

The “Europe route” for EU citizens and their family members: once from “north” to south, now from “east” to west?

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There is a long line of case law from the Court of Justice of the European Union (CJEU, previously European Court of Justice or ECJ), starting with *Surinder Singh*, which guarantees the rights of mobile EU citizens to have their close family members accompany them when they make use of the freedom of movement of persons: not only when they move to a host member state, but when they move back to their own member state of nationality. The significance of these rights, and the cases driving their development, emerged against the background of member states, typically in the northwest of the EU, introducing ever more restrictive rules for family reunification for their own nationals. Nationals of member states who were unable to satisfy restrictive income requirements for family reunification with their close family members from outside the EU would move to other member states in order to become mobile EU citizens and access the less strict requirements of EU law. In the Netherlands, this became known as “following the Europe route”. EU law thus became a source of rights for member state nationals, quite often themselves members of ethnic minorities from an immigration or post-colonial background, for whom their respective member states' restrictive rules for family reunification could be seen as a form of indirect discrimination.

With the 2018 decision *Coman*, the CJEU has expanded access to this source of protection of family life to members of another historically discriminated minority: lesbians, gays, bisexuals and transgender persons who are married to a spouse of the same (legal) sex. Member states from the “north”, to draw a very crude compass, tend to restrict family reunification with non-EU citizens altogether; member states from the “east”, on the other hand, tend to restrict family reunification very little, as long as same-sex spouses are rigorously excluded from their definitions of “family member”. Based on *Coman*, however, EU citizens from the latter member states will now be able to move to member states that do have marriage equality, marry their same-sex non-EU citizen spouses, and after a period of genuine residence can move back to their own member states, which will now be bound to recognize that the non-EU citizen spouse at least has a right of residence. In this paper, I will explain the legal workings of the *Singh/Coman* doctrine of EU law (including different types of equality the EU citizens are entitled to) and the political pressures on the level of the member state that stimulate EU citizens to follow the “Europe route”. I will conclude by exposing the ways in which real equality is still far from being achieved.

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In this paper, I will first provide a legal analysis of how exactly the doctrine of rights of residence for family members of “returning” EU citizens works. These are the EU citizens who are returning from making use of the freedom of movement in a “host” member state, i.e. a member state whose nationality they do not possess. How is it that these rights derived from EU law can set aside member states’ own, stricter laws on family reunification, or their own definitions of family members, that usually apply to their own nationals? From this starting point of legal doctrine, however, I can analyze how EU citizens’ fruitful employment of this doctrine by following the “Europe route” has gained significance as a political phenomenon.

I will demonstrate that as a political phenomenon, the “Europe route” (also known as the “U-turn”) historically reveals more about a member state’s own political preferences and allergies than it does about EU law as such. Indeed, to start with, restrictions on family reunification are the particular specialty of most of the member states in the northern half of Europe, with the northwestern edge of the EU and the EEA containing the states with the most restrictive laws. It is their nationals who were the pioneers of the “Europe route”, moving to any other member state (not necessarily south, of course—the “compass” in my title is admittedly rather crude) in order to obtain rights of residence for their third-country national (i.e. non-EEA national) family members. However, with the recent *Coman* judgment of the Court of Justice of the European Union, a new frontier has opened up for nationals of member states, predominantly in the eastern half of Europe, that do not even recognize the existence of their family relationship in the first place. I am speaking, of course, of nationals of member states who have spouses or partners of the same (legal) gender.

Once I have shown how EU citizens make use of the available legal framework of EU law to escape the political strictures of their own member states, however, I will expose worrying gaps in the degree of real equality that EU law is able to provide for. The innovator in restricting the real rights to be derived from making use of the “U-turn” is the Netherlands, perhaps paradoxically the member state that was also the first one to introduce marriage equality for same-sex couples. I will describe an actual case from my own practice as an immigration lawyer in the Netherlands in order to illustrate this collision of norms.

In the beginning

Citizens of the European Union, meaning all of the nationals of member states of the European Union, “have the right to move and reside freely within the territory of the Member States”, currently guaranteed by Article 21(1) of the Treaty on the Functioning of the European Union (TFEU) which was introduced by the 2007 Lisbon Treaty, “subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect”. The main measure (a/k/a “secondary legislation”) currently in force to implement this Treaty provision (a/k/a “primary legislation”) is Directive 2004/38, also known as the Citizenship Directive.

Much of the legal substance of the Treaty provision and the Directive, however, traces its roots back to the freedom of movement of workers, one of the fundamental freedoms of the European Economic Community starting with the entry into force of the Treaty of Rome on 1 January 1958. That Treaty provided, to start with, for the prohibition of discrimination based on nationality in all areas covered by the Treaty (Art. 7 EEC Treaty, corresponding to today’s Article 18 TFEU). It also provided for the freedom of movement of workers (Art. 48 EEC [cf. art. 45 TFEU]), entailing the right of a national of a member state “to stay in any Member State in order to carry on an employment”.

In 1961 the Community legislator (the European Commission, the supranational “civil service” of the Community, as initiator, acting in conjunction with the Council of the European Community, the council of heads of state and government of the member states, as approver) enacted secondary legislation¹ to work out the freedom of movement of workers in more detail. The 1961 Regulation repeated in broad terms (in art. 8) the Treaty’s non-discrimination doctrine that mobile workers were not to be treated any differently than nationals of the host member state, particularly with regard to the applicability of employment law and the right to unionize. This form of equality is non-discrimination in a strict and formal sense, determined only by reference to a host member state’s laws² and without regard to their actual content or effect.

¹ Regulation 15/61/EEC

² In my book, I describe this type of equality, based on the equal application of a legal norm of the given member state in which the federal citizen is located, as “horizontal” (Bierbach 2017a) , p. 11.

But the right of freedom of movement *itself*, i.e. the worker's right to actually live in a member state for employment there, was provided for directly by Art. 48 EEC and cannot be analyzed as a mere derivative of the principle of *formal* non-discrimination based on nationality: in other words, it was not based on a non-discriminatory application of a host member state's laws, since that would only mean that the host member state's immigration laws (i.e. the laws governing the rights of residence for all *aliens*) would have to apply equally to workers from other member states. Rather, the Treaty provision provided that the host member state must allow a national of a member state to stay there for the purpose of carrying on employment: this is its own, "vertical"³ legal norm of Community law that was directly effective in a host member state. In my analysis, I call this a "cross-border" equality⁴ because it applies equally to all member state nationals crossing borders to move within the community, i.e. "mobile" workers that had made use of the freedom of movement from another member state.

