

## European Court of Human Rights

### *Szypula v. Poland and Urbanik & Alonso Rodriguez v. Poland* (Application Nos. 78030/14 and 23669/16)

#### Third Party Intervention by the Human Rights Centre of Ghent University<sup>1</sup>

These written comments are prepared and submitted by the Human Rights Centre of Ghent University (Belgium), pursuant to the leave granted by the President of the First Section of the European Court of Human Rights on 8 October 2020, in accordance with Rule 44 §3 of the Rules of the Court. The interveners submit that the case of *Szypula v. Poland and Urbanik & Alonso Rodriguez v. Poland* raises important issues relating to the right to marry, alone (Article 12 ECHR) and in conjunction with the prohibition of discrimination (Article 14). We respectfully submit that this case provides the Court with the opportunity to clarify, for the first time, the scope of the right to marry as it applies to same-sex couples in a transnational context, in particular by recognizing that this provision gives rise to obligations for member states not to hinder a same-sex couple's access to this right in another State.

In order to support our argumentation, this submission will first provide a discussion of the state-sanctioned discrimination against the LGB community in Poland, which provides the backdrop against which the present case must be assessed (section 1). This is then followed by two separate discussions of the Convention obligations of the State of nationality (i.e. Poland) with regards to the access to marriage of its nationals in another country, the first focusing on the interpretation of Article 12 ECHR (section 2.1), and the second on Article 14 ECHR jointly with Article 12 (section 2.2). The next section invites the Court to also consider the risk that Member States might circumvent the case law from both the ECtHR and the CJEU by preventing same-sex couples from enjoying their right to marry abroad (section 3). The final section discusses the transnational dimension of this case, inviting the Court to also address the question which Convention obligations are to be imposed on the State in which the same-sex marriage is to be contracted (i.e. Spain), in particular in the field of private international law.

#### 1. Polish and European context

Over the past two years, the situation in Poland has been widely documented as increasingly challenging for the LGBTQI community. During the recent presidential elections, the ruling Law and Justice (PiS) party, and the now re-elected Polish President Andrzej Duda, turned LGBTQI rights into one of the main election issues.<sup>2</sup> Doing so, Duda referred to the promotion of such rights as an 'ideology' worse than communism.<sup>3</sup> Having signed a so-called 'Family Charter' of election proposals, he committed to protecting children and the family from such purported 'ideology', preventing same-sex couples from marrying or adopting children and to ban teaching about LGBTQI issues in schools.<sup>4</sup> Under Duda's rule, over a 100

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<sup>2</sup> 'Poland's LGBTQ Community in the Political Crosshairs' *Politico* (19 June 2020) <<https://www.politico.eu/article/poland-lgbtq-community-in-the-political-crosshairs-elections-duda/>>.

<sup>3</sup> 'Polish Election: Andrzej Duda Says LGBT "ideology" Worse than Communism' *BBC* (14 June 2020) <<https://www.bbc.com/news/world-europe-53039864>>.

<sup>4</sup> *Ibid*; Katherine Martin, 'President Duda, "LGBT-Free Zones" and the Growth of Nationalism in Poland' (*OutRight International*, 10 August 2020) <<https://outrightinternational.org/content/president-duda-%E2%80%9C9C1gbt-free-zones%E2%80%9D-and-growth-nationalism-poland>>; ILGA Europe, 'Poland - Anti-LGBTI Hate Timeline' (ILGA Europe) <<https://www.ilga-europe.org/sites/default/files/Poland-Anti-LGBT-Timeline.pdf>>.

Polish municipalities have declared themselves ‘LGBTQI-free zones’ these last two years.<sup>5</sup> About 30 of them have also signed a ‘Local Government Charter of the Right of the Family’ initiated by a religion-based foundation, that has been campaigning against LGBTQI rights, non-discrimination education in schools, and for a total ban of abortion rights in Poland.<sup>6</sup> In July 2019, numerous violent physical attacks took place during the Equality March in Bialystok, with anti-LGBTQI demonstrators harassing march participants and clashing with police who were escorting participants along the route.<sup>7</sup> In the aftermath of the Presidential elections, representatives of the LGBTQI groups were arrested and detained.<sup>8</sup>

