

# COMAN-HAMILTON

## Meeting with the couple that might put an end to discrimination against same-sex couples under the freedom of movements.

On 21 November 2017, the Grand Chamber of the Court of Justice of the European Union (CJEU) gathered for the hearing on case C-673/16 – Coman e.a.

This is a stepping stone towards the full recognition of same-sex couples' right to freedom of movement in the whole European territory.



Picture: Rudolf Costin

Behind the cold file number, the family formed by Adrian Coman and Clai Hamilton since 2002. Adrian is Romanian, Clai American. Their couple is almost like any other: a chance encounter in New York, the beginning of a life together, a long distance relationship due to work, and then a wedding.

*„In 2010, when I asked Clai to marry me, I was already far away from him for a year. While having a long-distance relationship, I understood he is my life partner, for better or for worse. That time, we still couldn't marry in New York, but, being a Belgian resident, we could get married in Belgium. He was very emotional about it, said „Yes” immediately, although on Skype, it was very romantic. Four months later, we were already married in Brussels.”* remembers Adrian.

In 2012, Adrian's contract comes to an end. Even though he looks for a job in Belgium and in the US, he also considered Romania for a position, as his parents and friends still live there. But there is an absolute precondition: he would only move to any new location together with Clai. Adrian knows that spouses of EU citizens can automatically get residency in a new EU country when the family relocates. He begins the administrative procedures with the Romanian Consulate in Belgium. In vain. The Consulate refuses to transcript Adrian and Clai's Belgian marriage certificate into the Romanian register, a necessary procedure to obtain a residency permit for Clai.

Romania is indeed among the 6 EU Member States<sup>1</sup> not recognising any kind of same-sex union. Hence, same-sex couples in Romania currently have no legal protection. Moreover, Article 277(2) of the Romanian Civil Code states: ***“Same-sex marriage contracted abroad, whether between Romanian citizens or by foreign citizens, is not recognised in Romania.”***

1. Slovakia, Latvia, Lithuania, Romania, Bulgaria, Poland

So should married same-sex couples decide to travel to Romania, they will lose their family status. A situation that can have serious consequences. For instance, if one of the partners is ill and requires medical care, their partner is not legally recognised as a spouse and may not be involved in decisions around treatment.

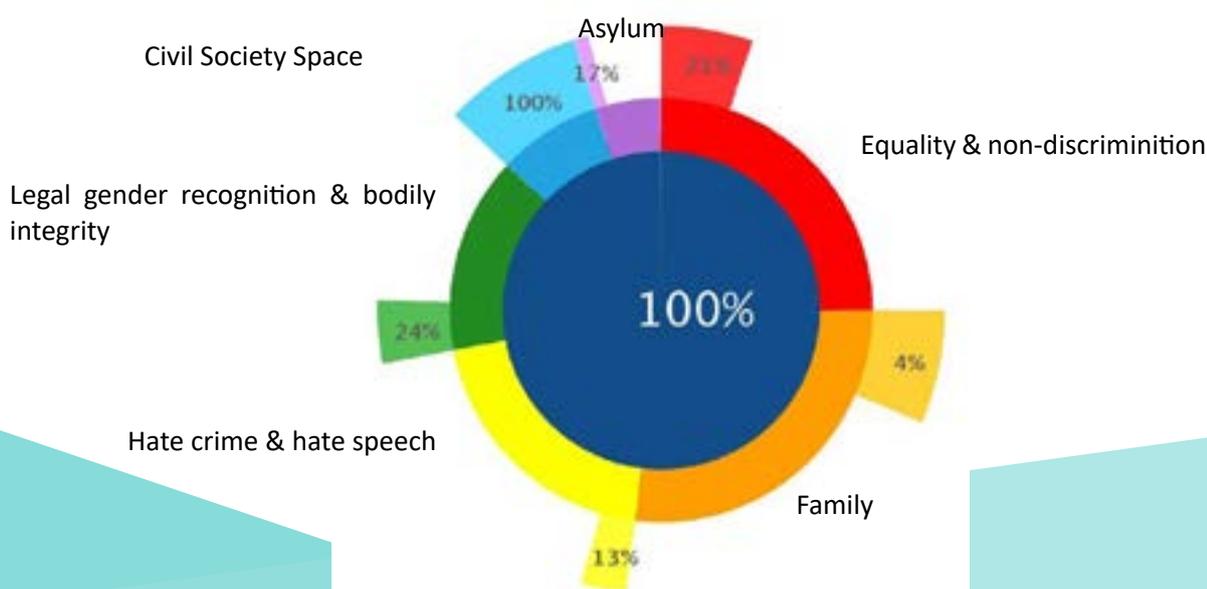
Romania remains socially conservative with regards to the rights of LGBT citizens. The decriminalisation of homosexuality only dates back to 2001 and the progressive measures initiated by the authorities in terms of LGBT rights are mainly the result of the European Union pressure during the accession process.