Even more interestingly, though, the 1961 Regulation, in further elaborating on this right of residence, also introduced an additional form of vertical equality for mobile workers: the spouse and children under 21 of a mobile worker were also to have a right of residence and a right to work in the host member state. In 1964⁵ the definition of these entitled core family members was expanded in the secondary legislation to include all dependent blood relatives of the worker and his or her spouse in the ascending or descending lines, and it was also provided that these core family members did not even have to have the nationality of a member state.⁶ The final version of the secondary legislation on the freedom of movement of workers that was adopted in 1968 and would remain in force until Directive 2004/38 went into force, Regulation 1612/68, included the consideration, crucial to many subsequent decisions of the European Court of Justice, that these rights of residence and equality of

3 I use this term partly to enable a comparison with rights that federal citizens enjoy in the United States based on what is called "federal" law there, without implying that the European Union is a federal state or ever will be one. (Bierbach 2017a) , p. 11.

4 (Bierbach 2017a) , p. 243-244.

5 Regulation 38/64/EEC

6 Of the original six member states, it was Italy, the one which at the time had the greatest number of its own nationals making use of the freedom of movement of workers, that was the driving force behind making rights of residence for (extended) family members an integral accessory to the freedom of movement of workers. (Bierbach 2017a) , p. 242-243.

treatment served the goal of the “integration” of the worker and “his” (*sic*) family in the host country.

Thus the groundwork was laid for a system in which mobile workers and their family members were almost completely exempt from the immigration laws of a host member state. Under the immigration laws that first became widespread only around the time of the First World War, aiming to control the movement of aliens (and their ability to work) using passports and visas as instruments,⁷ an alien traditionally had to ask a host state for permission to enter and remain (and/or work) on its territory. In the European Economic Community, on the other hand, even the “residence permits” that a mobile worker and their family members could apply for as documentary proof of their rights of residence from a host member state were not considered to be “permission” to reside, granted by the host member state; rather, these merely confirmed a pre-existing right conferred by the Treaty.⁸ Their rights of residence there were therefore virtually automatic, triggered by the worker’s participation in the labor market of the host member state and the family’s decision to move to that state.

From here, I will go on to explore the ways in which this Community legislation came to alternately clash with and be augmented by member states’ own laws: first, relative to their desire to restrict their own nationals’ ability to be joined by family members; and second, relative to their own definitions of family members entitled to rights of residence. It would be preliminary references from courts in the Netherlands in the 1980s that would give rise to the two decisions of the European Court of Justice highlighting this interaction. And more strikingly, both of the norms of member state law involved traced their roots to political decisions in response to the independence of a former colony of the Netherlands, Suriname.

7 (Torpey 2000), p. 8

8 ECJ Royer, see (Bierbach 2017a), p. 285-286.

The rise of restrictions on family reunification and “reverse discrimination”⁹

At the time Regulation 1612/68 entered into force, there is little evidence of any of the original six member states enforcing any significant restrictions on immigration of family members of their own nationals.¹⁰ Thus, the rights of residence accorded to family members of mobile workers scarcely would have been controversial at that time.

Yet in 1982, the European Court of Justice ruled¹¹ on the claim of two dependent Surinamese national parents of Dutch nationals, Morson and Jhanjan, who had tried to claim a right of residence in the Netherlands based on the equal applicability of the Regulation: their children, after all, were “member state nationals” and “workers” in the Netherlands. They cited an article¹² describing it as “reverse discrimination”, which therefore ought to be prohibited by the Treaty ban on discrimination based on nationality, if the Regulation were considered not to apply to member state nationals residing in their own member state of nationality.

However, their hopes were crushed by the Court, which ruled that “the Treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law.”¹³ The children of Morson and Jhanjan lived in what the European Commission, in its filing in the case, called a “purely internal” situation in a member state, untouched by Community law.

Apparently, Morson and Jhanjan were unable to rely on Dutch law for a right of residence in the Netherlands. What, therefore, had happened? Remarkably, until 1975, Morson and Jhanjan would themselves have been Dutch nationals, as Suriname was a

⁹ This section of my paper is a condensed version of the history of restrictions on settlement of Surinamese nationals that I presented in: (Bierbach 2017c) , which in turn was based on my presentation at the 2017 EUSA conference.

¹⁰ (Bierbach 2017c) , p. 276-277.

¹¹ ECJ Morson and Jhanjan

¹² (Mortelmans 1979)

¹³ ECJ Morson and Jhanjan par. 16. See also (Bierbach 2017a) p. 290-292.

component country of the Kingdom of the Netherlands. But the independence of the Republic of Suriname in 1975 also led to a separation in nationalities between the Republic and the Kingdom: all Dutch nationals with a connection to Suriname, residing in Suriname at the moment of independence, would be nationals of the Republic and lose the nationality of the Kingdom; and all Dutch nationals residing in the Kingdom (the European Netherlands or the then-Netherlands Antilles) would remain nationals of the Kingdom.¹⁴ This meant that many Surinamese-Dutch families separated by the Atlantic Ocean would also come to be bisected by a difference in nationality and rights of residence in their respective countries.

For five years thereafter, the Netherlands maintained a lax policy for family reunification with Surinamese nationals that was consciously modeled on Community legislation, allowing dependent extended family members also to come to the Netherlands,¹⁵ which probably accounted for Morson's and Jhanjan's argument that that Community law, as a matter of course, was the default legal norm that ought to apply to them. Nevertheless, ever since even before the independence of Suriname, in the late 1960s and early 1970s when Dutch nationals from Suriname increasingly made use of their freedom of movement as nationals, they had already been confronted with racist sentiments on the part of white Dutch nationals: the majority of Surinamese, it must be noted, are persons of color, largely descended from persons indigenous to, or enslaved or indentured to work in, the Dutch former colonial empire. Thus by the end of the 1970s, in response to sentiments on the part of the white Dutch population (also directed against the persons who had immigrated from Turkey and Morocco as "guest workers"), elected politicians in the Netherlands were enacting stricter rules for family reunification, aimed at encouraging immigrants and Dutch nationals of color to "go home" to the countries of their roots to be with their family members.¹⁶ As of November 1980, Surinamese nationals were to be treated in Dutch immigration law no differently than any other "third-country nationals", i.e. aliens from

14 (Bonjour 2009) , p. 129.