Where in many countries the LGBTQI community faces fewer difficulties than before, anti-LGBTQI hate in Poland continues to grow.<sup>9</sup> In mid-September of this year, ILGA-Europe together with Polish LGBTQI rights organisations KPH (Campaign Against Homophobia) and Fundacja Równości (The Equality Foundation) accordingly submitted a legal complaint to the European Commission about the LGBTQI Free Zones and the signing of the Local Family Charter.<sup>10</sup>

The EU has already condemned discrimination against LGBTQI persons in Europe, and in Poland in particular, on several occasions. On 18 December 2019, the European Parliament adopted a resolution in which it recalled that ‘LGBTQI rights are fundamental rights, and that the EU institutions and the Member States therefore have a duty to uphold and protect them in accordance with the Treaties and the Charter, as well as international law’.<sup>11</sup> Listing many problematic incidents that have occurred in Poland over the past years, it further put forward that these were ‘part of a broader context of attacks against the LGBTI community in [the country]’.<sup>12</sup> The creation of LGBTQI free zones was said to ‘represent[...] an extremely discriminatory measure limiting the freedom of movement of EU citizens’.<sup>13</sup> Most recently, European Commission President Ursula von der Leyen, in her State of the Union, held that: “‘I will not rest when it comes to building a Union of equality. A Union where you can be who you are and love who you want – without fear of recrimination or discrimination. Because *being yourself is not your ideology*. It's your identity. And no one can ever take it away. So I want to be crystal clear – LGBTQI-free zones are humanity free zones. And they have no place in our Union. And to make sure that we support the whole community, the Commission will soon put forward a strategy to strengthen LGBTQI rights’” (emphasis added).<sup>14</sup>

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<sup>5</sup> Martin (n 43)ILGA-Europe3); Maddalena Tomassini, “Poland Is Violating the Fundamental Rights of EU Citizens and Blatantly Disregarding EU Treaties and Standards,” Says LGBTI Organisation ILGA-Europe as a Legal Complaint Is Submitted to the European Commission’ (15 September 2020) <<https://ilga.org/ilga-europe-joint-statement-poland-sept2020>>.

<sup>6</sup> ILGA Europe (n 4); Ordo Iuris, ‘Local Government Charter of the Rights of the Family’ <<https://en.ordoiuris.pl/family-and-marriage/local-government-charter-rights-family>>.

<sup>7</sup> ILGA Europe (n 4).

<sup>8</sup> European Commission, ‘Commission Staff Working Document - 2020 Rule of Law Report - Country Chapter on the Rule of Law Situation in Poland’ (European Commission 2020) SWD(2020) 320 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602579986149&uri=CELEX%3A52020SC0320>>.

<sup>9</sup> Martin (n 4); ILGA Europe (n 4).3); ILGA Europe (n 3).

<sup>10</sup> Tomassini (n 5).

<sup>11</sup> European Parliament, ‘Public Discrimination and Hate Speech against LGBTI People, Including LGBTI Free Zones - European Parliament Resolution of 18 December 2019 on Public Discrimination and Hate Speech against LGBTI People, Including LGBTI Free Zones’ (European Parliament 2019) 2019/2933(RSP) para 1 <[https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.pdf)>.

<sup>12</sup> *ibid* P.

<sup>13</sup> *ibid* P.

<sup>14</sup> Ursula von der Leyen, ‘State of the Union Address at the European Parliament Plenary’ (Brussels, 16 September 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1655](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655)>.

We submit that this systematic government campaign of curtailing LGBTQI rights provides a highly relevant contextualization to the cases of *Szypuła v. Poland* and *Urbanik & Alonso Rodriguez v. Poland*. These cases concern obstacles Poland puts in the way of the effective exercise by same-sex couples of their legal right to marry in another country.

## 2. State interference with the exercise of the right to marry in another State Party

The cases of *Szypuła v. Poland* and *Urbanik & Alonso Rodriguez v. Poland* raise important issues regarding the transnational effects of restrictions on marriage eligibility that are adopted at the national level. This is in particular the case when restrictive measures adopted by one State obstruct access to the right to marry in another State for couples that legally have such right in the latter State. We submit that such restrictions may lead to violations of the right to marry (Article 12 ECHR) as well as to prohibited discrimination in the exercise of the right to marry (Article 14 + 12 ECHR).

