RAINBOW FAMILIES AND EU FREE MOVEMENT LAW

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1. INTRODUCTION

This chapter examines the position of the children of rainbow families (i.e. families comprising a same-sex couple and their children) in cases where such families move between European Union (EU) Member States and include at least one EU citizen. Currently, a division exists in the EU between Member States that provide legal recognition to same-sex couples and to the parental linkage between such couples and their children and Member States that provide only limited or no legal recognition. When same-sex couples move with their children from a Member State where they are fully legally recognised as a family to a Member State that refuses to afford full (or any) recognition, this is problematic from several perspectives. The free movement and fundamental (human) rights that both children and their parents enjoy under EU law are clearly affected when recognition is refused. This chapter explores whether

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EU law can assist the children of rainbow families when they seek legal recognition in a host Member State as children of both their parents under EU law.[1]

2. LEGAL RECOGNITION OF RAINBOW FAMILIES IN EU MEMBER STATES: THE CURRENT SITUATION

The 'nuclear family', comprising different-sex married spouses and their legitimate and biologically linked children, was never the only form of family that existed. However, until recently it has been the main form of family recognised under the law. Nonetheless, 'the family' is a flexible and adaptable unit. Recent years have seen an increase in 'alternative families', with many families now comprising (unmarried) cohabitants, children and their step-parents, children and their single parents, and children and their same-sex parents. Therefore, the law must not only recognise such alternative families, but also provide a system that is sensitive and responsive to their specific needs.[2]

Same-sex couples are incapable of having children who will be biologically related to both members. Such couples can, however, become *de facto* parents in several ways, such as through donor insemination (known or anonymous), assisted conception, surrogacy, a prior opposite-sex relationship, or adoption. This means that in some situations, one of the members of the couple will be biologically connected to the child (e.g. when one of the female partners in a same-sex couple undergoes medically assisted insemination using her own egg or when the sperm of one of the male partners in a same-sex couple is used in a surrogacy arrangement). In other situations (mainly adoption), the child will be biologically connected to neither of the couple's members.

In terms of same-sex parenthood, the important questions that arise are whether, under a specific legal system, same-sex couples are allowed *de facto* to become parents of a child *as a couple*; and, if they act as parents of a child, whether they can both be recognised under the law as the child's parents (either automatically or after taking specific steps, e.g. adoption).

This short section summarises the current legal landscape in EU Member States regarding parenting by same-sex couples.[3]

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1 For a more detailed exploration of this question see A. Tryfonidou, 'EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?' (2019) 38 *Yearbook of European Law* (forthcoming).

2 Opinion of AG Szpunar in Case C-335/17, *Babanarakis*, ECLI:EU:C:2018:242, para. 29. For an analysis of this argument see, inter alia, A. Bainham, 'Family Law in a Pluralistic Society', (1995) 22 *Journal of Law and Society*, 234.

3 For a comparison between Europe and the US in relation to the legal recognition of same-sex relationships and the parental ties between same-sex couples and their children, see S. Titshaw, 'A Transatlantic Rainbow Comparison: "Federalism" and Family-Based Immigration for Rainbow Families in the US and the EU' in C. Casonato and A. Schuster (eds.),

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Lack of EU competence on this matter and lack of guidance at the European level means that the family rights that same-sex couples enjoy at the national level with regard to parenting vary considerably throughout the EU. The most recent edition of ILGA Europe's Rainbow Map[4] demonstrates that only a minority of EU Member States provides full parental rights to same-sex couples. As Nikolina has noted, '[t]he idea that in order to thrive a child needs two parents of different sex who are in a committed relationship, translates in many jurisdictions into laws precluding different-sex cohabitants from adopting children and same-sex partners from both being acknowledged as legal parents of their children'.[5]

At the moment of writing, joint adoption by same-sex couples is allowed in only 14 EU Member States,[6] as is the case for second-parent adoption for same-sex couples.[7] Surrogacy is largely prohibited across EU Member States, which in effect limits parenting options for male same-sex couples to adoption. The law allows medically assisted insemination by same-sex couples (*as a couple*) in only 12 EU Member States,[8] while same-sex couples enjoy automatic recognition as co-parents only in 9 EU Member States.[9] In countries where medically assisted insemination is not open to same-sex couples (i.e. they cannot go through the process *as a couple*), one of the members can go through it if it is open to single persons. In the current EU context, 18 Member States allow medically assisted insemination for single persons.[10] However, EU Member States that do not allow medically assisted insemination for same-sex couples but allow it for single women[11] do not recognise the child produced through

Rights on the Move: Rainbow Families in Europe, Conference Proceedings, Trento 16–17 October 2014 <http://eprints.biblio.unitn.it/4448/1/Casonato-Schuster-ROTM_Proceedings-2014.pdf> accessed 27.06.2018. For an analysis of social attitudes toward adoption by same-sex couples in Europe, see J. Takács, I. Szalma and T. Bartus, 'Social Attitudes Toward Adoption by Same-Sex Couples in Europe', (2016) 45 *Arch Sex Behav* 1787.

4 See ILGA Europe Rainbow Europe Package: Annual Review and Rainbow Europe Map <https://www.ilga-europe.org/rainboweurope/2019> accessed 08.07.2019.

5 N. Nikolina, 'Evolution of Parenting Rights in Europe – a Comparative Case Study about Questions in Section 3 of the LawsAndFamilies Database' in K. Waaldijk, *More and More Together: Legal Family Formats for Same-Sex and Different-Sex Couples in European Countries: Comparative Analysis of Data in the LawsAndFamilies Database*, Working Paper 75 (2017) in the Families and Societies Working Paper Series, 102 <https://openaccess.leidenuniv.nl/bitstream/handle/1887/54628/Waaldijk%20-%20More%20and%20more%20together%20-%20FamiliesAndSocietiesWorkingPaper%2075%282017%29.pdf?sequence=3> accessed 22.06.2018.

6 Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the UK.

7 Austria, Belgium, Denmark, Finland, France, Germany, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Sweden, and the UK.

