THE DEFINITION OF ‘FAMILY’
UNDER EU LAW

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Free Movement Provisions in the EC Treaty and Case Law

Community secondary legislation and case law governing the rights emanating from the EC Treaty provisions on the free movement of workers provide us with the opportunity to understand how the political and judicial institutions of the European Union define a ‘family’ for purposes of law.

Regulation 1612/68\(^1\) expands on the Treaty rights of migrant workers by conferring various rights on the migrant workers’ families such as the right to install oneself with the worker in the territory of the Member State where the worker has sought work. The underlying rationale, as explained in the preamble, is to enable the migrant worker to be joined by his family and to facilitate the integration of that family into the host country. In Article 10 of Title III entitled ‘workers’ families’, it lists the following as part of the ‘family’:

(a) Spouse
(b) Descendants under the age of 21 years or dependants over that age
(c) Dependent ascendants of the worker or his spouse.

The Regulation recognizes (without identifying) other ‘members of the family’ who might also be dependant on the worker or were living under the same roof in the country from where the worker came, but they are granted lesser rights (Art 10 (2) - Member States are merely required to ‘facilitate the admission’ of such members of the family). So only the above listed members of the family are deemed to form part of the ‘nucleus’ of the family.

The European Court of Justice has interpreted the notion of ‘descendant’ under this Regulation widely to include not just the descendants from the present relationship between the worker and spouse but also descendants of the worker and those of the spouse from a previous relationship that was terminated by a divorce (\textit{Baumbast}\(^2\)). In other words, even children from a marriage that has been terminated by divorce are part of the family of the worker just as the children from his/her current relationship.

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\(^1\) Council Regulation 1612/68 on Freedom of Movement for Workers within the Community OJ [1968] L257/2.
\(^2\) Case C-413/99 \textit{Baumbast and R v Secretary of State for the Home Department} [2002] ECR I-7091.
On the other hand, the Court has defined ‘spouse’ in a conventional way as partners in a marital relationship. Separation, though, unlike divorce, would not deprive the partner from the status of ‘spouse’. In Diatta the Court considered a married couple that was separated as still falling within the notion of ‘spouses’ but indirectly hinted that married couples that are divorced would no longer be considered as ‘spouses’ for the purposes of the Regulation. Thus the spouse who divorced a worker would not be entitled to benefit any more from the rights that the Regulation bestowed on the worker’s family.

The Court has refused to consider the term ‘spouse’ as including unmarried persons living together in a stable relationship (cohabitees). In Reed the Court ruled that an unmarried British woman could not rely on the Regulation to claim the right to join in the Netherlands the British man with whom she had been living and who had moved to the Netherlands to work. It held that ‘Article 10(1) of Regulation 1612/68 cannot be interpreted as meaning that the companion, in a stable relationship, of a worker who is a national of a Member State and is employed in the territory of another Member State must in certain circumstances be treated as his “spouse” for the purposes of that provision’.

Considering both judgments (Diatta and Reed), Hervey remarks:

[T]he Community’s formal construct of ‘family’ is based upon a traditional model which excludes ‘atypical’ families, for example single parent families. These families are predominantly headed by women [EC Commission Communication on Family Policies, COM(89) 363, 7]; where that woman is not a worker, let alone a Community ‘migrant worker’, then the family is unable to benefit from the provisions of Community law. If the woman is a worker some form of child-care is necessary and will generally be carried out by another woman, for example a grandparent, aunt, or an unrelated close associate (Glasner, 1992:84). That unpaid woman carer will only fall within the Community definition of ‘family’ if she is a dependent ascendant. The Community construct of family reflects a norm which is not experienced by all families, and has a restrictive impact on women, since it is their experience which it least reflects.

Sex Equality Laws and Case Law

The free movement provisions are not the only provisions that have provided jurisprudence and legislation that sheds light on the kind of family model that the Community institutions embrace. Case law and legislation on sex equality have also depicted the type of family model that is endorsed by Community law.