### 2.1. Obligations under Article 12 ECHR

The Court has held that the right to marry is regulated by national law, but that ‘limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’.<sup>15</sup> Such limitations may result from formal as well as substantive rules.<sup>16</sup> Moreover, what matters is the ‘effective exercise’ of Convention rights, as a result of which the Commission has recognized in *Draper v. the United Kingdom* with regards to Article 12 that ‘hindrance in fact can contravene the Convention just like a legal impediment’.<sup>17</sup>

Under the current state of the case law, the Court no longer considers ‘that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex’.<sup>18</sup> The question whether Article 12 requires States to allow for same-sex marriage ‘is left to regulation by the national law of the Contracting State’.<sup>19</sup> However, when a Contracting State *does* recognize that same-sex couples enjoy the right to marry in its legal order – as for instance Spain did in the context of the present case –, Article 12 demands that the effective exercise of such right must not be hindered.

Moreover, since a State is responsible for the negative effects on the exercise of Convention rights in another State which result from acts taken on its own territory,<sup>20</sup> **the obligation not to hinder the effective exercise of the right to marry** in one country arguably also **extends to the authorities of another country**. The present case indeed concerns a situation in which the act of one State (i.e. the refusal of the State of nationality to grant a marriage eligibility certificate) prevents a couple from contracting a marriage in another country. It is submitted that the mere fact that the State of nationality (i.e. Poland) can decide not to allow same-sex marriage does not imply that they are allowed under Article 12 to hinder the effective

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<sup>15</sup> ECtHR, 14 December 2010, *O’Donoghue and Others v. the United Kingdom*, no. 34848/07, para. 82.

<sup>16</sup> *Ibid.*, para. 83.

<sup>17</sup> EComHR, Report of 10 July 1980, *Draper v. the United Kingdom*, no. 8186/78, para. 52, with reference to ECtHR (Plenary), 21 February 1975, *Golder v. the United Kingdom*, no. 4451/70, para. 26.

<sup>18</sup> ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*, no. 30141/04, para. 61. Also see ECtHR, 21 July 2015, *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, para. 191.

<sup>19</sup> *Ibid.*

<sup>20</sup> E.g. ECtHR (Plenary), 7 July 1989, *Soering v. The United Kingdom*, no. 140388/88, para. 91; and ECtHR, 27 October 2009, *Andreou v. Turkey*, no. 45653/99, para. 25.

exercise of the right to marry of its nationals abroad. In this regard, it must be recalled that the Court has recognized that the fact that domestic law does not provide for a legal right to marry for same-sex couples does not stand in the way of the applicability of Article 12 as such.<sup>21</sup> With this in mind, the mere fact that a State does not allow for same-sex marriage does not contradict the possibility of that State nonetheless being subjected to some kind of obligations under Article 12, such as the obligation not to hinder the effective enjoyment by its nationals of their right to marry *in another country*.

This finding is all the more important since, nowadays, in Europe as elsewhere, many individuals lead **transnational lives**. They may wish to marry a partner of different nationality, and they may choose to take up residence in a State other than their country of nationality. Such transnational mobility is one of the central ideas and drivers of European integration, particularly in the European Union. Since more than one State can have a legal connection to a transnational life, this however implies an enhanced risk that any of these States acts in a manner which affects the enjoyment thereof. As the present case illustrates, there is a particular risk that the State of nationality may act in a manner which prevents its nationals from enjoying their human rights in another country on an equal footing with nationals of that country. It is submitted that the Court must take into account the transnational dimension of such cases, with a view to ensuring that those *human rights which are prerequisite to the effective enjoyment of transnational lives are not unduly hampered* by the acts of the States concerned.

This particularly holds true for same-sex couples, who currently enjoy the right to marry in 16 Contracting States, a number which is expected to increase further. At the same time, a number of States continues to refuse same-sex couples access to the institution of marriage. While the Court has made clear in *Schalk and Kopf* that, at this point in time, the choice to deny same-sex couples the right to marry falls within the State's margin of appreciation,<sup>22</sup> this does not mean that it should similarly allow States to obstruct a same-sex marriage in a country which has made the reverse choice.

A choice in national law to reserve marriage to different-sex couples cannot, in our opinion, carry enough weight to justify a restrictive measure that impedes marriage abroad. The argument that 'marriage has deep-rooted social and cultural connotations which may differ largely from one society to another' cannot justify interference by one State of access to marriage in another State.<sup>23</sup> This is especially the case given that neither the ECHR, nor EU law, obliges the State of nationality to also recognize such marriage under its domestic law should the couple ever choose to take up residence there.

