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THE FAMILY IN EU LAW AFTER THE *SM* RULING: VARIABLE GEOMETRY AND CONDITIONAL DEFERENCE

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ABSTRACT: *SM* (Court of Justice, judgment of 26 March 2019, case C-129/18 [GC]) revolved around the possibility of embracing a child in guardianship under the Algerian *kafala* system within the EU law notion of “family member”. In the ruling, the Court opened the door to a “variable geometry” notion of family. To this extended notion of family, it tendered enhanced protection through resort to fundamental rights law. And relatedly it recognized only conditional deference to host Member States with regard to the treatment of relevant family members in the context of their immigration rules. Rather than offering a detailed analysis of the case, this *Insight* focuses on these three aspects of the judgment as the starting point for a reflection on the evolving treatment of the “family” in EU law.

KEYWORDS: family reunification – right to family life – citizenship of the Union – fundamental rights – free movement – immigration law.

I. EMBRACING THE VARIABLE GEOMETRY FAMILY

Variable geometry is not a metaphor that comes from family law, let alone EU family law. It rather belongs to the vocabulary of integration modes, and strategies. In the discourse of European integration, it is an old *leit-motive*, recently revived by attempts to circumvent the integration crisis.¹ Nonetheless, a ruling of the Court of Justice rendered in March, in the *SM* case,² inspires to apply the metaphor to the notion of the family in EU law.³ The *SM* case concerned two European citizens of French nationality residing in the United Kingdom, and seeking entry clearance for the Algerian child of whom they

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¹ See e.g. Commission, *White Paper on the Future of Europe – Reflections and Scenarios for the EU27 by 2025*, COM(2017)2025 final, available at ec.europa.eu.

² Court of Justice, judgment of 26 March 2019, case C-129/18, *SM v. UK Entry Clearance Office, Visa Section* [GC].

³ For a comprehensive study of this notion, see C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, Oxford: Oxford University Press, 2016, p. 103 *et seq.*

had become legal guardians under the Algerian *kafala* system. They relied on the rights of the child as the adopted family member of an EEA national. The questions referred to the Court of Justice by the UK Supreme Court, and the Court's ruling, focus on the clarification of two notions deployed in the Citizenship Directive,⁴ "direct descendant" and "any other family member".⁵ By offering further guidance as to the meaning of both terms, the ruling shed clarity on the EU law notion of family.

With regard to the notion of "direct descendant", the court found that, absent an express reference to the law of the Member States, an independent EU-wide interpretation was needed. And absent an express definition in the Citizenship Directive, that interpretation needed to take into account not only the wording of the directive, but also the context in which the notion was used and the objective of the rules to which it pertained. Given that the Citizenship Directive pursues the objective of strengthening the primary and individual right of movement, its provisions had to be read broadly. A broad reading of the notion of "direct descendant" required it to embrace both biological and legal parent-child relations. But not relations of mere legal guardianship, such as that entailed by the Algerian *kafala*.⁶

With regard to the notion of "any other family member", the Court of Justice emphasized that the objective of the provision where the notion sat was maintaining the unity of the family in the context of free movement in respect of a broader circle of family members. These were family members not belonging to the "core" family drawn by the definition of Art. 2, but nonetheless retaining close and stable family ties to a Union citizen, on account of a range of possible factual circumstances such as economic dependency, being members of the Union citizen's household, or serious health grounds.⁷ While that definition is not new,⁸ the context of application is. In previous case law, the court had focused on the relation of dependency of a family member on a Union citizen. In *SM*, in embracing within the extended family a child under legal guardianship according to the Algerian *kafala*, the court emphasized, beyond the legal bond, the Union citizen's responsibility for the care, education and protection of a person being a member of the household.⁹

Albeit relying here on a situation of legal guardianship, in opening up the category of "other family member" to a range of relations characterized by household membership and reciprocal responsibilities, the *SM* ruling potentially brings within the purview of EU

⁴ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

⁵ Directive 2004/38, Art. 2, para. 2, let. c), and Art. 3, para. 2, let. a), respectively.

⁶ *SM* [GC], cit., paras. 50-54.

⁷ *Ibidem*, para. 60.

⁸ See Court of Justice, judgment of 5 September 2012, case C-83/11, *Secretary of State for the Home Department v. Rahman* [GC].

⁹ *SM* [GC], cit., para. 59.

law a notion of family broader than in textual definitions and traditional conceptions. It embraces, albeit perhaps in an unexpected context, the modern family, the diversity of households, the multiplicity of ties and the flexibility of arrangements that it entails. This is an opportunity the court had missed in previous family rights cases.¹⁰ In catching it in *SM*, the court potentially recognizes the family, for EU law purposes, as a variable geometry structure, with an inner strictly bounded core, and an outer broader circle whose perimeter is more flexible and may shift depending on factual circumstances.

II. STRENGTHENED PROTECTION FOR THE EXTENDED FAMILY

Not only the court entrenches the notion of an extended family for EU law purposes, it also lends some strengthened protection to this extended family.