As shown above, even under free movement case law Reed showed the Court privileging heterosexual marriages over other forms of stable relationships while denying divorcees all

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3 Case 267/83 Diatta v Land Berlin [1985] ECR 567.
4 It stated that ‘a marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority’.
free movement rights. But one finds further evidence of the Court’s bias for heterosexual marriages in the cases under the EU’s sex equality laws. In *Grant v South West Trains* the Court refused to extend the scope of Article 141 EC Treaty and the Equal Pay Directive to cover discrimination on the grounds of sexual orientation. It observed that while in some Member States cohabitation by two persons of the same sex is treated as almost equivalent to marriage, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights or else it is not recognised at all. Moreover, the Court cited several decisions of the former European Commission of Human Rights where the latter while acknowledging the modern evolution of attitudes towards homosexuality reiterated that stable homosexual relationships do not fall within the scope of the respect for family life under Article 8 of the European Convention of Fundamental Human Rights and that national provisions which, ‘for the purpose of protecting the family’, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to Article 14 of the Convention (which prohibits *inter alia* discrimination on the ground of sex).

Furthermore, the Court cited the *Rees* judgment of 17 October 1986 and the *Cossey* judgment of 27 September 1990 where the European Court of Human Rights itself interpreted Article 12 of the Convention as applying only to the traditional marriage between two persons of opposite biological sex. The Court thereby concluded that: ‘It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex.’

This judgment was relied upon by the Court of First Instance when in the later case, *D and Sweden v Council*, the Court reiterated that ‘Community notions of marriage and partnership exclusively address a relationship founded on civil marriage in the traditional sense of the term’. This judgment was subsequently upheld on appeal by the Court of Justice. *D* who had a homosexual partnership that was registered under Swedish law that accorded such a partnership the same rights and privileges as marital partnerships could not therefore claim that his partner was a ‘spouse’ and thereby claim the allowances that the Council paid to the ‘spouses’ of Community officials just as any other spouse of the opposite sex. Homosexual partnerships even when recognised by national law just like heterosexual partnerships not legitimated by civil marriage have no place in the Community family model. The Community concept of spouse and partner excludes same sex partnerships and heterosexual partnerships not founded on marriage.

This case law contrasts sharply with the position taken by the European Court of Human Rights that has in more recent years often shown itself to be willing to recognize a ‘de facto’ family life between stable unmarried heterosexual couples and, according to some

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1 Case C-249/96 *Grant v South West Trains* [1998] ECR I-621.
Commentators, might even be moving towards a recognition of family life between same-sex couples. However, the European Court of Justice is not legally bound to follow the European Court of Human Rights jurisprudence in the interpretation of the European Convention of Human Rights and indeed there have been several instances where its interpretation of the Convention’s provisions differed from the interpretation given by the European Court of Human Rights so that the more liberal view taken by the latter Court need not necessarily influence the European Court of Justice’s view of what constitutes a ‘family’.

**Case Law Bias for Traditional Family Roles**

McGlynn reads more than just this bias against same sex partnerships and heterosexual partnerships not founded on marriage in the Court’s judgments. Considering a series of cases spanning 20 years from the mid-1980s with *Commission v Italy* up to the more recent *Hill and Stapleton* and *Abdoulaye* she also perceives a bias for the traditional roles for women and men in this ‘family’ - one based on the man as the traditional breadwinner and the woman with her predominant maternal role having the primary responsibility of child minding and care and expected to relegate paid employment and career to second place after her responsibilities within the home.

*Commission v Italy* concerned Italian legislation that seemingly discriminated against men because it granted leave only to women on the adoption of a child while *Hofmann* concerned the allegedly discriminatory nature of German law that granted maternity leave only to women and denied men, who wished to take on the role of child carer during the initial months following the birth of the child while the mother continued to work, a similar period of leave. In both cases, the Court found no discrimination because it emphasized the special relationship between mother and child at the period of entry into the family of the natural or adopted child. McGlynn observes that, here:

