Opinion of AG Sharpston (12 December 2013) and Grand Chamber Judgment (12 March 2014) in Cases C-456/12 *O and B* and C-457/12 *S and G*

The *O and B*; *S and G* cases concern the lawful residence of third-country national family members of Dutch Union citizens who left the Netherlands. It is the Netherlands where these family members now claim residency. The cases were jointly decided on 12 March 2014, but of most interest is the Opinion of AG Sharpston delivered three months earlier. The question of TCN family derived rights of residency has been a regular feature of the Court's preliminary rulings over the past years since the seminal *Zambrano* case, testament to the problems concerning a flagrant lack of clarity as to when a legally resident Union citizen's family may invoke fundamental rights. This has become a topic of much contention in recent years. This is the reason for a particular interest in the Opinion. AG Sharpston has previously requested for the Court to define their clear intentions on whether or not it believes that fundamental rights enshrined in the Charter of Fundamental Rights of the EU (hereafter 'the Charter') and those in the European Convention on Human Rights (ECHR) were free-standing, or if they still required the increasingly fictitious cross-border element to be triggered.[1] The post-*Zambrano* developments seemed to have changed AG Sharpston's tune in the matter, evidenced by this Opinion.

The Charter and free-standing fundamental rights

The British Advocate General is infamous for her extremely thorough analysis of situations. It is thus of no surprise that she takes the opportunity to raise such a number of issues in this Opinion. She begins by questioning fundamental rights' role in citizenship in the context of residency rights and family reunification by firstly expressing her disdain for ad hoc solutions. The Court seems to favour this method in citizenship (para 44), inciting AG Sharpston's puzzlement at the fact that there has been such an open-ended question remaining as to application of such rights. The possibility that there may now be three bases for claiming rights under EU law in citizenship – the rights to free movement and

[1] C-60/00 *Carpenter* [2001] ECR I-6279; C-148/02 *Garcia Avello* [2003] ECR I-11613; C-384/93 *Alpine* [1995] ECR I-1141

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residency (Art 21(1) TFEU), the right to privacy and family life (Art 7 Charter) and deprivation of genuine enjoyment of EU citizenship rights (Art 20 TFEU) – in her eyes is not the solution.

AG Sharpston makes 'clear that, at present at least, the Charter does not grant 'free-standing' fundamental rights' (para 60). She opines that when the Treaty is triggered by Art 20 or 21 TFEU, citizenship has to be 'Charter-compliant' (para 62). It is consistent with not extending the scope of EU law (something the Charter protects against in Art 51(2)) and also upholds the declaration that citizenship is to be the fundamental status of all EU citizens as first mentioned by the Court in *Grzelczyk*. This is provocative because her perspectives on this seem to have changed to be consistent with the case law.

Free movement

AG Sharpston considers that the Citizen's Rights Directive 2004/38 does not apply because the legislation does not cover movement from another Member State back to one's home Member State (para 79). However, she refers instead to Art 21 TFEU, and upholds that restrictions on free movement actually extend to impositions as well as negative obligations, in the context of family reunification. Referring to *Singh* and *Eind* which pre-date the Directive (*Singh* even predating Union citizenship itself), AG Sharpston agrees that the same rights should be granted because 'the home Member State cannot treat its own nationals returning to reside on its territory less favourably than the treatment they enjoyed as EU citizens in the host Member State.' (para 95).

Residence

AG Sharpston notes that the 'hypothetical prospect' of triggering rights, whether positively or negatively, is insufficient to establish a connection with EU law (para 50). This definitive statement translates to a necessary demonstration of legal residency and movement to trigger rights under the Treaty. However, she strongly upholds that this idea of length of residence – the duration of which differs in the four situations at hand – 'cannot be applied as an absolute threshold' though it is a 'relevant

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quantitative criterion.' (para 111). Therefore, it is considered that minimum time spent in residence, interruptions to residence (regular or irregular), time spent moving back and forth between Member States and reasons for movement (whether as a frontier worker or for contracted employment reasons) are all not conclusive in denying third-country nationals derived family rights of residency.