8 Austria, Belgium, Denmark, Finland, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the UK.

9 Austria, Belgium, Denmark, Ireland, Malta, the Netherlands, Portugal, Spain and the UK.

10 Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the UK.

11 This is the case in Bulgaria, Croatia, Cyprus, Estonia, Greece, Hungary, and Latvia.

insemination as the couple's child. Instead, the child will be legally recognised only as the child of the woman who gave birth to him/her. Since EU Member States that do not allow medically assisted insemination for same-sex couples do not allow second-parent adoptions for such couples, the woman who did not give birth to the child will not be legally recognised as the second parent.

Accordingly, it can be seen that currently, in EU Member States, a legal patchwork exists regarding the recognition of same-sex couples' parental status, reflecting how the matter of same-sex couples' parental rights remains controversial.[12] Only a rather slim minority of EU Member States (8) grants full parental rights to same-sex couples. It allows them to adopt a child jointly, undergo artificial insemination as a couple and be automatically recognised as a child's legal parents.[13] At the same time, almost half of EU Member States (13) do not provide any rights whatsoever to same-sex couples to act (legally) as co-parents.[14] Between these two extremes, some EU Member States allow only limited ways through which same-sex couples can become co-parents and be legally recognised as such. For instance, France allows joint adoption by same-sex couples but does not allow women to undergo medically assisted insemination if they are in a relationship with another woman or if they are single.[15]

3. FAMILY REUNIFICATION RIGHTS UNDER EU LAW: THE POSITION OF CHILDREN

EU law grants to all EU citizens (i.e. all persons possessing the nationality of an EU Member State)[16] the right to move and reside freely in the territory of another Member State. This right is derived from the free movement of persons provisions of the Treaty on the Functioning of the European Union (TFEU),[17]

12 See P. Dunne, 'Who is a Parent and Who is a Child in a Same-Sex Family? – Legislative and Judicial Issues for LGBT Families Post-Separation, Part I: The European Perspective', (2017) 30 *Journal of the American Academy of Matrimonial Lawyers* 27, 31 (and the references in footnote 13 of that article).

13 The EU Member States which offer such *full* recognition of the parental status of same-sex couples are Austria, Belgium, Denmark, Malta, the Netherlands, Portugal, Spain and the UK.

14 These are Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia.

15 The nuances and specificities of the exact entitlements granted to same-sex couples in different EU Member States will not concern us here since our focus is simply on *cross-border* recognition of the parental link between a child and *both* of his/her same-sex parents. For a rather recent analysis of the laws and trends regarding same-sex parenting in different EU Member States see N. Nikolina (above n. 5). See, also, E. Falletti, 'LGBTI Discrimination and Parent-Child Relationships: Cross-Border Mobility of Rainbow Families in the European Union', (2014) 52 *Family Court Review*, 28.

16 Article 20 TFEU.

17 The right is now laid down in Article 21 TFEU and – the *leges speciales* to it – Articles 45, 49, and 56 TFEU.

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which have always prohibited obstacles to the free movement of persons between Member States. These provisions have also granted numerous additional rights to Member State nationals, most notably the right to be treated equally with the nationals of the host State and the right to reside in the territory of the Member State to which they have moved.[18] These provisions have, nonetheless, never referred to the family of the migrant Union citizen. However, being aware of the importance of family life and – more pragmatically – that Union citizens would be discouraged from moving if the host State refused to admit their close family members into its territory, the EU legislature has included family reunification rights in secondary legislation complementing the free movement of persons provisions.[19]

Currently, the main source of family reunification rights for Union citizens is Directive 2004/38.[20] This Directive applies only to 'Union citizens who move to or reside in a Member State other than that of which they are a national';[21] however, the European Court of Justice (ECJ) has extended its application 'by analogy' to Union citizens who return to their Member State of nationality after spending a period residing in the territory of another Member State ('returnees').[22]

Directive 2004/38 grants to Union citizens the *automatic* right to be joined or accompanied by their 'family members' in the territory of the Member State to which they move, i.e. the host State is *required* by EU law to admit family members into its territory without applying its own immigration requirements, irrespective of whether or not the family member is a Union citizen.[23]

For the Directive, 'family members' are defined in Article 2(2) as follows:

(a) the spouse;
(b) the partner with whom the Union citizen has contracted a registered partnership on the basis of the legislation of a Member State if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with conditions laid down in the relevant legislation of the host Member State;
(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); and
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

18 See, e.g. Case 167/73, *Commission v. France*, ECLI:EU:C:1974:35 (non-discrimination on the ground of nationality); Case C-363/89, *Roux v. Belgium*, ECLI:EU:C:1991:41 (right of residence).

19 G. Barrett, 'Family Matters: European Community Law and Third-Country Family Members', (2003) 40 *CMLRev*, 369.

20 Council and Parliament Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77.

21 Ibid., Article 3.

22 Case C-456/12, *O. and B.*, ECLI:EU:C:2014:135.

23 Recital 5 of Directive 2004/38 (above n. 20).

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For family members who do not fall into the list above, Article 3(2) of the Directive mentions that

> Without prejudice to any rights to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
>
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence or where serious health grounds strictly require the personal care of the family member by the Union citizen;
> (b) the partner with whom the Union citizen has a durable relationship duly attested.

Family members who fall within the categories of Article 3(2) cannot *automatically* require the host State to accept them into its territory but can require it to justify its decision not to admit them by demonstrating that it has undertaken an extensive examination of their personal circumstances.[24]

A quick glance at the provisions above demonstrates that the EU legislature has employed gender-neutral and sexual-orientation neutral terms when listing family members who must be allowed to join or accompany a Union citizen in the host Member State. In relation to parents and their children, in particular, the 2004 Directive speaks simply about 'descendants' and 'relatives in the ascending line' without interpreting these terms in more detail. This lack of clarity has encouraged Member States that do not provide for rainbow families within their national legal systems to believe that they are free to refuse to recognise such families when they move into their territory in exercise of EU free movement rights.

Given that this chapter focuses on the position of the children of rainbow families, it will be useful to summarise the four ways in which such children can benefit from family reunification rights under EU free movement law and the difficulties they may encounter in Member States that refuse to recognise one or both of their parents as their legal parent(s).

