European Citizenship and Circular Migration

Case Summary and Comment: Cases C-456/12 O & B and C-457/12 S & G (Court of Justice, 12 March 2014)

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Last week the Grand Chamber of the Court of Justice of the European Union gave judgment in two related cases with important implications for rights of family reunification, circular migration in the European Union and the exercise of European citizenship rights against the state of one’s nationality. The cases were the latest in a long line dealing with so called ‘derived rights of residence’ for third country national family members of Union citizens. As is well known, Union citizens are the primary beneficiaries of rights of free movement and residence under the EU Treaties. Nonetheless in order to be able to effectively exercise these rights, they have a right to be accompanied by family members. Third country nationals can therefore enjoy so called ‘derived rights of residence’. While it is clear that these rights can be exercised against Member States to which a Union citizen moves (so called ‘host Member States’), an area of major legal contention over the past number of years has been the extent to which these rights can be exercised against the Member State of nationality, the so called ‘home member state’.

Facts and Context

The two cases C-456/12 O & B and C-457/12 S & G concerned four Dutch nationals who spent time abroad either to live or to work and who wished to be joined by members of their families in the Netherlands. In O & B the two Dutch nationals had resided abroad, in Spain and Belgium, either for a short period in the case of O or only on a part-time basis, as in the case of B. They were therefore in the situation of ‘returning’ EU migrants. In S & G the two Dutch nationals had not moved to or resided in a second Member State. Rather, they exercised some form of cross-border economic activity. In S’s case the Dutch national was employed in the Netherlands by a Dutch company but spent approximately 30 per cent of his working time dealing with Belgian clients. In G’s case the Dutch national lived in the Netherlands but worked for a Belgian company in Belgium, ie he was a typical ‘frontier worker’.

The Opinion of Advocate General Sharpston

AG Sharpston delivered a joint opinion for the two cases on 12 December 2013. She quickly concluded that Directive 2004/38/EC did not apply, pointing to the clear wording of Article 3(1) of the Directive that limited its scope to ‘Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members’. She proceeded to analyse the cases under the Treaty provisions. As all four cases involved some form of cross-border movement the

situations of \( O \), \( B \), \( S \) and \( G \) did not fall within the limited scope of Article 20 TFEU and the \textit{Zambrano} line of case law.\(^2\) The AG then considered the application of Article 21(1) TFEU, guaranteeing the rights of free movement and residence, under two situations: firstly where a Union citizen had moved to and resided abroad and returned to his or her home Member State and secondly where a Union citizen merely moved to another Member State without however exercising any right of residence.

Under the first set of cases where a right of residence had been exercised, the AG found that a Union citizen is entitled to return to his or her home Member State and retain any rights regarding family reunification acquired abroad. In this she applied the jurisprudence of \textit{Singh}\(^3\) and \textit{Eind}\(^4\) on the free movement of workers to non-economically active Union citizens. The reasoning of the Court in those cases was based on a deterrence logic: workers may be deterred from leaving their home Member State if they were not guaranteed that upon return they could continue to enjoy their family life as established in the host Member State. In defining residence the AG took a particularly broad view. Constant physical presence should not be a necessary condition to establish residence.\(^5\) Similarly, it is entirely possible for a Union citizen to enjoy residence in more than one Member State at the same time.\(^6\) Finally, while duration may be a qualitative criterion in establishing residence, it cannot be a definitive one. Accordingly, even short stays may, under particular circumstances, amount to residence.\(^7\)

Under the second set of cases, where a right of movement was exercised, without any right of residence, the AG adopted a more nuanced approach. Following the case of \textit{Carpenter}\(^8\), under certain circumstances the exercise of the cross-border activity may require the presence of a family member. This however depended on three variables: the family connection with the EU citizen; the EU citizen’s exercise of rights of free movement; and the causal link between the residence of the third country national and the EU citizen’s exercise of rights of free movement.\(^9\) Assessment of family reunification rights depends on how these three variables manifest in a particular situation.

In applying her legal assessment to the cases the AG left the ultimate decision to the national court to be decided on the facts but gave some indications. She found that it was probable that \( O \) enjoyed a right of residence in the Netherlands. At the time of