15 Explanatory memorandum on the Agreement by the Minister of Foreign Affairs:
Tweede Kamerstukken 1975-1976, file 14 048, number 1.

16 (Van Walsum 2008) , Ch. 3

outside the European Economic Community,¹⁷ and the Court's ruling would confirm that that was not a violation of Community law.

From the same year, notably, we see a decision from the European Court on a referral from a Dutch court concerning the family member of a member state national who, it would appear, moved to the Netherlands to escape her own member state's growingly restrictive immigration laws. Ms. D.M. Levin was a British national married to a South African citizen whose asylum claim had been rejected in the United Kingdom;¹⁸ she and her husband subsequently moved to Amsterdam. In the court case that gave rise to the preliminary reference that, it was undisputed that as a British national living in the Netherlands, she was a "member state national" moving to another member state to whom, in theory, Community law should apply. However, the Dutch state claimed that with Levin's part-time work as a chambermaid in various hotels, not earning enough money to satisfy the Dutch state's definition of a welfare standard, she did not qualify as a "worker", therefore her husband had no entitlement to a residence permit. Moreover, the Dutch state argued that her true motivation in moving to the Netherlands was only to get a residence permit for her husband.

The Court seized this opportunity precisely to strengthen the entitlement to rights of member state nationals who were working, even part-time, by declaring¹⁹ that any "genuine and effective" employment was enough to qualify them as a "worker". For that matter, any possible ulterior motives for coming to a host member state to work (such as Levin's motivations to move to the Netherlands) were irrelevant, as long as the member state national genuinely worked. This clearly opened a door to member state nationals to be able to obtain a right of residence for their family members, at least in another member state, by moving there and finding part-time work.

The fact that reverse discrimination thereby remained in place in their home member states exposed this norm of equality as one exclusively available to member state nationals who had the wherewithal to place themselves in a "cross-border" situation.

17 (Bonjour 2009) , p. 133 and (Jones 2007) , p. 255.

18 (Spijkerboer 2014) , p. 198-199.

19 ECJ Levin

The Community definition of “family member”: effectively augmented by member state law

So to start with: all member state nationals working in a member state of which they did not possess the nationality, i.e. in a cross-border situation, now enjoy a uniform, vertically prescribed, standard of equal treatment, in that their “family members”, as defined by the Regulation, would invariably enjoy a right of residence in the host member state. However, there is another type of equality enjoyed by all mobile workers that is more variable, and territorial rather than situational: the right to the equal application of the member state’s own laws, at any rate in the area of employment. This means that Community law does not itself (“vertically”) prescribe the content of that equal treatment, but rather only provides (“horizontally”) that workers from other member states have to enjoy the equal application of the member state’s laws. So if in Member State X, it is illegal to fire an employee without cause after the employee has been employed for one month, that norm must apply equally to workers from other member states and nationals of Member State X. But if the laws of Member State Y provide that an employee only enjoys similar protection after three months of employment, then that is the norm that will apply equally *in Member State Y* to workers from other member states and to nationals of Member State Y.

These two forms of equality, vertical and horizontal, were to dance a *pas de deux* in the 1986 judgment *Reed*,²⁰ in which the European Court of Justice answered preliminary questions referred to it by the Supreme Court of the Netherlands. Ann Florence Reed was a British national, and she had moved to the Netherlands as the unmarried partner of a British man, Mr. W., who was working in the Netherlands and who had obtained a residence permit confirming his right of residence in the Netherlands as a Community worker. Ms. Reed tried to find employment on her own, but was unsuccessful, and so applied to for a residence permit confirming her right of residence as the unmarried partner of Mr. W., since they had already had a stable relationship lasting some five years. The Dutch government rejected her

²⁰ ECJ Reed , see also (Bierbach 2017a) , p. 352

application. In her appeals against the rejection decision before the Dutch courts she cited Dutch immigration policy²¹ which provided (my translation):

Provided that the conditions for admission are satisfied, the stable, exclusive partner—either homosexual or heterosexual—is eligible for a residence permit if he or she is the partner of a:

- *Dutch national;*
- *holder of a permanent residence permit;*
- *an alien who has been admitted as a refugee;*
- *the holder of a residence permit as an asylee.*

Ms. Reed claimed that in any case, the definition of “spouse” in Regulation 1612/68, at least in the Netherlands, had to be read to include such a stable and exclusive partner if Dutch law provided for immigration for such partners of Dutch citizens. To do otherwise would mean that the Dutch state was discriminating against a Community worker (Mr. W.) based on nationality, in violation of the EEC Treaty. The Supreme Court of the Netherlands referred preliminary questions to the ECJ on this matter.

The ECJ ruled that “in the absence of any indication of a general social development which would justify a broad construction”, on its own, the word “spouse” in Community legislation could not be read to include an unmarried partner in a stable relationship, as that word was never meant to refer to any other kind of relationship than an actual marriage. However, the Court went on, the applicable Community legislation also prohibited the denial of any “social and tax advantages” to Community workers that were accorded to workers from the host member state, in order to aid their integration in the host member state. Since the possibility of being joined by an unmarried foreign partner undoubtedly constituted a “social advantage” for Dutch workers, therefore, this advantage could not be denied to a Community worker in the Netherlands. As a then-judge at the European Court of First Instance (who by the time of writing of this paper is no less than the President of the European Court of Justice) wrote in 1991:

21 Vreemdelingencirculaire 1966, Part C, Chapter IX-B, 33rd revision

<http://cmr.jur.ru.nl/cmr/vc/vc66/deelc/12.Hoofdstuk.IX.B.pdf> par. 2(e)(2)

Du point de vue du contenu, la Cour s'est, en effet, référée au choix politique opéré par l'État membre en cause (les Pays-Bas) et elle l'a simplement étendu à la situation des travailleurs migrants de cet État membre.²²

In other words, the political choice of a given member state to recognize non-traditional partnerships as equivalent to marriage for its own citizens has to have effect in the way in which Community law is applied in that member state. Community law was by no means going to impose an alien social norm on a member state that was not ready for it.

Nevertheless, it is important to pause to note the basis for this decision: the Regulation was not to be read expansively, as a vertical norm, to provide for rights of residence for unmarried partners of workers from other member states. Rather, rights of residence for unmarried partners of workers from other member states, in a member state that itself according immigration rights to unmarried partners of its own nationals, were construed as a benefit aiding workers that was no different than the protections of (say) employment law.