First, a child can fall under Article 2(2)(c) of Directive 2004/38 when (s)he is the direct descendant of a Union citizen who moves, or of the spouse or registered partner of the Union citizen. The child can fall within this category irrespective of whether (s)he is a Union citizen, but (s)he can only be covered if under the age of 21, or a dependant of his/her parents. The child of a rainbow family can, clearly, be covered by this category, if the parent recognised by the host State as his/her legal parent (usually the birth mother or the biological parent)

[24] Case C-83/11, *Rahman*, ECLI:EU:C:2012/519.

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is the Union citizen. In addition, the child can be covered by this category even if the Union citizen is the other parent and the host State refuses to legally recognise him/her as the child's parent, provided that the parent who is recognised as the legal parent is considered by the host State to be the spouse or registered partner of the Union citizen. Following the ECJ's judgment in *Coman*,[25] if the child's parents are married (and the marriage was concluded in an EU Member State), the host State is obliged to recognise them as married for the purposes of Directive 2004/38; thus, the child has to be recognised in the host State at least as the child of the spouse of the parent who is not recognised as the legal parent.

Second, under Article 2(2)(d) of the 2004 Directive, if the child is a Union citizen and is not dependent on his/her parents, then (s)he may wish to act as the 'sponsor' of family reunification rights for his/her parents who are not EU citizens and thus do not have free movement rights. However, a rainbow family moving to a Member State that refuses to recognise the parental linkage between the child and one or both parents will be confronted with a refusal to admit the parent(s) into its territory, unless the parent(s) can claim the right to move there on another basis.

Third, in *Zhu and Chen*,[26] the ECJ held that minors who are Union citizens and wish to exercise their right to move and reside in the territory of another Member State can claim the right to be joined or accompanied by their primary carer in the host State, provided that the family is economically self-sufficient.[27] This principle can be useful for a child in a rainbow family who is a Union citizen but whose parents are third-country nationals and cannot move to that Member State on another basis. If the aim is to claim a right of residence for the parent who is legally recognised by the host State as the parent of the child, the claim is unlikely to present any difficulties. The situation may be more complicated if the primary carer is the parent that the host State refuses to recognise as the legal parent. This is usually the case when the primary carer is not biologically connected to the child. However, in the *O, S and L* case – a case that did not involve a rainbow family – the ECJ noted that a child who is a Union citizen can sponsor a right of residence for his(her) primary carer irrespective of a blood relationship between the two.[28]

Fourth, if a child does not fall within any of the categories above, (s)he can try to rely on Article 3(2)(a) of Directive 2004/38 as a dependant or a member of

25 Case C-673/16, *Coman*, ECLI:EU:C:2018:385.

26 Case C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639, paras. 26–34.

27 Given that this chapter is about the *free movement* rights of rainbow families, it should be noted that the possibility of employing the principle established in Case C-34/09, *Ruiz Zambrano* ECLI:EU:C:2011:124, which enables children who are Union citizens to reside in the territory *of the Member State of their nationality* with their primary carer, will not be considered here.

28 Joined Cases C-356-357/11, *O, S and L*, ECLI:EU:C:2012:776, para. 55.

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the Union citizen's household. Alternatively, if the child is a Union citizen, (s)he can be the sponsor if the person or persons who wish to join the child can prove that they are members of the child's household in the home Member State or are dependent on the child. The Article 3(2)(a) category may, in fact, be the only acceptable solution for Member States as it grants family reunification rights to a rainbow family without this presupposing or leading to a recognition of the familial links between the child and his/her parents. At the same time, the actual familial links between child and parents are not recognised, which is exactly what the host Member State usually wishes to avoid.

4. THE CURRENT (UNCERTAIN) POSITION OF RAINBOW FAMILIES UNDER EU LAW

As noted in the Introduction, this chapter focuses on the rights *of the children* of rainbow families; hence, the right of Union citizens to be joined in another Member State by their same-sex spouse, registered partner, or partner will not be discussed here.[29] The question in this chapter, therefore, is whether same-sex couples' children can rely on EU law to require the Member State to which the family moves to legally recognise the legal links between them and their parents, as these have been lawfully established in the family's Member State of origin.

The problematic position in which rainbow families currently find themselves is clearly demonstrated by a petition made recently to the Committee of Petitions (PETI) of the European Parliament by Eleni Maravelia, a Greek national married to a British woman.[30] Ms. Maravelia gave birth to a daughter in Spain in 2014. The Spanish birth certificate of the couple's daughter indicates both Ms. Maravelia and her spouse as the child's mothers. Yet, in Greece – which does not legally

[29] The ECJ has very recently held that the term 'spouse' in Article 2(2) of Directive 2004/38 must be interpreted as including the same-sex spouse of a Union citizen – see *Coman* (above n. 25). For a discussion of the judgment, see A. Tryfonidou, 'The ECJ recognises the right of same-sex spouses to move freely between EU Member States: the *Coman* ruling', (2019) 44 *European Law Review* (forthcoming). The terms 'registered partner' in the same provision and 'partner' in Article 3(2) of the Directive have not been interpreted yet by the Court, although it has been argued elsewhere that these should also be clearly interpreted to include same-sex registered partners and partners – see A. Tryfonidou, 'EU Free Movement Law and the Legal Recognition of Same-Sex Relationships: The Case for Mutual Recognition' (2015) 21 *Columbia Journal of European Law*, 195. On the same issue, see U. Belavusau and D. Kochenov, 'Federalizing Legal Opportunities for LGBT Movements in the Growing EU' in K. Slootmaeckers, H. Touquet and P. Vermeersch (eds.), *The EU Enlargement and Gay Politics: The Impact of Eastern Enlargement on Rights, Activism and Prejudice* (Palgrave 2016).

[30] Petition No 0513/2016 by Eleni Maravelia (Greek) on the non-recognition of LGBT families in the European Union <https://petiport.secure.europarl.europa.eu/petitions/en/petition/content/0513%252F2016/html/Petition-No-0513%252F2016-by-Eleni-Maravelia-%2528Greek%2529-on-the-non-recognition-of-LGBT-families-in-the-European-Union> accessed 22.06.2018.