\(^2\) Opinion of AG Sharpston in Case C-456/12 \textit{O & B v Minister voor Immigratie, Integratie en Asiel} (Court of Justice, 12 March 2014) and Case C-457/12 \textit{S & G v Minister voor Immigratie, Integratie en Asiel} (Court of Justice, 12 March 2014), para 52.
\(^3\) Case C-370/90 \textit{The Queen v Immigration Appeal Tribunal and Surinder Singh} [1992] ECR I-4265.
\(^5\) Opinion of AG Sharpston (n 2), para 102.
\(^6\) Ibid, para 104.
\(^7\) Ibid, para 110.
\(^8\) Case C-60/00 \textit{Mary Carpenter v Secretary of State for the Home Department} [2002] ECR I-06279.
\(^9\) Opinion of AG Sharpston (n 2), para 122.
residence in the EU, B had been the partner, rather than the spouse of a Union citizen, an initial right of residence was not acquired in Belgium and therefore could not be carried back to the Netherlands. In the case of S the three variables mentioned above would have to be considered, taking into account the role the third country national family member, a mother in law, played in providing child care for the Union citizen. Finally, in the case of G, the ‘pure’ frontier worker, refusal of a right to reside in the Netherlands could amount to him being obliged to move to a second Member State, i.e. Belgium. According to the AG ‘[t]hat would be a restriction of his choice to be a frontier worker – an economic freedom that is however guaranteed under Article 45 TFEU’.10

Judgment of the Court of Justice in Case C-456/12 O & B.

In case C-456/12 O & B the Court was rather firm in its insistence that the jurisprudence of returning workers was applicable to economically inactive Union citizens. As with the AG, the Court concluded that Directive 2004/38/EC did not apply. At the same time under Article 21(1) TFEU Union citizens were entitled to maintain a family life ‘created or strengthened’ in a second Member State upon return to their home Member State.11 Otherwise an obstacle to the initial movement from the home Member State would arise. That family life however can only arise where the residence of the Union citizen in the host Member State has been ‘sufficiently genuine’.12 Accordingly, only Union citizens who exercised rights of residence under Articles 7 and 16 of Directive 2004/38/EC could enjoy a right of family reunification in their home Member States upon return. This finding ensures that rights of family reunification can only be carried back to the home Member State where they arose during stays of longer than three months that were moreover in compliance with the conditions of the Directive, principally the exercise of an economic activity or economic self-sufficiency.13 Finally, while Directive 2004/38/EC is not directly applicable, it is applicable by analogy to govern the situations of Third Country National family members upon return to the home member state, including the definition of family member and the rights enjoyed by such family members.14

Judgment of the Court of Justice in Case C-457/12 S & G.

For the reasons outlined by the Advocate General, Directive 2004/38/EC did not apply to the situations of frontier workers and quasi-frontier workers at issue in the case of S & G. Deciding the case under the free movement of workers and Article 45 TFEU, the Court somewhat reluctantly acknowledged the continuing validity of Carpenter and its application to the situation of workers.15 In Carpenter the Court of Justice found that the deportation of a third country national spouse of a UK national would interfere in his ability to provide services in other Member States and could

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10 Opinion of AG Sharpston (n 2), para 156.
11 O & B (n 2), para 49.
12 Ibid, para 51.
13 Article 16 refers to permanent residence obtainable after a period of five years lawful residence, normally under Article 7. It naturally follows that for a minimum period of 5 years the conditions of Article 7 will apply.
14 O & B (n 2), para 50.
15 S & G (n 2) para 40.
therefore constitute an obstacle to his freedom to provide services. However, in S & G the Court stressed that the family member’s presence would have to be ‘necessary to guarantee the citizen’s effective exercise of the fundamental freedom’. The assessment of whether the family member’s presence was ‘necessary’ in the present cases was left to the national court to determine. However, the Court of Justice did point out, echoing the language used in Derici, that the fact that such presence was merely ‘desirable’ was not sufficient in itself to found a right of residence. Rather the role played by the family member in supporting the activity of the Union citizen (child care by a mother in law in the case of S) would have to be ‘decisive’.

Comment:

O & B and S & G are important cases on a number of levels. Firstly, the judgments extend the ability of Union citizens to exercise rights vis-à-vis their home member state. They further undermine the conceptual category of the ‘purely internal situation’ and highlight the perennial problem of ‘reverse discrimination’. Secondly, they are a clear statement that Union citizenship, as well as being a status of integration in another Member State, can also be considered a status that facilitates circular migration in the European Union. Thirdly, at the same time, by reference to ‘genuine’ residence based on an intention to ‘settle’, the Court both limits the situations under which family reunification rights can be exercised upon return and reemphasises the role of Union citizenship as precisely a status of primary migration and integration. It therefore facilitates circular migration, but only where that migration involves a ‘genuine stay’ in another Member State. Finally, in their treatment of Directive 2004/38/EC the judgments are a further example of the rich interaction between the Court and the EU legislature in the evolution of Union citizenship.