Where, by the way, did this norm of Dutch immigration law, which was exceedingly socially progressive for its time, come from? Van Walsum and Jones identify the source as Suriname, whose legal system recognized diverse forms of family life beyond legally formalized man-woman marriage, including unmarried homosexual relationships (e.g., *mati* relationships between women).²³ Therefore, unmarried relationships, regardless of the gender of the partners, had to be recognized in the aforementioned transitional arrangement for family reunification of Dutch nationals with their Surinamese family members²⁴ that was instituted in 1975.

Apparently, this norm of recognizing non-traditional partnerships as family members had persisted in Dutch immigration law, even after Surinamese nationals became subject to the same restrictive rules for family reunification as all other third-country national family

22 (Lenaerts 1991)

23 (Walsum et al. 2013) , p. 167-169.

24 Supra n. 15

members of Dutch nationals. And this discrepancy plants the seed for the paradox that is to be exposed in this paper.

Member state restrictions on family reunification lead to creative use of EU law: leaving the “north” and coming back again

To return to the present: Guild analyzes the family reunification laws of most EU member states and how divergent they are from the conditions under which Directive 2004/38 provides for rights of residence for family members of mobile EU citizens. She identifies Denmark, Ireland, the Netherlands, and the United Kingdom as the group of member states in her analysis “where there are substantial differences between the treatment of own nationals (disadvantageously) in comparison with the more generous rules which apply in EU law”.²⁵ If we add the EEA state of Norway to this group,²⁶ then we find that an almost unbroken stretch of the northwest coast of Europe is occupied by the states in which “reverse discrimination” is most evident. It is these “northern” states’ nationals who will be most motivated to look for escape routes via Union law (although admittedly, they need not necessarily move “south” to do so: indeed, because the applicable EU law applies situationally, and not territorially with variations in different member states, a British citizen can follow the route via the Netherlands or Denmark, or vice versa).

The Netherlands, to focus once more on that member state, is one of the member states that is traditionally most resistant to allowing its own nationals an easy path to family reunification with the partners or spouses of their choice; by now, a third-country national partner is subject to arduous requirements of integration exams to be taken in her or his home country, and the Dutch partner must satisfy stringent income requirements as a guarantee that the couple will have sufficient resources to support themselves without making use of social assistance. The political debates surrounding family reunification reveal precisely the

25 (Guild 2018) , p. 10.

26 (Staver 2013) , p. 76-78.

picture that the Dutch legislature has of Dutch nationals who have foreign partners:²⁷ typically a racialized image of a Dutch national of foreign origin, whose choice of a foreign partner is imagined to have detrimental effects on society.

Indeed, these restrictions are often justified in terms of protecting values of sexual and social emancipation in the Netherlands from “non-Western” immigrants (surprising when one considers that the source for one of the first legal rights enacted for Dutch homosexuals, as Van Walsum and Jones identify it, was not at all “Western”.) Public discourse problematizing homophobia, moreover, often wrongly identifies Dutch nationals of “non-Western” origin as being the primary source of homophobic attacks in the Netherlands,²⁸ which further plays into the debate on immigration.

Yet it is precisely due to the Netherlands so strongly restricting the family life choices of its own nationals that so many of them decide to expressly make use of the “U-turn” that Community law, and subsequently EU law, has afforded them since 1992 in order to obtain rights of residence for their family members.

Surinder Singh was the Indian husband of Rashpal Purewal, a British citizen (again, we see an obvious case of the line of nationality dividing two family members who both have origins in a British colonial past), and had a right of residence in West Germany while Ms. Purewal worked there. They then moved to the United Kingdom, and Mr. Singh claimed the applicability of Community law to his rights of residence there. The British government claimed, on the other hand, that allowing Community law to apply to family members of British citizens in Britain would increase the “risk of fraud associated with sham marriages”.²⁹ (Implicitly, therefore, the British government was presenting one of its ostensible justifications for strict British rules for family reunification.) The EU Court, on the other hand, effectively granted Singh’s claim with the consideration that the applicability of Community law to this situation served a purpose: if Ms. Purewal, at the outset of going to Germany to work, had known that she would be able to bring her husband with her, but not

27 (Bierbach 2017a) , p. 367, citing (Van Walsum 2011) , p. 66 and (De Hart 2014) p. 42-51.

28 See (Buijs 2008)

29 ECJ Surinder Singh , par. 14.

bring him back with her under equally favorable conditions, it would have a “deterrent effect” on her use of the freedom of movement of workers.

This ruling opened the doors for many member state nationals, who as “sedentary” or “static” member state nationals were in a “purely internal” situation, unable to bring in their family members, to intentionally make use of the freedom of movement. They could move to another member state for a time, where their third-country national family members could get a right of residence with them—and then move back to their home member states in a so-called “U-turn”. What’s more, the more member states with restrictive family reunification laws—most prominently the Netherlands—resisted this use of EU law, the more the Court’s ensuing decisions entrenched it.

We can explore two crucial decisions on preliminary references from the Netherlands.³⁰

When the Dutch government tried to deny one Dutch national’s Surinamese daughter a right to stay in the Netherlands based on EU law, after the Dutch national had moved to the UK to work and then returned, the case gave rise to preliminary questions and a decision from the ECJ, *Eind*, that further clarified and strengthened EU citizens’ right of return with their family members.³¹ The fact that the Dutch national had ceased work upon his return to the Netherlands and had become reliant on social assistance, in fact, could not be used to deny his right to bring his daughter with him when returning from having worked in another member state.

When a later Dutch government continued to try to restrict Dutch nationals’ ability to rely on the “U-turn”, the ensuing rejections and appeals against them gave rise to further preliminary questions, resulting in the decision *O&B*.³² This decision strengthened the right of return even further, allowing the ECJ to clarify that anytime an EU citizen had “genuinely resided” in a host member state together with the family member based on Art. 7 of Directive 2004/38 (*including* as an economically inactive EU citizen, i.e. not only having worked in the host member state), in such a way that “family life was created or strengthened” in the host

30 Two other decisions of crucial importance to the “Europe route” originated in the UK—ECJ *Akrich* — and Ireland —ECJ *Metock* .