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recognise same-sex couples as co-parents – they were told that only the birth mother is recognised as the child's parent, thus making Ms. Maravelia the child's sole parent under Greek law. The petition noted that 'The petitioner believes that families like hers are being refused their right to free movement and that their children are vulnerable, since their parents are not equally recognized across the EU. The petitioner urges that the EP and the Commission work toward making official civil status documents, such as birth certificates, to be accepted *de facto* across Member States. She believes that children of parents in similar situations deserve the same rights as all children, with both their parents recognized'.

This petition makes it obvious that, as with cross-border legal recognition of same-sex marriages, in relation to which the EU had – until recently – washed its hands, with regards to the *cross-border* recognition of the legal ties between children and their parents who happen to be of the same sex, the EU has, so far, chosen to remain silent.

This gives leeway to Member States that do not recognise that members of a same-sex couple can be the joint parents of a child to extend the application of their restrictive laws to situations in which rainbow families legally recognised in other Member States come to their territory to exercise their free movement rights. Consequently, if the only sponsor of family reunification rights in the family is the child, either or both parents will be unable to join the child in the host State. Similarly, if the only sponsor of family reunification rights in the family is the non-biological parent, then the family may simply not be able to move together to the host State unless the latter admits the other parent as the same-sex spouse or registered partner of a Union citizen. In this case, the child will be able to join the couple as 'the child of the spouse or partner' of the Union citizen.

In any event, research has shown that host States facilitate the entry and residence of the children of a rainbow family even if their laws do not recognise them as children of one or either parent.[31] Hence, in practice, the main issue appears to be not so much whether rainbow families can move and reside in the territory of another Member State. Rather, the issue is *how* they will be able to move, i.e. whether they will be recognised as a family in the host State, with the legal ties established in the State of origin remaining intact.

This is critical since, in addition to the negative symbolic value that results from non-recognition under the law of the links between a child and one or both of his/her parents, such non-recognition will also have a host of adverse practical consequences. The child will not be recognised as the child of the parent (or parents) for any legal purposes. Thus, the parent or parents will not be able, for instance, to give consent for the child's medical treatment, open a

[31] 'Handbook on the Rights of Rainbow Families: Rights on the move', Cara-Friend, Northern Ireland 2014, p. 28 <https://www.ilga-europe.org/sites/default/files/rights_on_the_move_-_handbook_on_the_rights_of_rainbow_families_2015.pdf> accessed 10.05.2018.

bank account for the child, travel (alone) with the child, or place the child in school. In addition, the child will not have any inheritance rights on intestacy in case the parent who is not legally recognised as a parent dies, and will not be able to take the nationality of that parent. In case the parent who is legally recognised dies, the child becomes an orphan and can be placed in the care of a guardian or a foster family, whilst if the biological parent's family takes care of the child, they can decide whether they will allow the other parent (who is not legally recognised as a parent) to continue to play a part – and, if so, what part – in the child's life.

Research on the cross-border legal recognition of rainbow families and the legal status of their members has 'revealed a chaotic mosaic of full, partial, unclear, and denied recognitions'.[32] The non-recognition of legal ties between a child and one or both of his/her parents demonstrates that some EU Member States insist on refusing to recognise the realities of the familial relationships of children of rainbow families, jeopardising their legal security in addition to breaching several rights that children (and their parents) enjoy under EU law. The next section, therefore, analyses how the failure of the host Member State to recognise legal ties (as these are recognised in another EU Member State) between a child and his/her parent can breach several rights that the child enjoys under EU law.

5. IS THE NON-RECOGNITION OF THE PARENT-CHILD RELATIONSHIP A BREACH OF EU LAW?

Traditionally, and until relatively recently, different-sex married spouses and their legitimate (biological) children have constituted the only recognised form of 'family' for legal purposes. This has underpinned the approach not merely of EU Member States but also of the EU.[33] Such an approach ignores the existence of rainbow families despite evidence which suggests that the number of such families is increasing.[34]

The European Parliament – the most pro-LGBTI among the EU institutions – has called on the other EU institutions to create a legal framework at EU level

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32 K. Waaldijk, 'The Right to Relate: A Lecture on the Importance of Orientation in Comparative Sexual Orientation Law' (2013) 24 *Duke Journal of Comparative and International Law*, 161, 198.

33 H. Stalford, 'Concepts of Family under EU Law – Lessons from the ECHR' (2002) 16 *International Journal of Law, Policy and the Family*, 410; C. McGlynn, *Families and the European Union: Law, Politics and Pluralism*, Cambridge University Press, Cambridge 2006.

34 L. Hodson, 'The Rights of Children raised in lesbian, gay, bisexual or transgender families: A European perspective', ILGA-Europe 2008, p. 8 <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/rights-children-raised-lesbian-gay-bisexual-or> accessed 25.06.2018.

which will ensure that the rights of rainbow families which move between Member States are respected, whilst the Member States' competence in the family law field is respected. In particular, in its recent resolution on protection and non-discrimination with regard to minorities in the EU Member States,[35] it recommended, inter alia, the provision of clear and accessible information on the recognition of cross-border rights for LGBTI persons and their families in the EU.[36] It urged the Commission to ensure that Member States correctly implement Directive 2004/38, and consistently respect, inter alia, the provisions related to family members and prohibiting discrimination on any grounds.[37] In the same resolution, the Parliament called on the Commission to take action to ensure that LGBTI individuals and their families can exercise their right to free movement in accordance with both Article 21 TFEU and Article 21 EUCFR.[38]

Importantly, however, this is not the first time that the European Parliament has made such suggestions. In 1994 – when only one Member State (Denmark) had offered some form of legal recognition to same-sex relationships – the Parliament issued a resolution noting, inter alia, that the Commission should draft a recommendation on equal rights for lesbians and homosexuals, which would, as a minimum, seek to end 'the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, and should guarantee the full rights and benefits of marriage, allowing the registration of partnerships' as well as 'any restrictions on the rights of lesbians and homosexuals to be parents or to adopt or foster children'.[39]

Yet, despite the Parliament's repeated calls for a legal framework that caters to the needs of rainbow families and that grants them the same protection and rights as those enjoyed by the traditional nuclear family, the EU has, to date, buried its head in the sand on this matter. Other EU institutions have chosen to ignore social reality, and as a result rainbow families continue to live in a state of legal uncertainty: a mere attempt to exercise the core – free movement – rights they enjoy under EU law often brings them face to face with the harsh reality that their family is not recognised in many EU Member States.