Under the Citizenship Directive, Member States do not owe a duty of admission to extended family members. Core family members, such as direct descendants, have a right against host Member states. In respect of extended family members, Member States only have an obligation to facilitate entry. They have to confer “a certain advantage” to their application for entry, based in good part on an extensive examination of personal circumstances. A key point is that Member States retain, in the context of that examination, discretion in deciding on admission.¹¹ This opens a gap between the treatment of core and extended family members for free movement purposes. Core family members sit within the sphere of right that surrounds Union citizens. Extended family members remain in the sphere of immigration law, where any rights are concessions in disguise.¹²

SM bridges, in part, the gap. The main novelty in the ruling is that Member State discretion in deciding on the admission of an extended family member finds a clear limit in fundamental rights protection duties.¹³ In implementing their duty to facilitate the entry of extended family members, host Member States are required to make a balanced assessment of all relevant circumstances and to take into account all interests in play. These include, in particular, the interests of the family and the best interest of the child, as protected by the Charter of Fundamental Rights of the European Union.¹⁴

¹⁰ See e.g. Court of Justice, judgment of 6 July 2015, case C-218/14, *Kuldip Singh et al. v. Minister for Justice and Equality* [GC]. For an analysis, F. STRUMIA, *Divorce Immediately, or Leave. Rights of Third Country Nationals and Family Protection in the Context of EU Citizens’ Free Movement: Kuldip Singh and Others*, in *Common Market Law Review*, 2016, p. 1373 *et seq.*

¹¹ See *SM* [GC], *cit.*, paras 61-63.

¹² For a reflection on the spheres of rights and of immigration, see D. THYM, *Citizens and Foreigners in EU Law. Migration Law and Its Cosmopolitan Outlook*, in *European Law Journal*, 2016, p. 296 *et seq.*

¹³ See S. PEERS, *Guardianship, Free Movement and the Rights of the Child*, in *EU Law Analysis*, 26 March 2019, eulawanalysis.blogspot.com.

¹⁴ *SM* [GC], *cit.*, paras 64-68. Also see Charter of Fundamental Rights, Art. 7 and Art. 24, para. 2.

This resort to EU fundamental rights law to contain discretion tempers the harshness of the immigration law approach. It shifts the admission decision away from the concession end of the spectrum and back towards its rights' end.

III. CONDITIONAL DEFERENCE TO HOST MEMBER STATES

This says something, in turn, on an interesting, if understated, judicial trend, in respect of family rights in the context of free movement. On the one hand, in a rather long line of cases, the Court has recognized the duty of home Member States to admit the third country national family members of nationals returning from the exercise of free movement.¹⁵ In relevant cases, the duty is justified in light of not discouraging the exercise of the right to move on the part of the Union citizens, and is grounded in Art. 21 TFEU, read through an application by analogy of the Citizenship Directive.¹⁶ On the other hand, in interpreting the provisions of the Citizenship Directive regarding host Member State obligations, the Court –despite its affirmation in the *SM* case that those obligations are to be read broadly–has increasingly demonstrated deference to host Member States.¹⁷ The ruling in *SM* sits, at first sight, within this trend. In classifying children under legal guardianship according to the *kafala* system as extended family members, the Court recognizes the discretionary nature of the host Member State's decision to admit them or not. It defers to host Member States and their judgment. On the other hand, in emphasizing the role of fundamental rights in limiting such discretion, it highlights that the deference recognized to host Member States is conditional on their commitment to protect individual, fundamental rights. In this sense, it stirs away slightly from its recent attitudes towards the intensity of host Member State obligations. It is a clever balance: it pays tribute to sovereign interests and sensitivities, while at the same time maintaining a protective attitude towards individual rights.

IV. CONCLUSION

Ultimately, the judgment gives to the family as a social entity an important place in the EU architecture of rights. In doing this, it brings good news in two respects. First, it relies, for these purposes, on a flexible, pragmatic idea of family that leaves potential room to several models of cohabitation and reciprocal responsibility, and to a variety of underlying bonds, from the biological, to the legal, to the factual and affective. Second, in protecting family rights from the strictures of immigration law, the judgment moves

¹⁵ Court of Justice, judgment of 12 March 2014, case C-456/12, *O. and B.*; judgment of 5 June 2018, case C-673/16, *Coman v. Inspectoratul General pentru Imigrări*[GC]; judgment of 12 July 2018, case C-89/17, *Secretary of State for the Home Department v. Rozanne Banger*.

¹⁶ *O. and B.*, cit., paras 49-50.

¹⁷ See e.g. *Singh et al.* [GC], cit.; Court of Justice, judgment of 30 June 2015, case C-115/15, *Secretary of State for the Home Department v. NA*, paras 49-51.

with agility between state and individual interests. The ability of the court, and of EU free movement law more in general, to play along with sovereignty while not yielding ground on individual rights is a crucial skill, in times of integration crisis, resurgent nationalism, and endangered internationalism.