The Court has acknowledged in its *Orlandi* judgment that States have a legitimate interest in avoiding domestic restrictions on same-sex marriage to be circumvented.<sup>24</sup> However, such interest goes no further than the situation in which State authorities are confronted with the narrow question whether they should recognize a same-sex marriage contracted abroad as a marriage under domestic law. This is evident from the *Orlandi* judgment itself, where such interest was not considered relevant for the broader discussion regarding the legal protection of the applicants' relationship.<sup>25</sup> Also, the Court of Justice of the European Union (CJEU) has carefully distinguished the question of access to same-sex marriage under domestic law from related questions such as the granting of a (derived) right of residence to a same-sex spouse based on a marriage concluded in another EU Member State. According to the CJEU in the *Coman* judgment (see more elaborately below), unlike access to marriage, the right of residence on the basis of marital status

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<sup>21</sup> E.g. ECtHR, 14 December 2017, *Orlandi and Others v. Italy*, nos. 26431/12 etc., para. 145.

<sup>22</sup> ECtHR, 24 June 2010, *Schalk and Kopf v. Austria*, no. 30141/04, paras. 61-63.

<sup>23</sup> *Ibid.*, para. 62.

<sup>24</sup> ECtHR, 14 December 2017, *Orlandi and Others v. Italy*, nos. 26431/12 etc., para. 207.

<sup>25</sup> *Ibid.*, paras 208-211.

‘does not undermine the national identity or pose a threat to the public policy of the Member State concerned’.<sup>26</sup> It is submitted that the mere granting of a marriage eligibility certificate to a national who wants to contract a same-sex marriage abroad would similarly not undermine national identity or pose a threat to public policy.

In short, it is apparent from the case law of both the ECtHR and the CJEU that the **margin of appreciation** of States which do not allow for same-sex marriage does not extend any further than the mere choice not to recognize same-sex marriages under their respective domestic jurisdictions. Consequently, a State’s objection against same-sex marriages should not be accepted as a justification for an interference with the right to marry in another State, and the *Court should not allow States to “export” their objections* accordingly. Doing so would grant a disproportionate power for rights-restrictive States in transnational situations, a scenario that in our opinion runs counter to the object and purpose of the Convention as an instrument for the protection of individual human beings.<sup>27</sup> In this respect, States not allowing same-sex marriage have to be reminded of the fact that the question of the provision of a necessary document or any other kind of administrative act that is essential for access to marriage abroad (e.g. a birth certificate and/or a certificate declaring a person’s unmarried status) cannot be used to give extraterritorial application to their national restrictions. The Court is therefore respectfully invited to hold that *hindering the effective enjoyment of the right to marry of same-sex couples on the territory of other States falls outside the margin of appreciation* of the Contracting States.

## 2.2. Obligations under Article 12 + 14 ECHR

In addition to Article 12 taken alone, the present application also raises important issues under Article 12 in conjunction with Article 14.

Obstructing the access of an individual to marriage abroad, by way of a refusal by State authorities to provide a necessary document or any other kind of administrative act that is essential for access to marriage, on account of an objection to same-sex marriage, is a direct distinction on the ground of sexual orientation. The Court has recognized that ‘[w]here a difference in treatment is based on sexual orientation, the State’s *margin of appreciation is narrow*’<sup>28</sup> (emphasis added). With regards to differential treatment based on sex, the Court requires ‘*very weighty reasons*’ before such treatment could be regarded compatible with the Convention.<sup>29</sup> Similarly, the Court has recognized that ‘just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons’.<sup>30</sup> Moreover, the Court has held several times that differential treatment based solely on considerations of sexual orientation is *unacceptable under the Convention*.<sup>31</sup>

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<sup>26</sup> *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* (2018) ECLI:EU:C:2018:385 (CJEU).

<sup>27</sup> ECtHR (Plenary), 7 July 1989, *Soering v. The United Kingdom*, no. 140388/88, para. 87.

<sup>28</sup> ECtHR (Grand Chamber), 19 February 2013, *X and Others v. Austria*, no. 19010/07, para. 99.

<sup>29</sup> ECtHR (Plenary), 28 May 1985, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, no. 9214/80 etc., para 78; ECtHR, 22 February 1994, *Burghartz v. Switzerland*, no. 16213/90, para. 27; ECtHR, 24 June 1993, *Schuler-Zraggen v. Switzerland*, no. 14518/89, para. 67; ECtHR (Grand Chamber), 22 March 2012, *Konstantin Markin v. Russia*, para. 127.