Postscript

A unique feature of this Opinion comes in the form of a postscript (para 158). Throughout her Opinion, AG Sharpston identified several tangential issues to the case which needed attention. Therefore, in her postscript, she urges the Court not to ignore these problems, asking them:

> 'to give clear and structured guidance as to the circumstances in which the third country national family member of an EU citizen who is residing in his home Member State but who *is* exercising his rights of free movement can claim a derived right of residence in the home Member State under EU law.'

Judgment

The Court frames the Netherlands' preliminary ruling as follows: does Directive 2004/38 and Article 21(1) TFEU prevent a third-country national family member of a Union citizen from deriving residency in the Union citizen's original home Member State after the Union citizen and the family member moved away, but have now decided to return? After clarifying in paragraph 37 that the Directive does not cover this particular situation (a point AG Sharpston also noted) the Court turns to Article 21(1) TFEU and the cases of *Singh* and *Eind* which concern similar situations decided pre-Directive. Paragraph 55 confirms that the Union citizen has the right to enjoy the same family life in their home Member State as they did in their host one, as long as the Union citizen enjoyed a genuine residence which created and strengthened their family life. This should not be stricter than the conditions laid out in the Directive for derived third-country national family member residence; hence it is applied by analogy.

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In terms of the questions raised and clarification on points of the Directive's application, the Court is very clear and formalistic. They seem to consider the reasons AG Sharpston presented in her Opinion for applying the Directive by analogy to the situation at hand. The principle of non-discrimination, citizenship and free movement principles underpin the reasoning of the Court. In this sense, the judgment resembles a classic decision on Union citizenship finding expression through free movement of workers and is relatively uncontroversial.

However, there is an evident disparity in the way AG Sharpston addresses the case and how the Court decides to approach it, somewhat indicative of the Court's hesitance to engage with some of the more sensitive and difficult questions the Opinion strongly urged them to clarify (Opinion para 158). The bulk of the judgment focuses on the first three questions posed for preliminary ruling which centre around Directive 2004/38 and Article 21(1) TFEU's interpretation of derived residency. Confirming that the Directive does not cover situations where the Union citizen rejoins his or her partner in their home Member States after leaving, yet the Court extends Article 21(1) TFEU's scope to protect them nonetheless. However, this is the extent of its discussion.

Comment

Whilst the judgment cannot be overly criticised for its logical approach to questions regarding the Directive's application, it is troubling that yet again, despite AG Sharpston's gentle request, the Court fails to engage with the fundamental rights-citizenship dichotomy. The situation is underlined by her unique addition of a postscript, exacerbating the effect of the Court's decision to ignore this. Though the Court has yet to convey their express intentions for the relationship, the AG did in *O and B*; *S and G*, declaring that fundamental rights are not free-standing. This suggests that she has resolved herself to the decisions made in *McCarthy* and *Dereci*, sentiments which were not present in her *Zambrano* Opinion. It represents acquiescence to the passive interpretation of the Lisbon Treaty's fundamental rights influence on citizenship, rather than the tacit judicial activism which she previously suggested may be a possibility for the Court in the *Zambrano* Opinion.

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Because the Court has decided not to address fundamental rights in the judgment and the AG clarified that there are no free-standing fundamental rights, there is still legal uncertainty surrounding whether the right to private and family life will be enough on its own to grant residency rights for third country national family members of Union citizens. Though a link to EU law has been established in the case at hand thus requiring consideration of the Charter, the Court does not mention this aspect in its judgment. AG Sharpston also called for a 'Charter-compliant' holistic consideration of third-country national rights of residency. It would appear that though the decision made by the Court is sound, it is more what it does not say that is of importance. There is still the unanswered question of when exactly fundamental rights will come into play for Union citizens with third country national family members when invoking their citizenship rights. It is unclear whether the Court will ever be prepared to give a definitive answer to this question, and until then the speculation from Advocates General and commentators will build.

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