A survey from the European Fundamental Rights Agency (FRA) reveals that in 2013, Romania ranked third, behind Croatia and Bulgaria, among the countries with the highest levels of homophobic behaviour<sup>2</sup>. A trend that persists: in 2017, on the basis of laws and policies that have a direct impact on the LGBTI people's human rights in under 6 categories, ILGA-Europe ranked Romania, in Rainbow Europe, at the 25th position (before Poland, Lithuania and Latvia) and only scores 21.12% out of 100%<sup>3</sup>.

But if Romania refuses to recognise same-sex partnerships concluded abroad, the authorities still have to abide by the European law. In December 2012, following the Consulate refusal to transcript their marriage certificate, Adrian asks the General Inspectorate for Migration to consider a residence permit for his husband, Clai Hamilton, on the basis of the right to free movement for EU citizens and their family, which includes a spouse who is not an EU citizen. Again in vain. In January 2013, the General Inspectorate for Migration declines the demand on the ground that Romania does not recognise same sex marriages conducted abroad. If Adrian married a female citizen of the United States, she would have received a positive response, with no restrictions.

*„For the Romanian state, our 15-year old relationship simply doesn't exist, nothing of what we've done and built together is recognized here. Clai can't get his residency permit, despite being my husband. As an American citizen, he can only visit as a tourist, or for business purposes. But when I grow older, I would like to move back to where I was born and where I grew up. I'd like to be able to do that with my family, with the man I love,”* said Adrian.

### Rainbow Europe - Romania 2017



2. <http://fra.europa.eu/en/publication/2014/eu-lgbt-survey-european-union-lesbian-gay-bisexual-and-transgender-survey-main>

3. <https://rainbow-europe.org/#8655/0/0>

Considering this differentiated treatment to be discriminatory, Adrian and Clai, with the support of ACCEPT Association, decided to take the issue before the courts and to challenge the constitutionality of Civil Code Article 277, which denies recognition to married same-sex couples married abroad in Article 277(2), while Article 277(4) notes that freedom of movement provisions remain applicable.

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## ACCEPT

Established in 1996, at a time when homosexuality was still incriminated in Romania, ACCEPT is a Romanian human rights organization and the first Romanian non-governmental organization that defends and promotes the rights of LGBT persons at national level. The Association's mission is to improve the situation of LGBT people in the Romanian society, to decrease the level of discrimination and stigmatization for this group and, at the same time, to advocate for equal rights for all Romanian citizens. ACCEPT also focuses on organizing social and cultural events (since 2005, Bucharest PRIDE) and co-managing the Romanian Anti-Discrimination Coalition. ACCEPT provides training and assistance as well as legal and psychological counseling.

Further information on <http://www.acceptromania.ro/>

## The judicial battle starts

October 2015, first hearing before the Bucharest Fifth District Court. December 2015, Bucharest Fifth District Court refers the complaint to the Romanian Constitutional Court (RCC). July 2016: RCC postpones to September 2016 its decision in the Coman-Hamilton family case but allows, in parallel, a separate citizens' initiative to redefine family in the Romanian Constitution in a restrictive manner to move forward to the Parliament. September 2016, instead of making a decision, the RCC announces a new hearing of the Coman-Hamilton family case in October 2016. October 2016, ACCEPT asks the RCC to send preliminary questions to the Court of Justice of the European Union to clarify how the provisions in the Community law and the Romanian Constitution can be interpreted harmoniously when the family status of LGBT people is questioned in the context of the application of their right to free movement. Also, ACCEPT would like the EU Court to clarify whether, in Community law, same sex spouses have equal rights regarding the right to reside on the Romanian territory. November 2016, the RCC agrees to suspend the case until an opinion by the CJUE is issued. This is the first time that the RCC has referred questions to the CJEU since Romania joined the EU in 2007.

## References for preliminary rulings

To ensure the effective and uniform application of European Union legislation and to prevent divergent interpretations, the national courts may, and sometimes must, refer to the Court of Justice and ask it to clarify a point concerning the interpretation of EU law. It is also through references for preliminary rulings that any European citizen can seek clarification of the European Union rules which affect him. The CJEU's reply is not merely an opinion, but takes the form of a judgment or reasoned order that must be applied by national courts.

## Court of Justice of the European Union

Judicial authority of the European Union, the Court ensures the uniform application and interpretation of EU law and interprets European Union law at the request of the national courts and tribunals.

To rule on case C-673/16 – Coman e.a., the CJEU decided to sit as the the Grand Chamber therefore confirming the importance of the case as only cases considered of exceptional importance for EU legal order are heard by the Grand Chamber. Hence, Adrian and Clai flew from New York, where they are currently living, to Luxembourg to attend the hearing organised by the Grand Chamber on 21 November and agreed to share their first impressions with us.

**How do you feel following the Grand Chamber’s hearing? Are you confident about the CJEU decision?**

*Clai:* We are very optimistic, especially with regards to the referred questions on the principle of freedom of movement in the European Union. We hope for a positive ruling that will enable me to obtain my Romanian residency so that one day Adrian and myself can live there. Romania is a lovely country.