Firstly, the judgments can be added to a long line of previous cases allowing Union citizens, under certain circumstances, to exercise Treaty rights against their own Member States. Unlike the line of case law beginning with Zambrano, O & B and S & G can be fitted within the older category of returning migrant or at least the Union citizen who had made use of his or her Treaty rights in some manner but broaden the scope of this category by extending it to include economically inactive citizens. The increasing range of exceptions to the ‘purely internal rule’ has been criticised as undermining a useful conceptual category and jurisdictional marker determining the scope of Union law, and as increasing the injustices in the consequential ‘reverse discrimination’ whereby nationals of a Member State are treated less favourably that migrant Union citizens, thereby undermining the principle of equality inherent in any concept of citizenship. While O & B in particular can be seen as a logical and coherent extension of Singh and Eind to economically inactive migrant citizens, this judgment does broaden the exception and further complicate the ‘purely internal rule’.

Secondly, the judgments, again particularly O & B, can be seen as a clear endorsement of Union citizenship as a status that facilitates circular migration. The Court implicitly acknowledges the existence of modern migratory patterns of

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16 Ibid, para 42.
18 S & G (n 2), para 43.
increased mobility and the social reality of migration. Rights acquired and familial situations created in one Member State must be capable of being retained upon return to the host Member State or indeed to any other Member State. In this sense, rights are ‘passported’ in the words of AG Sharpston and can be carried throughout the Union. More broadly the judgments can be seen as highlighting the concept of choice or autonomy inherent in Union citizenship as an ‘amplified bundle of opportunities’ in a broader geographical space. The emphasis on choice is particular apparent in the Opinion of the Advocate General who mentions the right to move freely throughout the Union, the choice inherent in the right to move or not to move or even to have the prospect of moving and the possibility of maintaining multiple residences across the Union.

Thirdly, however the Court does insist on some element of ‘genuine’ residence in the host member state, based on an ‘intention to settle’ that is supposedly evidenced by fulfilment of the conditions for residence of more than three months contained in Article 7 of Directive 2004/38/EC. It therefore does insist to some extent on Union citizenship as a status of primary migration and integration in other Member States. Union citizens cannot simply move around at random and for short periods in order to gain rights of family reunification and carry them with them wherever they are in the Union. Instead such family reunification rights can only arise where the Union citizen has somehow settled in another Member State. Aside from providing some clear limits on the rights of family reunification upon return, a move that is no doubt welcomed by Member State governments, the condition of ‘genuine residence’ in the host Member State also indicates a certain balancing between free movement and circular migration, on the one hand, and integration in host societies, on the other.

Finally, the Court quite logically and properly does not apply Directive 2004/38/EC directly to the situations in the present cases. Directive 2004/38/EC is after all only applicable to Union citizens and their families in second Member States. To that extent these cases are yet another example of the Court supplementing the rights contained in secondary legislation by directly relying on the Treaty. Nonetheless, it does apply, in quite some detail, various conditions and limitations contained in the Directive in order to give further substance to rights created directly on the basis of Treaty articles. In order to determine whether the Union citizen had been enjoying ‘genuine residence’ in the host Member State, the categories of residence contained in the Directive are thus used directly. Similarly, upon return to the host Member State, or in the case of S & G where a derived right of residence is founded on a potential obstacle to cross-border work, the definitions, conditions and limitations found in the Directive are used to govern the exercise of those rights in the home Member State. The result is a continuation in the collaboration between the Court and the legislature in the evolution of Union citizenship with the judgments of the Court being codified

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19 In this sense they echo the ‘name cases’ in particular Case C-353/06 Stefan Grunkin and Dorothee Regina Paul [2008] ECR I-7639.
20 Opinion of AG Sharpston (n 2), para 95.
22 Opinion of AG Sharpston (n 2), para 89
23 Ibid, paras 123 and 134.
24 Ibid, para 104.
in legislation and the Court using concepts and rules in legislation to inform and specify rules it develops in its case law.25

In summary, O & B and S & G are important cases on both a practical and conceptual level for the development of Union citizenship. They provide an important means for Union citizens to exercise rights of family reunification vis-à-vis their own Member State. While the tone of the judgment in S & G does imply situations where ‘frontier workers’ will be able to enjoy such rights will be limited, the case of the returning migrants O & B appears more secure, albeit when based on ‘genuine residence’ in another Member State. O & B in particular is therefore an acknowledgement of Union citizenship as a status that facilitates circular migration. This is entirely in line with the modern reality of migration in the Union and is a logical extension of the right of free movement. Finally, this emphasis on Union citizenship as facilitating choice or free movement, is balanced somewhat by the Court’s insistence on the existence of ‘genuine residence’ and an intention to ‘settle’, re-emphasising the role of Union citizenship as a ‘genuine vehicle of integration into the society of the host Member State.’26

25 See generally Niamh Ní Shuibhne, ‘The Third Age of EU Citizenship’ in Phil Syrpis (ed), The Juriciary, the Legislature and the EU Internal Market (CUP 2012).