and frauds in documentation. It is worth quoting the Court:

- "measures adopted by the national authorities, on the basis of Article 35 of Directive 2004/38, in order to refuse, terminate or withdraw a right conferred by that directive must be based on an individual examination of the particular case";

- "the adoption of measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud would mean […] that the mere fact of belonging to a particular group of persons would allow the Member States to refuse to recognize a right expressly conferred by Directive 2004/38 on family members of a Union citizen who are not nationals of a Member State, although they in fact fulfil the conditions laid down by that directive";

- "such measures, being automatic in nature, would allow Member States to leave the provisions of Directive 2004/38 unapplied and would disregard the very substance of the primary and individual right of Union citizens to move and reside freely within the territory of the Member States and of the derived rights enjoyed by those citizens' family members who are not nationals of a Member State".[15]

On this ground, thus, it seems that the Handbook went too far in proposing an expanded reading of the expression "sole purpose". A non-binding document cannot purport to redefine the content of legal provision: it is not a matter of interpretation, this could be labelled a "hidden" amendment, totally inadmissible from a legal point of view.

The second issue which obliges to a critical evaluation is the same concept of *genuine marital life*. In a relevant passage, the Handbook admits that "failure to appreciate the global variety of marital practices and inability to see beyond European or even national perceptions related to marriage and family life can lead to prejudiced and ultimately incorrect conclusions", and that "the choice of a partner

[14] Handbook, p. 9.

[15] ECJ, judgement 18.12.2014, C-202/13, *McCarthy*, §§52-57.

and the decision to marry is a strictly private and personal matter and there is no universal or commonly accepted pattern for such a choice or decision".[16]

However, in another parts of the Handbook, where hints of abuse are described, some indicators seem to reflect a preference for a traditional or – in some cases – idealized model of relationship. For instance, in the pre-marriage phase a preferential focus is given to physical meeting of the person:[17] well, virtual reality, distance communications and social media (even the growing market of dating applications) show how couple can form and even have a certain "life" thanks to virtual contacts. In the phase "applying for an entry visa or residence document", emphasis is given to a previous "adverse immigration history" of the non-EU spouse.[18] Anyone who knows the history of many domestic legislations on regular migration (and of the relevant pieces of EU legislation) and, even more important, of their implementation is aware of the danger implicit in such reference. Often, third country nationals are left in legal limbos, or are hit by contradictory and floating interpretations and misinterpretations of the same domestic rules by the public administration, not to say about involuntary status irregularities due to the delays (by public authorities) in responding to applications for issuance of documents or renewal of the same. Thus, this is an extremely delicate ground, where "adverse immigration history" in one or more MSs might not mean that the couple is not genuine.

With reference to the phase of residence in the host MS, it is suggested that hints of abuse might be represented by lack of contribution to the responsibilities and practical obligations arising from the marriage, absence of plans for their financial stability, lack of will to effectively share parental responsibility for one or more children.[19] Again, the (sad) reality of many marriages is one of frequent occurrence of one or more of those hints, in part due to the economic crisis or to the different financial stability of one of the spouses (let's think for instance to the widespread precarization of labour), in part due to a growing individualism or "lightness" (in terms of maturity) of many spouses.

Finally, regarding a possible divorce, the Handbook draws the attention on the fact that, in comparison with genuine couples, abusers are more likely to divorce shortly after the non-EU spouse has acquired an (independent) right of residence; or the non-EU spouse has acquired nationality of the host EU country.[20] It might happen, certainly, but experience shows three things: 1) domestic legislation may discourages such practices by subordinating acquisition of nationality to a congruous period of time; 2) in the couple's life, the maintenance of the marriage might be turned into a "competitive advantage" to the benefit of the EU spouse, leading him/her even to abuse of it in order to blackmail the non-EU spouse; 3) a common trend in many

[16] Handbook, p. 10.

[17] Handbook, p. 36.

[18] Handbook, p. 39.

[19] Handbook, p. 40.

[20] *Ibidem*.

domestic legislations is detectable in the last years, aiming at relaxing formalities and requirements for divorcing, so that a high degree of prudence must be employed in this kind of deductions.

Scope of the Handbook: what about personal unions?

A third aspect deserving a critical comment is the renounce of the Handbook to tackle the close topic of "personal unions", which have gained wide recognition in many MSs and are also taken into consideration by Directive 2004/38. Those unions may regard same-sex couples or heterosexual couples, and might raise problems similar to the fully-fledged marriages. A solid systematic approach would have called for a deepening of this reality.

The frequent transnational dimension of the phenomenon and the doubt about the chance to conduct a serious and balanced investigation

The Handbook enters in a very detailed analysis on how to detect abuses in the various stages of "the life cycle" of marriages of convenience:[21] before the future spouses meet for the first time; pre-marriage phase; the wedding; applying for an entry visa or residence document; residence in the host Member State; end of the marriage.

