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Tryfonidou, Alina

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EU Free Movement Law and the Children of Rainbow Families: Children of a Lesser God?

Alina Tryfonidou*

ABSTRACT

EU citizens and - through them - certain of their family members, derive from EU law the right to move between EU Member States and reside in the Member State of their choice. This right is enjoyed by all Union citizens irrespective of their sexual orientation. However, when rainbow families (i.e. families comprised of a same-sex couple and their child(ren)) exercise this right and move to a Member State which does not provide legal recognition to same-sex couples and/or their families, they are faced with the possibility that that Member State will refuse to legally recognise the familial ties among all or some members of the family, as these have been legally established elsewhere. This means that such families are not treated in the same way as the typical nuclear family which has an opposite-sex, married, couple with children as its basis: the familial links among the members of such families are only very rarely – if ever – legally contested. The question that emerges, therefore, is whether the severance in the host Member State of the legal ties among the members of rainbow families, amounts to a breach of EU law. This article will focus on the parent-child relationship and will examine the above question by taking a child-centred approach: does the refusal of the host Member State to legally recognise the relationship between a child and one or both of his same-sex parents when the family moves to its territory, amount to a breach of any of the rights that the child enjoys under EU law?

KEYWORDS

EU law; EU free movement; Fundamental Rights; LGBT+ rights; Rainbow Families; Children's Rights.

I Introduction

European Union (EU) citizens,¹ and – through them – (certain of) their family members, derive from EU law the right to move between EU Member States and reside in the Member State of their choice. This right is enjoyed by all Union citizens irrespective of their sexual orientation.² However, when rainbow families (i.e. families comprised of a same-sex couple and their child(ren)³) move to a Member State which

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¹ Article 20 TFEU provides that every person holding the nationality of an EU Member State is an EU citizen.

² As Jessurun D'Oliveira has aptly put it, 'freedom of movement is granted in Article 3 EEC to persons (workers and others); lesbians and gay men are persons; thus lesbians and gay men enjoy freedom of movement' – H. U. Jessurun d'Oliveira, 'Lesbians and Gays and the Freedom of Movement of Persons' in K. Waaldijk and A. Clapham (eds), *Homosexuality: A European Community Issue* (Martinus Nijhoff, 1993) 294.

³ Rainbow families can, also, involve more complex parenting configurations, where the parental roles are divided among more than two persons (usually, among the two biological parents plus the partner of one or both and/or a best friend who donates a sperm or an egg). Due to lack of