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12 H Toner *Partnership Rights, Free Movement and EU Law* 87-88.
14 In Case C-65/98 *Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg* [2000] ECR I-4747 although AG La Pergola in his opinion (paragraphs 18 and 23) refers with apparent approval to the European Court of Human Rights case law accepting an unmarried partner as a family member, citing some of the judgments mentioned in n 11, in the judgment the ECJ makes no reference whatsoever to the European Convention of Human Rights on this point and remains silent on the issue of the ‘family status’ or otherwise of unmarried couples and on the question of the equal treatment of married and unmarried couples.
16 Case 163/82 *Commission v Italy* [1983] ECR 3273.
18 Case C-243/95 *Hill and Stapleton v The Revenue Commissioners and the Department of Finance* [1998] ECR I-3739.
[T]he Court reinforces sexual divisions of labour in which child care is always the responsibility of mothers, ignoring any conception that the father may also have a legitimate need and/or desire for a period of leave. Fatherhood is thereby limited, by implication, to a breadwinning role, with the assumption that a man’s primary commitment and identification should be with paid work, rather than child care...This clearly assumes that the mother has a more important role than that of the father. There is no desire to protect (or encourage) fathers, or fathers’ special relationships with their children.

While these two judgments date back to the mid-1980s when the role of men and women in the family were still rooted in the traditional concept of man as the breadwinner and the woman as the child-carer, McGlynn shows that with Abdoulaye at the turn of the century, it is clear that the Court is still stuck to this notion of family life as in this case it saw no discrimination in a collective agreement entered into by Renault with its workers that granted a lump sum payment to female employees taking maternity leave but not to male employees following the birth of a child, thereby discouraging men from taking up a significant role in the care and upbringing of their children.

McGlynn is critical of this ‘model European family’ as constructed by Community law as she deems it to be ‘mythical and imaginary’ and ‘bearing little relation to the realities of family life in the EU’. It is seen as excluding some families from rights under EU law, privileging specific relationships and perpetuating discrimination against women and men.

According to McGlynn, what emerges is a particular conception of the traditional “nuclear” family: that of the heterosexual married union, in which the husband is head of the family and principal breadwinner and the wife is the primary child carer. It is also a conceptualisation of family which reinforces the notion of children as dependants... This pattern of the Court’s jurisprudence has led Isabella Moebius and Erika Szyszczak to argue that the free movement provisions are based on a “male breadwinner family model”. The apparent aim of Community law, therefore, is to privilege, and encourage the movement of, those families which provide the “infrastructure for men’s mobility”, that is, the availability of a (preferably full-time) wife.

**Political Institutions and Member States**

In contrast with the conservative view taken by the European Court of Justice of the ‘model European family’, the European Parliament, Commission and Council, have shown a more ‘progressive’ stance in their efforts at developing an EU family policy. Nevertheless, this notwithstanding, when faced with the opportunity to steer Community law in a direction that would include in the family fold cohabitees and homosexual partners, the political institutions and the Member States were unable to agree on a clear-cut legislative change that would embrace them in the ‘model European family’. Following much lengthy and

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lively debate over a proposed directive that *inter alia* would amend the definition of ‘family member’ in Regulation 1612/68 with proposed amendments shifting from extending the notion of ‘spouse’ to unmarried heterosexual partners only to extending it to same-sex partners or registered partners only to extending it to both categories or to neither, the European Parliament and Council finally settled for a provision in the adopted Directive 2004/38\(^{21}\) that only slightly departed from the entrenched jurisprudence described above.\(^{22}\)

Article 2 of this directive replaced the said Article 10 of Regulation 1612/68 as from the end of April of this year with a broader definition of a ‘family member’ that includes besides the spouse also ‘the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.’ Moreover, the directive (Article 13) will extend the rights to the registered partner’s direct descendants and ascendants and will allow such rights to be retained by the spouse or partner even on divorce or annulment of marriage or termination of the registered partnership provided such a family member is a national of a Member State.

Thus, homosexual partners are recognized as ‘family members’ only if the national law recognizes their registered partnership as equivalent to marriage. Moreover, the definition does not extend to unmarried heterosexual or same-sex partners in a stable relationship as was originally proposed by the Commission.