Here a basic problem arises. Most of the situations where a hypothetical marriage of convenience is put in practice take place in a State different from the one whose immigration rules are admittedly circumvented. A serious enquiry into dubious situations must carefully examines all the relevant circumstances, even the ones favorable to the couple. Such circumstances include material facts and verifications on the ground that only local authorities might carry out with a minimum of reliability. Effective cooperation between the national authorities of at least two States (N.B. this could mean, in some cases, a MS and a third State) would be needed in order to properly assess each case. The risk of producing evaluations that are poorly justified or are evidently partial is very high, thus raising a general doubt about the soundness of an approach that aims at using the "abuse of rights" argument in order to fight specific patterns of circumvention of domestic immigration rules.

Moreover, techniques of investigation may pose a serious challenge to the right to marry and to the right to privacy, in terms of necessity and proportionality (even in the light of the ECHR case law). In general terms, it is worrying that state authorities enter into matrimonial life with interviews, documentary enquiries and, even worse, inspections and community-based checks.[22] State practice on these measures is rather heterogeneous and the Handbook keeps extremely vague: the risk of abuses (this time by public authorities) and of covert discriminations against mixed couples is relevant.

[21] Handbook, pp. 36-40.

[22] Handbook, 41.

Frankly, I suppose that George Orwell would be amused by this discussion and perhaps would add a chapter to his famous "1984". More specifically, a good legal argument might be advanced against intrusive checks when other kinds of enquiries would be possible but have not been carried out for reasons of practicality and cost saving (such as activating channels of administrative cooperation with foreign countries, be them MSs or third States).

The ultimate dilemma: recourse to (more) detailed provisions, or room for open clauses such as the one on marriages of convenience?

The remarks so far outlined all point a crosscutting question. In the framework of free circulation for EU nationals, having regard to the basic principles and to the need to maintain derogations to the state of strict exceptions to a solid freedom, is it viable and recommendable that patterns of malicious exploitation of current rules are contrasted by a problematic technique such as "abuse of rights"? In dwelling on this issue, we should never the double check of admissibility of derogations and/or intrusions in the family life: human rights law; EU citizenship and the related case law of the ECJ.

My opinion is that, in this field, practical problems and systematic data call for the renounce to employ this technique, exception made for blatant cases, where the competent authorities are able to collect and present robust documentary and factual evidence that a marriage of convenience does exist.[23] In all other cases, the legitimate interest of MSs to avoid circumvention should rely on the proper application of existing rules. The same Handbook recalls that a scrupulous reading of the conditions to be met for enjoying of residence rights may solve a certain amount of cases.[24]

But on this point more clarity is required. Let us think about the case of departure of the EU spouse or of divorce after the taking of residence of the couple. The Directive already regulates this situation (see Articles 12-13): the material requisites therein provided for maintaining the right of residence for the non-EU spouse are the points of reference for the issue of hypothetical marriages of convenience. The same goes for the acquisition of right to permanent residence: if the relevant conditions are actually met, what happens afterwards to the couple should never be used to revoke residence rights. To state the contrary would create a tremendous legal uncertainty as to the beneficiaries of residence rights.

In sum, it would be contrary to the Directive to argue that additional cases of revocation of residence rights may be raised by national authorities in those cases where the same Directive already contains dedicated provisions which are aimed to verify the solidity of material or legal circumstances. Thus, a careful verification on the existence of a *lex specialis* with regard to Article 35 of the Directive must be

[23] Most probably, this will occur when the marriage in stipulated in the same host State, or where a robust administration cooperation is provided by the MS or the third country where the couple married.

[24] Handbook, pp. 41-42.

carried out, in order to avoid what we might define as an "abuse of the anti-abuse clause".

5. A provisional conclusion

As a provisional conclusion (and subject to further enquiry on the practices deployed in some relevant MSs and on the related case law), it might be advanced the idea that the room for the "marriage of convenience clause" should be rigorously confined to cases where no specific rules of Directive 2004/38 are present and where the competent authorities are able to collect and present robust documentary and factual evidence that a marriage of convenience does exist.

Even in those cases, techniques of investigation impinging on the personal sphere of the spouses should be activated only after the collection of documentary evidence in cooperation with the relevant authorities, and only to a limited extent (avoiding for instance intrusions in the domicile or other "big brother-type" interviews).

Should all there cautions transform into a basis for widespread abuses by non-genuine couples (and eventually criminal organizations) – something that I seriously doubt – the principal way to tackle to question would be a targeted amendment to the Directive, rather than opening the doors of dubious interpretations carried out by the various MSs.