31 ECJ *Eind* , discussed in (Bierbach 2017a) , p. 370 et seq.

32 ECJ *O&B* , discussed in (Bierbach 2017a) , Ch. 10.

member state, then the family member had to enjoy a derived right of residence in the home member state on the same terms after the EU citizen had returned. (Importantly: the Directive does not *itself* apply in the EU citizen's home member state, since the Directive expressly only applies to situations in which a member state national is residing in a member state of which she does not have the nationality.)

After all, the situation of an EU citizen *returning* to her home member state after making use of her rights to live elsewhere in the EU is not a “purely internal situation”, but is governed by EU law. If an EU citizen were denied the opportunity to bring her family member home whom she had lived with in another member state, and who had enjoyed the protection of EU law there, it could constitute a barrier (the “deterrent effect” named in *Surinder Singh*), to her freedom of movement, a fundamental freedom provided for not just by the Directive, but by Art. 21(1) of the TFEU (i.e., primary legislation of the EU). As to the conditions for a right of residence based on Art. 21(1) TFEU for the family member of a returning EU citizen, the court held in *O&B* that these could not be any stricter than the conditions set by Directive 2004/38 for the family member of a mobile EU citizen. (In other words: the Directive could be considered to be virtually applicable, or applicable by analogy in the home member state.)

Coman: the “Europe route” is opened from “east” to west and back

It was precisely this statement of the Court in *O&B* that already led me to speculate, in writing on that decision,³³ that the Court was thereby potentially “passporting” rights of residence enjoyed by same-sex spouses and registered partners (based on the *host* member state's definition of “family members”), allowing them to be brought back to the EU citizen's *home* member state, even if it did not share the same definition.

And in this context, the swath of member states that do not have marriage equality or even civil unions for same-sex couples, whose nationals could benefit from this use of EU law, lie

33 (Bierbach 2017a) , p. 425-426.

squarely at the eastern extremity of the European Union: Poland, Slovakia, Bulgaria, Latvia, Lithuania, Hungary and Romania.

The case can be summarized quite succinctly. Mr. Coman, a national of Romania, lived and worked for some time in Belgium, where he married his American husband Mr. Hamilton. Presumably, Mr. Hamilton would have had no trouble having the Belgian authorities issue him a residence card, based on Directive 2004/38, confirming his right to live and work in Belgium as the spouse of an EU citizen who was working in Belgium -- their marriage would have perfectly satisfied the definition of “spouse” by Belgian law. Mr. Coman and Mr. Hamilton then intended to move to Romania, however, and Mr. Hamilton asked the Romanian authorities to issue him a visa confirming his right to live and work in Romania as the “spouse” of a returning Romanian citizen in the sense of Directive 2004/38. However, Romanian law expressly bans the contracting or recognition of any marriage not between a man and a woman, and so the application was denied, giving rise to the appeal in which the Romanian Constitutional Court made the preliminary reference.

The Court’s decision³⁴ confirmed that the *O&B* doctrine also applied to this situation. If an EU citizen had lived in another member state and lawfully contracted a marriage in that member state³⁵ with a third-country national of the same sex, with whom he or she had “created or strengthened family life” by living there on the basis of Art. 7 of Directive 2004/38 (the provision providing for a right of residence for longer than three months in a host member state for workers, self-employed persons, and self-supporting economically inactive EU citizens), then when the EU citizen returned to his home member state, his spouse would have to enjoy a derived right of residence there based on Art. 21(1) TFEU under conditions no less favorable than under the Directive.

A crucial consideration for the Court is that the word “spouse”, as used by the Union legislator in the Directive, is completely gender-neutral and also does not refer to the political choices made by a given member state in its legislation (the provision of the Directive on

34 ECJ Coman ; commented on extensively in (Tryfonidou 2019) , (Rijpma 2019) , (Kroeze and Safradin 2019), etc.

35 What about a marriage validly contracted in a third state, or another member state? The Court appears to leave this matter open, as Tryfonidou notes ((Tryfonidou 2019) , at n. 33).

registered partnerships *i.e.* civil unions, on the other hand, only benefits the registered partner “if the legislation of the host Member State treats registered partnerships as equivalent to marriage”). Or as I could put it otherwise: the fact that a host member state recognized rights of residence for the same-sex spouse is not to be viewed as a quirk or special favor granted by the member state based on its own unilateral interpretation of the word “spouse” as a local supplement to the freedom of movement, but was precisely a legal obligation on the host member state derived from the Directive. (In this regard, a contrast can be drawn to *Reed* in that the spouse’s rights of residence, as far as Union law is concerned, are not a “social advantage” for the EU citizen, to be tacked on to the EU citizen’s use of freedom of movement, but are an inherent part of it).

Therefore, a “spouse” in a host member state, who is thus a beneficiary of Art. 7 of the Directive there, must be considered to be a “spouse” in the home member state of a returning EU citizen, *for purposes of applying art. 21(1) TFEU to recognize rights of residence for the spouse*. In this italicized clause lies the rub, and likewise the Court’s defense from any potential accusation (leveled by Latvia, in particular, in its submission) that it was deploying Union law to undermine the national identity of a member state for which the prohibition of same-sex marriage is sacrosanct.

Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex. It is confined to the obligation to recognise such marriages, concluded in another Member State in accordance with the law of that state, for the sole purpose of enabling such persons to exercise the rights they enjoy under EU law.³⁶

The EU, after all, does not have any competence to prescribe the content of member states’ family law. So one sees that there is a crucial difference, be it a wafer-thin one, between Union law protecting freedom of movement by compelling a member state to *grant rights of residence* to the same-sex spouse of one of its own returning nationals (which could be considered to remain acceptably within the bounds of the Union’s competences) and Union

³⁶ECJ Coman , par. 45.

law compelling that member state to *recognize that marriage as such* (which would strain the received understanding of those competences).³⁷

The Rub, or: how member states in the “east” still can stop short of marriage equality

Indeed, this potentiality has been borne out in Romania: the final judgment of the Romanian Constitutional Court after the EU Court’s decision only meant that same-sex spouses would be accorded immigration benefits, but did not lead to a legal conclusion that a ban on same-sex marriage itself was constitutionally untenable. A person such as Mr. Hamilton will be able to live in Romania with his husband, but their marriage will only exist there—by way of his immigration benefits—as a mere trace, an imprint of a marriage. This led Brodeala to describe the Constitutional Court’s decision as “paying lip service to the CJEU”.³⁸

In theory, the obligations of Union law on that member state do not stop at immigration: since the Directive would have to be considered to apply by analogy, all of the provisions of the Directive and other secondary legislation providing for “horizontal” equal treatment of mobile EU citizens and their spouses (for instance, in the areas of social security, tax, and other “social advantages”) would also potentially have to apply to the foreign same-sex spouse. Nevertheless, this will be an uphill battle for couples like Messrs. Coman and Hamilton, which will have to be fought piecemeal on a case-by-case, benefit-by-benefit basis.