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35 2017/2937(RSP), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bMOTION%2bB8-2018-0064%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN> accessed 25.06.2018. This motion was, in fact, the European Parliament's response to the PETI public hearing organised by the Committee on Petitions (PETI) titled 'Fighting against discrimination of EU citizens in the EU Member States and the protection of minorities' that took place on 4 May 2017, where the Petition submitted by Eleni Maravelia (above n. 30) was heard.

36 Ibid., para. 19.

37 Ibid., para. 20.

38 Ibid., para. 21.

39 European Parliament Resolution on equal rights for homosexuals and lesbians in EC A3-0028/94 (1994) OJ C 61/40.

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Accordingly, the next sub-section examines whether the EU has the competence and tools to require its Member States to recognise familial links between the members of rainbow families, as these are recognised in the family's Member State of origin.

5.1. DOES THE EU HAVE THE COMPETENCE TO ACT?

As is well known – and as has been repeatedly confirmed by the ECJ[40] – family law and the regulation of civil status still fall broadly within Member State competence. The EU does not have competence, except when measures concerning family law 'having cross-border implications' are concerned.[41] Therefore, Member States have largely been left to decide what legal recognition, if any, will be given to same-sex couples. Similarly, EU Member States are left to decide whether they will allow same-sex couples to become *de facto* parents and whether a same-sex couple can be legally recognised as the joint legal parents of a child.

Yet, as stressed in numerous different contexts,[42] Member States must act in a way that respects their obligations under EU law even in areas that fall within their competence. Among these is the obligation to respect the free movement rights of Union citizens. In particular, in situations that fall within the scope of EU law by virtue of an actual or potential exercise of free movement rights by a Union citizen, Member States must comply with their obligations under the EU free movement provisions and the secondary legislation complementing them. In addition, the EUCFR (and fundamental human rights that are part of the general principles of EU law) binds EU institutions in all instances and Member States 'when they are implementing EU law',[43] which has been interpreted, in some cases, to mean situations that fall within the scope of EU law.[44] Hence, in situations that fall within the scope of EU law, by virtue of the fact that a Union citizen has exercised free movement rights, the EU institutions and Member States must act in a way that complies with the free movement provisions and fundamental human rights protected under EU law.

Accordingly, the remainder of this section examines whether the host State's refusal to recognise the legal links between children and their same-sex parents

40 Case C-267/06, *Maruko*, EU:C:2008:179, para. 59; Case C-443/15, *Parris*, EU:C:2016:897, para. 59; *Coman* (above n. 25), para. 37.

41 Article 81(3) TFEU.

42 Case C-148/02, *Garcia Avello*, EU:C:2003:539, para. 25; Case C-353/06, *Grunkin and Paul*, EU:C:2008:559, para. 16; Case C-438/14, *Bogendorff von Wolffersdorff*, EU:C:2016:401, para. 32; *Coman* (above n. 25) para. 38.

43 Article 51 EUCFR (for the Charter); Case 5/88, *Wachauf*, ECLI:EU:C:1989:321 (for the general principles of EU law).

44 See, inter alia, Case C-459/99, *MRAX*, ECLI:EU:C:2002:461; Case C-617/10, *Åkerberg*, ECLI:EU:C:2013:105; Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281.

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when the family moves to its territory (and the resultant refusal of several rights which would have been enjoyed, had there been such recognition) breaches the free movement provisions of the Treaty and fundamental (human) rights as these are protected *under EU law*.[45]

5.2. IS THERE A BREACH OF THE EU FREE MOVEMENT PROVISIONS?

As noted earlier, the free movement of persons provisions in the TFEU prohibit national measures that obstruct the free movement of Union citizens between Member States. Union citizens have been given the right to be accompanied or joined by their close family members in the host State because the refusal to allow them to do so would deter them from exercising their free movement rights, thus creating an obstacle to free movement. To paraphrase the ECJ in its judgment in *Carpenter*,[46] the separation of the members of a rainbow family would be detrimental to their family life and, therefore, to the conditions under which the member(s) of the family who hold(s) Union citizenship exercise(s) free movement rights.

Clearly, when a child is a Union citizen and (s)he is not allowed to be accompanied or joined by both of his/her parents in the host State – because the legal links between members of the family are not recognised in the host State – the child's right to move and reside in the territory of another Member State will be infringed. Similarly, when, for the same reason, a Union citizen cannot be accompanied or joined by his/her spouse or partner *and/or any children of the couple*, (s)he will be deterred from exercising free movement rights.

Assuming that a rainbow family is actually admitted to the host State, this is not the end of the story. If the host Member State does not legally recognise the family ties between family members for other legal purposes (e.g. taxation, nationality, pensions, intestacy and so on), this will cause great inconvenience to those family members, thereby impeding the exercise of their free movement rights. In *Garcia Avello*[47] and *Grunkin Paul*,[48] the ECJ noted that the host State's denial of surname recognition to Union citizens registered in another Member State, and the resultant discrepancy in surnames in different Member States, led

45 The words 'EU law' have been italicised to emphasise that this chapter is concerned with the rights of the children of rainbow families only *under EU law* – the rights enjoyed under the ECHR or under other international instruments for the protection of children's rights will not be considered, unless and to the extent that this is necessary when examining the position under EU law.