<sup>30</sup> ECtHR (Grand Chamber), 19 February 2013, *X and Others v. Austria*, no. 19010/07, para. 99.

<sup>31</sup> ECtHR (Grand Chamber), 11 January 2008, *E.B. v. France*, no. 43546/02, paras. 93 and 96; ECtHR, 21 December 1999, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, para. 36.

Under the current state of the Court’s jurisprudence, the only question involving a distinction on the ground of sexual orientation in which the State still enjoys a wide margin of appreciation, is the decision whether or not to allow for same-sex marriage under domestic law. However, the present case is not about access to marriage in the country concerned. Given the differences as regards the legal stakes, it would be more appropriate for the Court to only leave a narrow margin of appreciation, as is typical of cases of discrimination on the ground of sexual orientation, and to apply the ‘very weighty reasons’ test. Above, it has been argued that it is difficult to conceive of a convincing justification for the hindering of nationals from contracting a same-sex marriage abroad under Article 12. It is even more difficult to see how any attempt to justify such practice could pass the high ‘very weighty reason’ threshold under Article 14 in conjunction with Article 12.

In addition, we respectfully submit that the societal climate of harassment of sexual minorities, including same-sex couples, in Poland, as sketched in the first section of this intervention, is relevant to the examination of the claim of sexual orientation discrimination. Here as well, the present case ought to be distinguished from cases concerning access to marriage in the defendant State. By allowing States to deny same-sex couples access to marriage, through reliance on a wide margin of appreciation, the Court is implicitly working on the basis of a presumption of good faith: the idea that there can be Convention-compliant grounds to reserve marriage to opposite-sex couples (cf. marriage’s purported ‘deep-rooted social and cultural connotations’), and that States claiming such grounds can be assumed to be acting upon them.

It is submitted, however, that in human rights matters, and particularly in matters regarding measures targeting groups subject to large-scale exclusion and discrimination, presumptions of good faith on behalf of the alleged perpetrator need to be exceptional and can only be narrowly tailored. Hence, beyond the narrow topic of access to marriage in the State concerned, a context of systematic harassment of same-sex couples (see section 1 above) is in our opinion relevant for the assessment of the existence of a legitimate aim and/or proportionality of any government measures specifically targeting same-sex couples.

We submit that the unacceptability under the Convention of distinctions based solely on sexual orientation, as well as the context of anti-LGBTQI sentiment in the defendant State, make it difficult to imagine how a State’s obstruction of access to same-sex marriage in another State could be justifiable let alone based on good faith.

### **3. The need to prevent States from circumventing ECtHR and CJEU jurisprudence**

Finally, it is important for the Court to take into account the broader legal context in which the present case is embedded. In particular, it is argued that the creation of obstacles for nationals to contract a same-sex marriage abroad may be a way for States like Poland to circumvent case law of both the ECtHR and the CJEU.

While the Court has acknowledged that States have the choice not to provide for same-sex marriages in their legal order, it has held in *Orlandi*, with regards to a same-sex marriage concluded abroad, that States have the obligation to guarantee legal recognition and protection of the relationship.<sup>32</sup> The present case illustrates that Poland has found a way to circumvent the Court’s case law offering protection to the right to respect for family life of same-sex couples who contracted a marriage abroad by preventing access to marriage abroad altogether. In principle, Contracting States prohibiting same-sex marriages cannot prevent the establishment of a same-sex marriage abroad unless they refuse to issue one of the required documents:

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<sup>32</sup> ECtHR, 14 December 2017, *Orlandi and Others v. Italy*, nos. 26431/12 etc.

a birth certificate, a certificate of legal capacity to marry, certificate of marital status, etc. Upholding such practices would be tantamount to allowing States to circumvent *Orlandi* by interfering with their nationals' rights *before* the conclusion of the marriage, thus undermining the requirement that the Convention is intended to guarantee rights that are 'practical and effective' rather than 'theoretical or illusory'.<sup>33</sup>