In the member states of the EU that do not have marriage equality, the current state of affairs is something akin to what existed for a time in the United States initially following the Supreme Court decision *United States v. Windsor*.³⁹ In that decision, the Court struck down a statute passed by Congress in 1996, the so-called “Defense of Marriage Act” which excluded recognition in the federal legal order of any marriage other than one between a man and a woman, as a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Moreover, to the extent that the law prohibited the federal government from

³⁷ Indeed, Lenaerts (2010), p. 1356, cites the potential objections to any “state of origin” principle on recognizing marriages from other member states.

³⁸ (Brodeala)

³⁹ SCOTUS Windsor

recognizing marriages that had been validly contracted based on state law, it was also in violation of ideals of federalism in respect of a state's democratically enacted laws:⁴⁰ an ideal that we may hear an echo of in *Coman* if we accord significance to the EU Court's consideration that a marriage "was concluded in a Member State in accordance with the law of that state".⁴¹

On the one hand, *Windsor* provided that a valid state or foreign same-sex marriage had to be recognized by federal law. But it did not nationalize same-sex marriage:⁴² a state that had never had same-sex marriage could continue⁴³ not to have it or to ban it. The Supreme Court did in fact ultimately nationalize same-sex marriage with *Obergefell v. Hodges*,⁴⁴ the 2015 decision by which the Court would effectively mandate all of the states to both license and recognize same-sex marriage.

But during the interim of exactly two years between *Windsor* and *Obergefell*, there could have been surreal gaps in legal protection if, for instance, an American woman could validly marry an Egyptian woman in Massachusetts, and the Egyptian woman could obtain a right of legal residence in the United States based on that marriage (since immigration law is an exclusive competence of Congress, i.e. federal law, to which *Windsor* applied). This would have enabled the couple to settle in Kentucky, where by state law their marriage still would not be recognized and they would not have been able to enjoy the ensuing benefits granted to married couples by state law. What's more, if the marriage didn't work out, they would not

40 (Soucek 2017) , p. 1103-4. Crucially, "federalism", in the American context, refers precisely to a decentralizing ideal of allowing states autonomy to democratically make their own legislation on matters within their competence. In the European context, where "federalism" is often used to refer to a movement centralizing authority in the institutions of the European Union, this might be called "subsidiarity".

41 Although, to return to the open question referred to supra at n. 35: to me, it seems quite difficult to insist that it is the conclusion of the marriage itself in a (host) member state is what provides the necessary connection to EU law, which in turn creates the obligation for the home member state of a returning EU citizen to allow her spouse to reside there. Rather, it is the fact of the third-country national spouse having enjoyed a right of residence in a host member state on the basis of Art. 7 of the Directive, based on being considered a spouse by the laws of that member state (therefore, even if they had gotten married in Las Vegas and that marriage had been validly recognized), that creates the necessary connection to EU law.

42 (Soucek 2017) , p. 1110.

43 SCOTUS *Hollingsworth v. Perry* , a contrario

44 SCOTUS *Obergefell*

have been able to get divorced without at least one of them first moving to an equal-marriage state for a length of time in order to satisfy that state's residence requirement for divorce.

In fact, this latter lack of protection of the law could end up being a very real problem for same-sex married couples in the EU who reside in a member state without same-sex marriage and want to get divorced. Their marriage would then go on to become a “zombie” marriage which on the one hand, has no full legal effect (i.e. is not really alive), but on the other hand also cannot be terminated (i.e. cannot be killed), unless one of the spouses moves to an equal-marriage member state and satisfies that member state's residence requirement to be able to file for divorce. It will be particularly painful if the third-country national is the one who wants out of the marriage, since she or he, not being an EU citizen, will have no autonomous right to move to a marriage-equality member state.

[And: how member states in the “north” still can stop short of providing immigration equality](#)

In any case, the *Coman* decision has revealed the “Europe route” to be a viable tactic for member state nationals to escape the strictures of their own states' laws that discriminate against them as members of minority groups—at least in the area of immigration benefits for family members. However circuitous, the “Europe route” does provide members of minority groups with the nationality of a member state the same “representation reinforcement”⁴⁵ for unrepresented minorities that EU free movement law guarantees to EU citizens who do not have the nationality of a member state.

And indeed, I am encouraged to see that there is a productive dialectic between advancement of rights of EU citizens in the case law of the Court and backlash on the part of member states: the more a member state resists fully recognizing rights granted to EU citizens by EU law, and the more the thus disadvantaged citizens go to court to invoke those rights, the more the ensuing preliminary references lead to decisions from the CJEU that further entrench those rights. This was so in the Netherlands with *Eind* (indeed, that case

⁴⁵ In (Bierbach 2017a) , p. 366, I use this term of the American constitutional theorist John Hart Ely for what (Barnard 2010) calls “virtual representation” in the EU context on p. 231; see also (Lenaerts 2011) , p. 9.

ensued from the then-immigration minister's expressly declared commitment to stamp out the "Europe route"⁴⁶) and *O&B*.

At the same time, I do also feel some degree of pessimism, not just as a scholar of EU citizenship but as an active practitioner of immigration law in the Netherlands, as to whether a protracted judicial dialogue between disadvantaged EU citizens and their own member states, acting on behalf of a deeply prejudiced majority, can ever lead to a true breakthrough. I also wonder whether the ideal of equal treatment for all, which ought to lie at the heart of EU citizenship, is truly served by the escape routes that are available only to the most resourceful.⁴⁷

When the *Coman* decision was handed down, one wouldn't have been mistaken if one perceived the mainstream press coverage in the Netherlands to be faintly gloating that marriage equality, something that the Netherlands was the pioneer of in 2001, had finally arrived in the "laggard" member states of the EU.

But none of the journalists covering the decision seemed to fully understand what it really meant. The left-of-center *Volkskrant* and the liberal *NRC* both wrote, with nearly identical formulations (my translation): "According to the court, member states cannot be forced to introduce gay marriage—that remains a national competence—but they are not allowed to discriminate against gays who married elsewhere."⁴⁸

More astonishingly, the populist newspaper *De Telegraaf* summarized the judgment as (my translation): "EU countries are allowed to determine for themselves if they want to allow gay marriage, but cannot deny a right of permanent residence to a homosexual spouse from

46(Bierbach 2017a) , p. 379.