46 Case C-60/00, *Carpenter*, ECLI:EU:C:2002:434.

47 Above n. 42.

48 Ibid.

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to serious inconvenience for the persons concerned which, in turn, was likely to deter them from exercising their free movement rights.[49] If we transpose this reasoning to the context of rainbow families, the refusal of the host State to legally recognise family ties between family members once the family is within its territory can constitute an obstacle to free movement. In recent cases, the ECJ has highlighted the need to ensure that Union citizens can *continue* a way of family life that may have come into being in the Member State from which they come, if they are not to be deterred from exercising their free movement rights.[50]

As is well known, obstacles to free movement can be justified on numerous grounds. In cases involving rainbow families and the refusal to recognise them, Member States would probably try to rely on the ground of public policy and particularly their interest in preserving their national identity, as was done in the recent case of *Coman*, which concerned the cross-border legal recognition of marriages. However, as the ECJ pointed out, an obligation to recognise the status attached to a same-sex relationship in another EU Member State and – importantly – to recognise the parental linkage (as established in another Member State) between one or both of the parents in a same-sex relationship and their child, for the sole purpose of granting family reunification rights under EU law, 'does not undermine the national identity or pose a threat to the public policy of the Member State concerned'.[51]

Moreover, as laid down in Article 27(2) of Directive 2004/38, measures taken by the host State relying on public policy 'shall be based exclusively on the personal conduct of the individual concerned'. This will not be satisfied when Member States engage in a blanket refusal to admit within their territory, and/or to recognise, the exact family ties of all members of a rainbow family. This is because, by doing so, they exclude a whole category of persons (LGB individuals who are in a same-sex relationship and their children) simply because they fall within that category; hence, their exclusion is not based on their personal conduct.

Finally, (again) according to the ECJ's judgment in *Coman*, 'a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the Charter, it being the task of the Court to ensure that those rights are respected'.[52] As will be seen in the next sub-section, the refusal of the

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49 For a similar argument with regard to the legal status attached to same-sex relationships, see G. Biagioni, 'On Recognition of Foreign Same-Sex Marriages and Partnerships' in D. Gallo, L. Paladini and P. Pustorino (eds.), *Same-Sex Couples Before National, Supranational and International Jurisdictions*, Springer Publishing, New York 2014, pp. 376–377.

50 *O. and B.* (above n. 22), para. 50; Case C-291/05, *Eind*, ECLI:EU:C:2007:771, para. 36; Case C-40/11, *Iida*, ECLI:EU:C:2012:691, para. 70.

51 *Coman* (above n. 25), para. 46.

52 Ibid., para. 47.

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host State to recognise the legal links between a child and his/her parent in a rainbow family is capable of breaching several fundamental human rights that the child and parents derive from the EUCFR and which are also protected as general principles of EU law.

Therefore, the obstacle to free movement that emerges from the non-recognition of rainbow families by the host State cannot be justified and thus such non-recognition can clearly be found to amount to a breach of the EU free movement of persons provisions.

5.3. IS THERE A BREACH OF EU FUNDAMENTAL HUMAN RIGHTS PROTECTION?

Under EU law, fundamental human rights have been protected as part of the general principles of EU law since the late 1960s.[53] Following the changes made to the Treaty on European Union (TEU) by the Treaty of Lisbon in 2009, Article 6 TEU provides that the EUCFR has the same legal value as the Treaties. Hence, in the EU, we have two parallel sources of fundamental human rights protection which significantly overlap: the EUCFR and the general principles of EU law.

Although the European Convention on Human Rights (ECHR) is *not* an EU instrument, it has nonetheless always had an important impact on the development of fundamental human rights protection in the EU, being recognised as a source of 'guidelines' for the ECJ when determining which fundamental human rights form part of the general principles of EU law and how these should be interpreted.[54] In addition, it plays an equally important role in the interpretation of the EUCFR, as Article 52(3) of the latter instrument provides that 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection'.

Accordingly, given that no *ECJ* case law deals with rainbow families and parenting by same-sex couples in particular, a large part of the analysis that follows examines the Strasbourg court's jurisprudence, as the latter can clearly inform the ECJ's reasoning in situations falling within the scope of EU law. So far, all cases of the European Court of Human Rights (ECtHR) involving rainbow families have been approached from the parental point of view – in other words, the question has been whether the rights enjoyed by parents have

53 Case 29/69, *Stauder*, ECLI:EU:C:1969:57.
54 Case 4/73, *Nold*, ECLI:EU:C:1974:51.

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been breached as a result of the contested measure of a State.[55] In this chapter, however, a different perspective is taken – that of the child – and thus the question is whether the contested non-recognition of familial ties in rainbow families in situations where the families move between Member States can breach the fundamental human rights of the children of rainbow families.

5.3.1. Breach of the Right to Private and Family Life

The right to private and family life is protected as a general principle of EU law[56] as well as under Article 7 EUCFR.

The ECtHR held in *Gas and Dubois v. France* that a same-sex couple and their child can together enjoy 'family life' within the meaning of Article 8 ECHR, irrespective of whether one or both parents are not biologically connected to the child.[57] This follows the general approach of the ECtHR, according to which biological ties are not an overriding factor in establishing family life and some evidence of real and constant relationship is normally needed before such relationships are afforded the protection of Article 8 ECHR.[58]

However, can the refusal of a host Member State to recognise legal links established between a child and both of her/his parents in their Member State of origin amount to a breach of the child's right to family life, provided that the family does enjoy family life within the meaning of Article 8 ECHR?

In *Marckx v. Belgium*,[59] the ECtHR held that Article 8 ECHR 'does not merely compel the State to abstain from' arbitrary interference with the exercise of the right to family life. It also imposes positive obligations on it, such as 'when the State determines in its domestic legal system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family'.[60] The case, of course, involved facts confined within one and the same State; however, it is important for our purposes, since it underlined the significance of ensuring that

55 For a criticism of this approach that seems to be leaving the question of the child's best interests outside the equation, see the dissenting opinion of Judge Villiger in *Gas and Dubois v. France*, no. 25952/07, ECHR 2012-II.

56 See, e.g. *Carpenter* (above n. 46), para. 41.

57 *Gas and Dubois v. France* (above n. 55), para. 37.