**Would a CJEU positive ruling constitute a precedent for Romania and the European Union as a whole?**

*Adrian:* The legal question the Romanian Constitutional Court asked the CJEU was whether the term ‘spouse’ covers same-sex partners because the EU Directive (i.e. Directive 2004/38 - Article 2(2)(a)<sup>4</sup>) does not define it. The Court rulings are legally-binding so a positive ruling from the CJEU will create a precedent and the impact will be on 6 of the 28 Member States that currently don’t recognise same-sex partner for legal residency under the Directive. These are Romania, Bulgaria, Slovakia, Latvia, Poland and Lithuania.

**Hungary was present at the hearing...**

*Adrian :* Yes indeed. Four States were at the hearing: Romania, Latvia, Poland and Hungary. Interestingly Hungary has a civil partnership law although they also have a prohibition of same-sex marriage in the Constitution. One question from the judges to the representative of Hungary was about the difference between same-sex marriages and civil partnerships. She answered that our marriage would have been assimilated to the civil partnership and that Clai would get the residency in Hungary. Nevertheless, the point of the four States present at the hearing was that the interpretation of the term ‘spouse’

*is not a matter of EU law but should be left to the Member States according to their domestic laws. Fortunately the Commission disagreed arguing that the whole purpose of the EU Directive was to ensure free movement. The Directive provides for families. Otherwise freedom of movement would not be effective.*

**Beyond the legal ruling, isn’t the lack of political will the true issue stifling in the present issue?**

*Adrian:* We saw the lack of political will from the governments of the four Member States present at the hearing. We saw supportive political will from the Netherlands which is the only country that had a written opinion supporting our case. We saw the political will of the Commission. But when you get before a court, this is because you did not find the support in the executive and legislative authorities.

**When will the Court make its decision?**

*Adrian and Clai:* We don’t know exactly but we do know that the EU Advocate General will have his opinion on 11 January 2018 that will be posted on the CJEU website. Then, the Court will probably decide a month or two afterwards.

**Are you aware whether many couples are in the same situation as yours?**

*Adrian:* I think I have been personally contacted by more than ten persons and I know that ACCEPT got several other approaches. They are not all the same. We are in this situation because Clai is not an EU citizen and because I was moving from one EU country to another. But we did get many couples who realised that the recognition of their relationship could be impacted by our case.

**With the Brexit, are couples more at risk finding themselves in the same situation as yours?**

*Adrian and Clai:* We did receive an email from a British woman married to a Polish woman. They are thinking of moving in Poland and follow our case very closely. For the time being, they are both EU-citizens but after the Brexit, matters will certainly grow more complex.

4. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0038&from=FR>

While it is impossible to predict the CJEU decision regarding case *C-673/16 – Coman e.a.*, prospects are rather encouraging for several reasons. Indeed, the term ‘spouse’ in the Free Movement Directive (2004/38) must be applied and interpreted in the light of Article 21 of the Charter of Fundamental Rights of the European Union, which states: “[a]ny discrimination based on ... sexual orientation shall be prohibited”. Should “spouse” be limited to “different-sex spouse”, there would be de facto discrimination between heterosexual couples and same-sex couples based on sexual orientation. In addition, 22 of the current 28 EU member states already recognise a same-sex partner in their immigration legislation. Besides, Article 52(3) of the Charter of the Fundamental Rights stipulates that the rights it provides “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”. Yet, three judgments of the European Court on Human Rights (ECtHR) are particularly relevant:

- *Oliari and others v. Italy*<sup>5</sup>: the ECtHR has ruled that Council of Europe member states must provide “a specific legal framework” to recognise the unions of same-sex couples.
- *Taddeucci and McCall v. Italy*<sup>6</sup>: the ECtHR established that member states must (as part of this framework or otherwise) provide a means for a same-sex partner who is not a national of the member state (and not an EU citizen) to qualify for a residence permit that would otherwise be restricted to a different-sex spouse.
- *Pajić v. Croatia*<sup>7</sup>: the ECtHR found that discrimination solely based on sexual orientation between unmarried same-sex couples and unmarried different-sex couples in obtaining family reunification constitutes prohibited discrimination under the Convention.

In light of these elements, there is a good chance that the CJEU will interpret EU law as requiring Romania to grant him a residence permit on the basis of freedom of movement. Beyond its particular dimension, case *C-673/16 – Coman e.a.* may secure new rights for same-sex couples in the European Union. It would demonstrate once again the European law and the CJEU are non-negligible instruments for the harmonisation of national legislations and for the fight against discrimination in the European Union.

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5. <http://hudoc.echr.coe.int/eng?i=001-156265>

6. <http://hudoc.echr.coe.int/eng?i=001-164715>

7. <http://hudoc.echr.coe.int/eng?i=001-161752>