47 I can note Kochenov's prescient criticism in 2009, in which he analyzed Directive 2004/38 as containing the potential for mobile EU citizens in same-sex marriages to obtain more rights in a given member state. However, this would allow sedentary EU citizens in same-sex relationships in the same member state, denied marriage, to continue to be disadvantaged: "More and more instances of reverse discrimination will be created" (Kochenov 2009)

48 <https://www.nrc.nl/nieuws/2018/06/05/hof-van-justitie-alle-eu-lidstaten-moeten-rechten-van-homos-erkennen-a1605447> ; <https://www.volkskrant.nl/nieuws-achtergrond/hof-alle-eu-lidstaten-moeten-rechten-van-getrouwde-homoparen-erkennen~b349db19/>

outside the EU if the marriage took place in an EU country”.⁴⁹ The *Telegraaf* journalist was apparently completely unaware that the Netherlands, for its part, absolutely does not guarantee a right of residence (and certainly not a permanent one) to third-country national spouses of Dutch nationals—whether heterosexual or homosexual—merely because they got married in an EU country.

What’s more, none of the newspapers recognized the link to the “Europe route” or the fact that the court’s decision in *Coman* built on so much case law due largely to the Netherlands’ own resistance to it. (*De Telegraaf*, in particular, had already published a particularly venomous article about the “Europe route” called “Asylum U-turn” in 2008.⁵⁰)

Indeed, the government of the Netherlands continues to actively resist its citizens’ use of the “Europe route” by subtly adapting its immigration policy in response to *O&B* and other decisions of the EU Court from which (sedentary) Dutch nationals can derive family reunification rights. As noted above, the innovation of *O&B* is that it restated the “U-turn”, which had previously been confirmed only for EU citizens who moved to other member states to *work*, in terms of the Maastricht Treaty’s general freedom of movement based on EU citizenship that Directive 2004/38 aims to implement. Therefore, member state nationals who previously were practically excluded from work in a host member state⁵¹ can now at least follow the “Europe route” by moving to another member state as economically inactive EU citizens, provided that they can satisfy the Directive’s requirement of having sufficient financial resources to support themselves and their family in the host member state without making use of the host state’s social assistance system.

49 https://www.telegraaf.nl/nieuws/2126351/homopartner-heeft-verblijfsrecht-in-hele-eu?utm_source=google&utm_medium=organic

50 (Koolhoven 2008) , discussed in (Bierbach 2017a) , p. 378-379.

51 The late Advocate-General Geelhoed noted once that cultural differences between member states still form one of the greatest obstacles to freedom of movement of economically active citizens. In practice, therefore, not only the upper sector of the labor market is “privileged” enough to go work in other member states (e.g. to work multinational white-collar workplaces) but the lowest sector is as well (e.g. to do manual labor where language barriers form less of a hindrance). The middle sector of workers (dependent on finding mid-skilled work for which they only need to fluently speak their respective native languages), on the other hand, is left behind. (Geelhoed 2006) p. 36,

That requirement, to start with, already excludes all member state nationals lacking significant savings, pensions, or other portable benefits to live off of in a host member state from being able to take up legal residence there (with their family member) on the basis of Art. 7 of the Directive. (And anyways, the requirement of even *moving* to another member state, in the first place, excludes an even greater number of member state nationals who might have, for instance, regular income from a job in the home member state and who could in theory get the residence in a nearby host member state as a frontier worker commuting to the home member state, but who are simply tied down to residing in the home member state by factors like having a good home they cannot even temporarily move out of, children enrolled in school, etc.)

Even if the member state national does have the resources or flexibility to move to another member state as an economically inactive EU citizen and be joined by their family member, the requirement of *O&B* that they had to “genuinely reside” in the host member state for their family member to get a right of residence based on Art. 21(1) TFEU can flummox them on their return if they don’t have a specialized lawyer to help them: yet another exclusionary factor, in practice.

I identify⁵² “genuine residence” as the Court’s restatement of the *Levin* doctrine of determining when an EU citizen is really a “worker” in a host member state: when the EU citizen has engaged in “genuine and effective activities” in employment. “Genuine residence”, by analogy, is the standard of when an EU citizen has made real use of their right of residence for more than three months in a host member state based on Art. 7 of the Directive, by contrast to making use of the more short-term, “touristic” right of residence provided for by Art. 6 of the Directive. The *Swaddling* criterion cited by A-G Sharpston in her Opinion⁵³ in *O&B* of “moving the center of one’s interests” to a host member state seems largely to overlap with “genuine residence”.

However, in terms of documentary evidence, this criterion is significantly more burdensome to satisfy for economically inactive Union citizens than for economically active Union citizens. For the latter, proof of satisfying the *Levin* criteria, i.e. having had an at least part-time job as a worker in the host member state, and being able to show for it with

52(Bierbach 2017a) , p. 423; (Bierbach 2017b) p. xxx

53 (Opinion in *O and S* 2013) , par. 100.

nothing more than contracts and salary slips, still fully satisfies the “genuine residence” requirement: they were working in the host member state, therefore they clearly moved the center of their interests there.

For economically inactive Union citizens, on the other hand, there is a double bind: in the first place, they already have to prove to the host member state that they had sufficient resources. And then on their return, they also have to prove to the home member state that they *really did live* in the host member state as something more than a tourist, also as proof that it was not merely “sham” residence evidenced by little more than a rental contract.⁵⁴

Based on knowing how the Dutch government enforces this requirement when processing applications for review against Art. 21(1) TFEU, I advise my Dutch national clients to be able to furnish extensive evidence of their physical presence in the host member state, have bank statements showing where they conducted consumer transactions with their bank cards, to have joined a health club, signed up for a mobile phone subscription, obtained a library card, and so on. The clients of mine who are most vulnerable to accusations of “sham residence” are frontier workers, who of course do maintain a significant portion of their lives in the home member state; for them, the onus is on proving that the center of their interests outside of work was in the host member state.

Even if a Dutch national succeeds in bringing back their family member via the “Europe route”, the Dutch immigration authority can still throw up confounding barriers later on, sometimes years later. I can illustrate this with a case of two clients of mine which all too poignantly demonstrates how despite *Coman*, there is still a long way to go in making the “Europe route” a source of equality even just in the area of rights of residence.