58 *J.R.M. v. the Netherlands*, no. 16944/90, ECHR 1993; *Nylund v. Finland*, no. 27110/95, ECHR 1999-VI; *K. and T. v. Finland*, no. 25702/94, ECHR 2001-VII.

59 *Marckx v. Belgium*, no. 6833/74, ECHR 1979.

60 Ibid., para. 31.

in situations in which two or more persons enjoy family life together (as can be the case in the context of a rainbow family), States have the positive obligation to see that their legal system allows for the child's integration into his/her family by being legally recognised as a part of it.

In a subsequent case, *Wagner v. Luxembourg*,[61] the ECtHR was confronted with an alleged breach of Article 8 ECHR in a case that involved the *cross-border* recognition of an adoption, albeit not involving a rainbow family. At issue was the refusal of the Luxembourg authorities to recognise the Peruvian court's decision pronouncing the full adoption by Ms. Wagner – a Luxembourg national – of her child, JMWL, of Peruvian nationality. The refusal resulted from the absence in Luxembourg legislation of provisions allowing an unmarried person to obtain full adoption of a child. The Court held that this refusal amounted to an unjustified interference with the right to respect for Ms. Wagner and her child's family life and, thus, amounted to an infringement of Article 8 ECHR. The Court, in particular, noted that '[b]earing in mind that the best interests of the child are paramount in such a case … the Court considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention'.[62]

More recently, the Court was confronted with the same issue in two cases that involved the cross-border recognition of a legal parent-child relationship lawfully established abroad as the result of a surrogacy agreement (*Mennesson v. France* and *Labassee v. France*).[63] The Court, following the principles established in *Wagner v. Luxembourg*, found that the contested refusals amounted to a breach of Article 8 ECHR, albeit not of the 'family life' aspect (in relation to which it found that the infringement was justified) but of the 'private life' aspect. This was in view of the fact that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship';[64] 'legal uncertainty' caused as a result of non-recognition in the host State is liable to have negative repercussions on the children's definition of their personal identity.

Hence, the ECtHR has clarified in numerous judgments that Article 8 ECHR is breached where there is *de facto* family life and the host State refuses to recognise the legal status of those family ties as formally recognised in the country of origin. Although the cases in which this was held did not involve rainbow families, similar cases and legal argumentation in situations involving

61 *Wagner v. Luxembourg*, no. 76240/01, ECHR 2007-VII.

62 Ibid., para. 133. See, also, *Negrepontis-Giannisis v. Greece*, no. 56759/09, ECHR 2011.

63 *Mennesson v. France*, no. 65192/11, ECHR 2014. See, also, *Labassee v. France*, no. 65941/11, ECHR 2014.

64 *Mennesson v. France* (above n. 63), para. 96.

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the cross-border legal recognition of the legal status of members of a rainbow family are likely to arise in national and international courts.[65] Hence, transposing this interpretation of Article 8 ECHR into the EU context, the failure of a host Member State to legally recognise the family ties between a child of a rainbow family and one or both of his/her parents places that child in a legal vacuum; this can breach his/her right to private and family life, which is protected as a general principle of EU law as well as under Article 7 EUCFR.

Like Article 8 ECHR, Article 7 EUCFR and the right to private and family life as a general principle of EU law, do not impose an absolute prohibition but allow Member States to justify measures which constitute an interference with the exercise of this right. The most likely ground of justification in cases in which the children of rainbow families are ignored by the law of the host Member State would be the aim of supporting and encouraging the traditional family. However such a justification would fail. This is because 'in the achievement of this end recourse must not be had to measures whose object or result is … to prejudice the rainbow family', given that members of the rainbow family can – as noted in *Gas and Dubois v. France* – 'enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family'.[66] Moreover, as Dunne has rightly argued,

> 'The standard "traditional family" defense would suggest that by reducing non-heterosexual family rights to the greatest extent possible, national laws disincentivise non-traditional family structures, prioritise heterosexual marriage relationships and encourage individuals into a socially optimal family model. However … such an argument would be intellectually weak (not to mention wholly removed from social reality). Severing the legal connection between gay, lesbian and bisexual parents and their non-biological children does not persuade such individuals to enter an opposite-gender heterosexual marriage … instead of reinforcing the *de facto* social superiority of traditional families, the absence of LGB family rights has no appreciable impact on heterosexual marriage, but significantly impedes lesbian, gay and bisexual family life'.[67]

This argument can, obviously, be extended to situations where there is no *cross-border* legal recognition of the familial ties among members of rainbow families.

Accordingly, the failure of a host Member State to recognise the legal links between a child in a rainbow family and both parents – as these are recognised in the home State from which the family is moving – can clearly amount to an unjustified breach of the child's right to private and family life under Article 7 EUCFR and as a general principle of EU law.[68]

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65 K. Waaldijk (above n. 32), 197.
66 *Marckx v. Belgium* (above n. 59), para. 40.
67 P. Dunne (above n. 12), 48–49.
68 For a similar argument see P. Dunne (ibid.), 43–44.

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5.3.2. *Breach of the Prohibition of Discrimination on the Ground of Sexual Orientation*

In situations in which a host Member State refuses to recognise the parental ties between a child of a same-sex couple and both parents, as these are recognised in the Member State of origin, this is based on the child's parents being of the same sex. Accordingly, the children of same-sex couples face discrimination because of their parents' sexual orientation; hence they face discrimination *by association with their LGB parents*.

As established by the ECJ in the *Coleman* case,[69] the prohibition of discrimination under Directive 2000/78[70] – the instrument that prohibits discrimination on, inter alia, grounds of sexual orientation in the context of employment – includes discrimination by association. There is no reason why this would not be recognised as the case also for Article 21 EUCFR, which generally prohibits discrimination on, inter alia, the ground of sexual orientation.[71]

The question is whether a host Member State may nonetheless be justified in drawing a distinction between the children of rainbow families and children of opposite-sex couples – as regards the legal recognition of their ties with their parents – in situations in which EU free movement rights have been exercised. After all, it is very rarely – if ever – that the legal links between children and their opposite-sex parents are severed when the family moves between Member States, and, if they ever are, this is certainly *not* based on the (heterosexual) sexual orientation of the parents.