Moreover, the refusal by the Polish authorities to issue marriage eligibility certificates to Polish nationals who intend to marry a non-Polish same-sex partner in another EU Member State may prevent the application in Poland of the CJEU's above-mentioned landmark *Coman* judgment.<sup>34</sup> *Coman* established that the term 'spouse' for the purpose of the grant of family reunification rights under EU free movement law includes the same-sex spouse of Union citizens who exercise their free movement rights.<sup>35</sup> Importantly, the latter are endowed with these rights not only when they move to another Member State, but also when they, having done so, return to their Member State of nationality.<sup>36</sup> In *Coman*, the CJEU thus found that Member States may not refuse a non-national legally married to a 'returnee' a (derived) right of residence in their territory on the ground that they do not recognize marriage between persons of the same sex in domestic law.<sup>37</sup> A refusal to issue a marriage eligibility certificate, however, prevents the marriage *and*, at the same time, a possible future request to recognize it for the purpose of the grant of residence rights to the same-sex spouse in question. As such, a Union citizen could be denied the possibility of returning to the Member State of which he is a national together with his same-sex partner.<sup>38</sup>

However, it must also be kept in mind that it is the Spanish requirement for these specific documents that enables a State like Poland, which does not allow for same-sex marriage, to be placed in a position where it can circumvent *Oliari* and *Coman* by effectively preventing access to such a marriage altogether. With this finding in mind, the next section discusses the transnational dimension of this case which we invite the Court to duly acknowledge.

#### 4. Obligations of Contracting States allowing same-sex marriages

While the present case has been brought against Poland, its transnational dimension inevitably also brings Spain into the picture. In this regard, it is only because Spanish private international law referred to Polish family law that the Polish authorities were placed in a position in which they could take a decision to deny granting the applicants the required certificate. The Court is kindly invited to also address the legitimacy of the operation of such rules of private international law which may result in the non-nationals being denied

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<sup>33</sup> E.g. ECtHR, 9 October 1979, *Airey v. Ireland*, no. 6289/73, para. 24.

<sup>34</sup> *Coman* (n 28).

<sup>35</sup> Alina Tryfonidou, 'Free Movement of Same-Sex Spouses within the EU: The ECJ's *Coman* Judgment' (*European Law Blog*, 19 June 2018) <<https://europeanlawblog.eu/2018/06/19/free-movement-of-same-sex-spouses-within-the-eu-the-ecjs-coman-judgment/>> accessed 25 October 2020.

<sup>36</sup> *ibid*; *The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department* (1992) ECLI:EU:C:1992:296 (CJEU); *O v Minister voor Immigratie, Integratie en Asiel, and Minister voor Immigratie, Integratie en Asiel v B* (2014) ECLI:EU:C:2014:135 (CJEU).

<sup>37</sup> *Coman* (n 34) *Strasbourg Observers* 39) para 51; Manon Beury, 'The CJEU's Judgment in *Coman*: A Small Step for the Recognition of Same-Sex Couples Underlying European Divides over LGBT Rights' (*Strasbourg Observers*, 24 July 2018) <<https://strasbourgobservers.com/2018/07/24/the-cjeus-judgment-in-coman-a-small-step-for-the-recognition-of-same-sex-couples-underlying-european-divides-over-lgbt-rights/>> accessed 25 October 2020. The need to receive any recognition does not apply to same-sex spouses who are also EU nationals and who meet the relevant conditions set out in EU free movement law, since they have their *own* residence rights.

<sup>38</sup> *Coman* (n 34), para. 40.

access to marriage which they would have enjoyed had they possessed the nationality of the State allowing same-sex marriage.

As held above, under the current state of Convention law, it falls within the margin of appreciation of the State to decide whether or not to grant same-sex couples access to the institution of marriage. However, if a State decides to provide same-sex couples access to the institution of marriage, Article 14 in conjunction with Article 12 requires that such access is provided without discrimination,<sup>39</sup> including on the ground of nationality. While Contracting States enjoy a wide margin of appreciation in deciding whether or not they legally recognise same-sex marriages, it is submitted that this margin of appreciation is restricted in a transnational context. If a Contracting State, for example Spain, allows same-sex marriages, a non-national leading a genuine family life<sup>40</sup> should in principle also be able to exercise the right to contract a same-sex marriage in that State. The fact that access to same-sex marriage is made dependent on the legislation of the State of nationality of the spouses (including by requiring the submission of documents providing information on the marital status or capacity to marry), amounts to a difference of treatment on the ground of nationality for which ‘very weighty reasons’ would have to be put forward.<sup>41</sup> The mere fact that **private international law** often uses nationality as a connecting factor to determine which law applies to a particular situation with an international dimension (i.e. the designated law), does not in itself justify such discriminatory treatment. In the past, the Court has made clear that Contracting States can freely determine the appropriate connecting factor, on condition, however, that the result obtained after having applied the designated law does not contravene the rights enshrined in the ECHR.<sup>42</sup>