The Dutch man (D) moved to Spain over six years ago and married his husband (CA), who hails from a Central American country, on the basis of Spanish law. D worked at various part-time jobs in Spain, and CA was duly issued a residence card by the Spanish authorities as the family member of an EU citizen. After some time, they

⁵⁴ See the court judgments upholding the Dutch government’s rejection of “Europe route” claims, where the evidence of “genuine residence” in a host member state was found to be unconvincing: Raad van State, 17 December 2012, ECLI:NL:RVS:2012:BY7401; also Rechtbank ‘s Gravenhage, zittingsplaats Zwolle, 9 March 2012, ECLI:NL:RBSGR:2012:BV8504.

returned to the Netherlands, where CA was issued a Dutch residence card as the family member of an EU citizen based on the evidence of the residence in Spain. In fact, almost as if he was conscious of *Eind*, D felt free to claim need-based social assistance as soon as he and CA had established himself in the Netherlands: indeed, this could never have been a reason to deny CA a right of residence. After a few months, D found several part-time jobs, including doing piecework at home.

CA, for his part, was conscious of the fact (due to the ever-present discourse on the subject in Dutch society) that he was “expected” to integrate into Dutch society as an immigrant. Yet paradoxically, due to the fact that he was a beneficiary of EU free movement law, he could not be required to satisfy any immigration requirements. (If he had come via the “regular” route of Dutch immigration law, i.e. having D file an application for a spousal visa for him while he still lived in his home country, which would have had requirements of a preliminary integration exam and proof of D’s regular income, then CA would have had an obligation to pass the integration exam of Dutch language and culture within three years, or otherwise be fined.) D helped CA, therefore, also to apply for social assistance from the local municipality so that the family would have some extra support while CA studied Dutch full time, also in order to improve his employment prospects. Some time later, D fell ill and stopped his economic activities, also falling back on social assistance for a year and a half until he got back on his feet with a full time job in a shop. CA was still studying Dutch and not working.

When CA’s residence card was about to expire, he filed an application for a residence card proving that he had a right of permanent residence based on Art. 16 of Directive 2004/38 (i.e. the analogous application of it), since there is no “renewal” procedure, as such, available for a residence card as the family member of an EU citizen. To his surprise, his application was rejected: as he described it to me, “they rejected the renewal of my permanent residence permit”. The reason for the rejection was that he and he husband had not satisfied the conditions of Directive 2004/38 (applied by analogy) for five years, since during the periods that they were not working and both received social assistance they clearly did not have sufficient resources.

CA's description was legally inaccurate (I had to explain that his first residence document, was not, actually, "permanent", and that it was not a "renewal" application), but not at all unjustified. After all, if *Eind* provided that his husband could return from Spain, having worked there, and make use of social assistance, then why, indeed, was CA's right to stay in the Netherlands not unconditional?

I have filed an objection on CA's behalf, but in the meantime, I have advised him to file an application for a new residence card as the family member of an EU citizen, which will be granted to him—indeed, the Dutch government does not deny that he still has a right to stay based on Art. 21(1) TFEU, but it appears to only grudgingly recognize this right. If my client had not sought legal assistance, he might well have thought that he about to be subject to removal from the Netherlands and "self-deported".

Moreover, recently the Dutch government has changed the conditions for naturalization,⁵⁵ excluding family members of EU citizens from eligibility for naturalization to Dutch nationals after five years' residence (even if they did pass the required integration exam) if they have not yet obtained the permanent resident status.

The ideal of equality has thus fractured to the extent that completely different legal conditions apply to three different groups of EU citizens in the Netherlands with third-country national family members:

- a) partners/spouses of sedentary Dutch citizens who came via the regular route, having to satisfy arduous conditions in the first place, being reminded of penalties for not integrating, yet having access to the reward of nationality after only three

⁵⁵ Besluit van de Staatssecretaris van Justitie en Veiligheid van 8 maart 2018, nummer WBN 2018/2, houdende wijziging van de Handleiding voor de toepassing van de Rijkswet op het Nederlanderschap 2003; Paragraaf 3.4/8-1-b Toelichting ad artikel 8, eerste lid, onder b HRWN. This change was clearly aimed primarily at excluding from eligibility for naturalization those who had a right of residence as family members of EU citizens as caregiver parents of young Dutch children based on Art. 20 TFEU (as interpreted by the Court in ECJ Ruiz Zambrano and most recently ECJ Chavez-Vilchez, to whom Directive 2004/38 does not apply; but because there is no differentiation in Dutch immigration law between rights of residence as a family member of an EU citizen based on Art. 20 or on Art. 21(1) TFEU/Directive 2004/38, it seems it was decided to formulate this as a blanket provision.

years if they do pass the exam;

- b) partners/spouses of mobile EU citizens, who have to satisfy few conditions for initial admission, but cannot naturalize until they gain the permanent residence status (although for most of them, this will be less of a problem, since their mobile EU citizen family members rarely would have claimed full social assistance during those first five years); and
- c) partners/spouses of Dutch citizens who used the “U-turn”, who have to satisfy arduous conditions for proving “genuine residence” in the past, but then are often even more rudely surprised than the aforementioned two groups when they are denied “graduation” to stronger rights.

In this, the Netherlands is innovative, as ever. Spouses of Dutch citizens who used the “U-turn”, who in all but name do effectively have a permanent right of residence, are thereby kept in an prolonged state of being only within touching distance of gaining full permanent residence permits or becoming naturalized citizens: their rights are maintained with the impression of being somehow temporary, perhaps in the hope that they will leave before they gain a truly permanent right to stay. An analogy to the situation of a same-sex married couple who used the “U-turn” to obtain a right of residence in a member state without marriage equality could not be more obvious: their marriage is sort of there, but not really.

As long as the absurdity of “reverse discrimination” does not become so abundantly obvious for more than a few, such that it can then collapse on its own contradictions;⁵⁶ as long as there are still significant restrictions on the mobility of economically inactive EU citizens; and as long as EU law does not claim more authority in what has, until now, been situations “purely internal” to member states, I fear that these paradoxes will persist.

⁵⁶ I previously drew a comparison to the legal history of civil rights for African-Americans, in which tactics of having to cross interstate borders in the US to obtain equal rights were relatively short-lived, due to the enactment of federal legislation granting a claim to rights to sedentary African-Americans as well. (Bierbach 2017c)

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