As the ECtHR has repeatedly noted, discrimination on the ground of sexual orientation requires 'particularly convincing and weighty reasons' to be justified, and differences solely based on considerations of sexual orientation are unacceptable under the ECHR.[72] In line with Article 52(3) EUCFR, the same approach should be adopted in the EU context when considering justifications in situations in which discrimination occurs on the ground of sexual orientation, as this is prohibited under the Charter.

The usual argument for justifying discrimination in cases of non-recognition in the context of rainbow families is the need to protect the child's best interests. However, same-sex couples should continue to be legally recognised as the joint parents of their children in the host State, not despite the children's best

69 Case C-303/06, *Coleman*, ECLI:EU:C:2008:415.

70 Council Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (2000) OJ L 303/16.

71 There has not been a case to date that precedes recognition of the EUCFR as a legally binding document and which involved the need to establish whether the prohibition of discrimination on the ground of sexual orientation is a fundamental human right protected as a general principle of EU law.

72 *Vallianatos v. Greece*, no. 29381/09 and 32684/09, ECHR 2013, para. 77.

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interests but precisely because this is required if the children's best interests are considered, as is, after all, required by Article 24 EUCFR.

Considerable social, scientific and psychological research argues that successfully raising a child does not depend on his or her parents' sexual orientation.[73] Moreover, increasing numbers of children in Europe are being raised in families comprising a same-sex couple. Failing to provide legal recognition to such families will not reduce the numbers of such families but will complicate their lives and – as already seen in this chapter – result in a breach of several rights enjoyed under EU law both by the parents and by the children themselves. As Judge Villiger rightly noted in his dissenting opinion in the *Gas and Dubois v. France* case,

> 'joint parental custody is in the best interests of the child. I fail to see a justification for this difference in treatment [between the children of a same-sex and an opposite-sex couple]. In my view, all children should be afforded the same treatment. I cannot see why some children, but not others, should be deprived of their best interests, namely of joint parental custody. Indeed, how can children help it that they were born of a parent of a same-sex couple rather than of a parent of a heterosexual couple? Why should the child have to suffer for the parents' situation?'[74]

Or, as asked by another commentator, 'Why prejudice children living in a certain kind of relationship?'[75] After all, as laid down in Article 2(2) of the UN Convention on the Rights of the Child – to which all EU Member States are parties – 'States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members'.

Accordingly, the children of rainbow families should not be 'penalised in [their] daily existence'[76] simply because of their association with parents who are of homosexual sexual orientation. Children of opposite-sex couples who move to a host Member State in exercise of their free movement rights have the right to benefit from family reunification rights granted by EU law and, once admitted, to be recognised as the children of both of their parents. In the same

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73 See the sources referred to in this website <https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-wellbeing-of-children-with-gay-or-lesbian-parents/> accessed 25.06.2018. See, also, the American Psychological Association Policy Statement on Sexual Orientation, Parents, and Children (2004) <http://www.apa.org/about/policy/parenting.aspx> accessed 25.06.2018.

74 Dissenting opinion of Judge Villiger in *Gas and Dubois v. France* (above n. 55).

75 K. Lundström, 'Family Life and the Freedom of Movement of Workers in the European Union' (1996) 10 *International Journal of Law, Policy and the Family*, 250, 262.

76 *Wagner v. Luxembourg* (above n. 61), para. 158.

way, children of same-sex couples who move to another Member State should be able to maintain the legal ties lawfully established between them and their parents in the Member State of origin.

6. CONCLUSION

This chapter examined the position of children of rainbow families (comprising at least one EU citizen) who move between EU Member States in exercise of EU free movement rights.

Since family law and issues regarding family and civil status are still areas that fall within Member State competence, there is currently a legal patchwork regarding the recognition of same-sex couples' parental status. The sad reality is that in many EU Member States, same-sex parents lack not only automatic recognition of their parental status but also the means to become *de facto* parents.

This, in itself, is not problematic from the point of view of EU law. What *is* problematic, however, is that because of the lack of clarity in EU legislation governing the family reunification rights of EU citizens who move between Member States, the Member States that do not allow same-sex couples to be registered as joint parents of their child *in their territory* refuse to recognise them as such even in situations in which they were lawfully registered as joint parents of their child in another Member State.

There are different legal and cultural conceptions of what constellations may form a family. However, in addition to the traditional nuclear family, the ECtHR has recognised that alternative families, including rainbow families, can enjoy 'family life' and merit equal protection with families whose basis is an opposite-sex couple. Moreover, *all* children enjoy human rights equally, and their best interests must be protected, irrespective of who their parents are.

As explained in this chapter, the host State's refusal to legally recognise the parental ties between the child of a rainbow family and both parents breaches the right to free movement that rainbow families comprising at least one Union citizen enjoy under EU law; breaches the right to private and family life that the child and his/her parents enjoy under Article 7 EUCFR and as a general principle of EU law; and breaches the right that children of rainbow families enjoy under Article 21 EUCFR, not to be discriminated against on the ground of their parents' sexual orientation (discrimination by association).

Accordingly, the EU should clarify that *all* EU Member States are required by EU law to recognise the exact legal ties among the members of a rainbow family *as these are recognised under the law of another Member State*. It should, nonetheless, be emphasised that this chapter does not advocate that EU Member States are now obliged under EU law to allow same-sex couples to become *de facto* parents of a child and to be legally recognised as the child's parents in

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situations in which the couple is nowhere recognised as such and where there has been no exercise of EU free movement rights. Rather, this chapter argues that in situations in which (legal) links among the members of a rainbow family have been lawfully established in another Member State, the host Member State is obliged under EU law to mutually recognise those links. The (implicit) reforming pressure that will emerge following the recognition of rainbow families from other Member States should not be ignored, however. While space does not allow an analysis of this point, it is submitted that if the host Member State has to recognise – for the purposes of EU law – a same-sex couple as a child's joint parents, it will certainly feel the pressure to do so for same-sex couples whose situation is confined within its territory and is not governed by EU law.

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