Contracting States that allow for same-sex marriage and that use nationality as a connecting factor often use the **positive public policy** exception to guarantee the effective enjoyment of the right to marry to same-sex couples. This is the case in for example Austria (Article 17 (1a) IPR) and Belgium (Article 46, paragraph 2 Belgian Code of PIL): if the national law of one of the spouses prohibits marriage between people of the same sex, that law will not be applied with a view to ensuring that the spouses can nonetheless get married. Alternatively, such States make use of the law of habitual residence or the law of the State of celebration of the marriage instead of the law of nationality (which is the case in for example Luxembourg, the Netherlands and Sweden). In other Contracting States allowing same-sex marriage, the administrative authorities accept a wide array of documents as certificates of marital status, thus effectively avoiding the need for certificates from the home country on marriage impediments (which is for example the case in Iceland). Consequently, it is submitted that the Court must have regard to the existence of **an emerging consensus** in countries allowing same-sex marriage to allow a person from a country which explicitly prohibits same-sex marriages to contract a marriage with a person of the same sex.<sup>43</sup> Moreover, as discussed in section 3, the possibility for a State of nationality to circumvent both ECtHR and CJEU case law arises when a State that allows for same-sex marriage nonetheless applies the law of the State of nationality that does not allow for same-sex marriage.

Finally, it is submitted that where a Contracting State provides substance to the right to non-discrimination on the ground of sexual orientation by opening up the institution of marriage to same-sex couples, in cases involving foreigners it should not allow progress towards equality to be undermined by the back door via referral to the legislation of the State of nationality or by demanding documentary evidence. Contracting

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<sup>39</sup> *Mutatis mutandis*, ECtHR (Grand Chamber), 24 May 2016, *Biao v. Denmark*, no. 38590/10, para. 88.

<sup>40</sup> See also *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* (2018) ECLI:EU:C:2018:385 (CJEU), para. 24.

<sup>41</sup> ECtHR, 16 September 1996, *Gaygusuz v. Austria*, no. 17371/90, para. 42.

<sup>42</sup> ECtHR, 28 June 2007, *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01.

<sup>43</sup> *Mutatis mutandis*, ECtHR (Grand Chamber), 7 July 2011, *Bayatyan v. Armenia*, no. 23459/03, para. 102.



States allowing same-sex marriages should adopt a flexible attitude towards candidate-spouses originating from a country not allowing same-sex marriage. This flexible approach could consist of accepting the absence of certain documents. Bearing in mind the genesis and spirit of the EU Regulation 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union, EU nationals should be protected against bureaucratic procedures. If a person's personal information, nationality, marital status, etc. has already been established, there is no need to request more recent or a specific type of documents. This is moreover in line with the requirement that the right to marry must be guaranteed in a practical and effective manner, which is incompatible with 'excessive formalism' on behalf of the State authorities.<sup>44</sup>

## Conclusion

The case of *Szypula v. Poland and Urbanik & Alonso Rodriguez v. Poland* provides the European Court of Human Rights with its first opportunity to endorse a 'practical and effective' interpretation of the right to marry for same-sex couples. Until now, the Court has not addressed the circumstances in which a same-sex couple's right to marry could be protected under the Convention. For that purpose, this intervention argues that a State Party oversteps its margin of appreciation under Article 12 and violates the prohibition of discrimination by preventing a same-sex couple from being married in a State which allows for same-sex marriage.

In addition, this intervention argued that the requirement by a State that allows for same-sex marriage for non-nationals to present a marriage eligibility certificate, places States that do not allow for same-sex marriage in a position where they can circumvent both ECtHR and CJEU case-law, respectively in *Oliari* and *Coman*, by effectively preventing access to same-sex marriage in another country altogether .

Finally, in our opinion, it would be highly relevant for the Court to address the legitimacy of the application of any rules of private international law which may lead to a denial to non-nationals of access to same-sex marriage when this would not have been the case had they possessed the nationality of the State allowing this marriage.

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<sup>44</sup> E.g. ECtHR (Grand Chamber), 5 April 2018, *Zubac v. Croatia*, no. 40160/12, para. 97.