The same approach was taken in Council Directive 2003/86 on the right to family reunification\(^{23}\) that was adopted a few months earlier and determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States (termed ‘sponsors’ by the directive). In Article 4 it recognizes as the family members with an automatic right to entry and residence, the spouse and their natural or adopted minor children. But it leaves it up to the discretion of the Member States whether or not to authorize the entry and residence of dependant ascendants and adult unmarried children and of the ‘unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership …’ and their children. However, Member States may, if they so wish, decide that registered partners (so not any unmarried partners living in a stable relationship) are to be treated equally as spouses for the purpose of family reunification which would give them an automatic right of entry and residence. So once again it is dependent on each individual Member State’s perception of ‘family’ - Community law remains neutral as far as cohabitation and homosexual relationships are concerned. Member States remain free to retain a conservative approach of recognizing only heterosexual marriages.

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Again the original proposal would have been more favourable to unmarried couples living in a stable relationship because the definition of ‘spouse’ would have extended to ‘an unmarried partner living in a durable relationship with the applicant, if the legislation of the Member state concerned treats the situation of unmarried couples as corresponding to that of married couples’ without requiring that their relationship be formally registered as a partnership under national law. The Economic and Social Committee had lauded this approach as ‘non-married couples [would be] free to live together, support each other, secure legal recognition for, raise and educate their children, and exercise the rights and duties of parents.’ Moreover, the Committee recommended that restrictive interpretations should be avoided and called upon the Commission to monitor the transposition of this Directive into national legislation.

However, subsequently the Commission amended the Proposal and restricted the definition of family members to the traditional nuclear family because it stated that:

> Given the diversity in national legislation concerning those enjoying the right to family reunification, it does not seem possible for the moment to extend the obligation to allow entry and residence beyond the spouse and minor children. There is therefore a possibility but not an obligation, as regards relatives in the ascending line, dependent adult children and unmarried partners.

Directive 2003/86 does however exclude polygamous marriages as in the case of such marriages if the sponsor already has a spouse living with him in the territory of a Member state, the Member State concerned is prohibited from authorizing the family reunification of a further spouse.

Likewise, even though the Community Staff Regulations for Community officials, that at the time of *D and Sweden v Council* had excluded that forms of partnerships may be assimilated to marriage for the purposes of allowances and other benefits to the official’s family members, have been changed, they also make recognition of such partnerships subject to the discretion of Member States. For the current Staff Regulations as last amended in 2005, while now also extending these benefits to unmarried partners who the Regulations treats as spouses (Article 72) while treating non-marital partnerships as marriage (Article 1d), the Regulations make such treatment dependent on the non-marital partnership status being legally recognised by a Member State.

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25 Ibid.
26 Ibid 362.
27 The Court at paragraph 38 had observed that: ‘Only the legislature can, where appropriate, adopt measures to alter that situation, for example by amending the provisions of the Staff Regulations. However, not only has the Community legislature not shown any intention of adopting such measures, it has even (see paragraph 32 above) ruled out at this stage any idea of other forms of partnership being assimilated to marriage for the purposes of granting the benefits reserved under the Staff Regulations for married officials, choosing instead to maintain the existing arrangement until the various consequences of such assimilation become clearer.’
Conclusion

The Court’s traditional or ‘apologetic’ (as McGlynn calls it) conceptualisation of families, is likely to prevail despite the more progressive approach of the Community’s political institutions because as seen in Directives 2004/38 and 2003/86 and the Staff Regulations any departures from the ‘apologetic’ approach are conditional on the Member States changing national legislation in the same direction. And McGlynn perceives Member States to be generally more conservative or ‘apologetic’. So, it is unlikely that Community law will see any drastic change in the near future to the traditional confines of the notion of ‘family’ as epitomised by case law. This leads Toner to pessimistically conclude that:

Looking more widely, it seems clear that the question of family status is likely to become increasingly problematic. Two EU Member States … now permit same-sex marriage, and registered partnerships of various kinds are recognised in a number of others … Yet, some remain resolutely opposed, and the Catholic Church is becoming increasingly vocal in its opposition to any move to weaken the legal position of heterosexual marriage as the uniquely favoured (and preferably the only legally recognised) family form. The accession of New Member States will do nothing to make this an easier issue - if anything, it will deepen divisions by introducing several new Member States whose conservative views on such matters will provide a counterbalance to the trend towards same-sex partnership recognition.