OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 10 November 2005 [1]

I — Introduction

1. The essence of the case is whether a woman on maternity leave suffers discrimination — inconsistent with Community law — if national law makes the acquisition of the status of official — and its legal consequences — dependent on the actual taking up of the post.

II — Legal framework

A — *National law*

2. The referring court describes the relevant provisions of national law as follows: in accordance with the Spanish rules on the filling of public service posts, the taking up of the post by the official is a precondition of the commencement of his rights. The Estatuto de personal no sanitario al servicio de las Instituciones Sanitarias (Staff Regulations applicable to non-health personnel employed by the Health Institutions), approved by Order of 5 July 1971, does not make any exception in this regard.

3. Part 9 of the Decision of the Instituto Nacional de la Salud (hereinafter: 'Insalud'), of 3 December 1997, in which the general notice of competition and the common bases of the selective tests for the award of posts in various categories in the health institutions coming under Insalud were published, in the part concerning appointments and the taking-up of posts, states, in paragraph two, that the successful applicants will have one month, beginning on the day following the date of publication of the decision, in which to take up their posts; and in paragraph three, that an applicant who fails to take up the post within the prescribed period will lose all the rights deriving from his participation in the competition, unless just cause is shown and accepted as such by the institution concerned.

1 — Original language: German.

4. According to the national court, the rules of the notice of competition thus apply the provisions of Royal Decree 118/1991, of 25 January 1991, which stipulates in Article 12(5) that anyone who fails to submit the documentation within the prescribed period, except in cases of force majeure, cannot be appointed.

B — *Community law*

5. The purpose of Council Directive 76/207/EEC [2] (hereinafter: 'Directive 76/207') is to eliminate all discrimination on grounds of sex in working conditions and conditions for access to jobs or posts and to all levels of the occupational hierarchy, without prejudice to provisions concerning the protection of women, especially as regards pregnancy and maternity.

6. Moreover, Council Directive 92/85/EEC [3] (hereinafter: 'Directive 92/85') lays down certain minimum requirements for their protection.

7. As regards maternity leave, Article 8 of Directive 92/85 provides for a right to a continuous period of maternity leave of at least 14 weeks including compulsory maternity leave of at least two weeks. Moreover, Article 11 of the directive provides for maintenance of a payment to, and/or entitlement to an adequate allowance for, workers, in addition to the other rights arising from the employment contract during the period of leave under Article 8.

III — Facts, procedure and questions referred for a preliminary ruling

8. On 12 September 2003, Carmen Sarkatzis Herrero (hereinafter: 'Ms Sarkatzis Herrero' or 'the plaintiff in the main proceedings') lodged a claim in respect of rights and quantum against the Instituto Madrileño de la Salud (hereinafter: 'Imsalud'), in which she maintained that for all purposes her seniority should be calculated from the date of her appointment and not from the date on which she took up her post in that institution.

9. Ms Sarkatzis Herrero was employed as a temporary servant in the defendant public institution, first in Insalud and then in Imsalud — after the Administración Central del Estado transferred competences and

2 — Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

3 — Directive of 19 October 1992 on measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

services in health matters, together with the relevant staff, to the Comunidad Autónoma Madrid, with effect from 1 January 2002.

10. By decision of 3 December 1997, while Ms Sarkatzis Herrero was still employed by Insalud, that institution announced that it proposed to hold tests for posts in its permanent staff.

11. Ms Sarkatzis Herrero took part in the competition and obtained a post as an administrative assistant, by decision of 20 December 2002. In that decision she was assigned to a specific section and was given a period of one month within which to take up the post.

12. On 27 November 2002, the applicant in the main proceedings, who was then about to give birth, contacted the public institution in which she was employed as a temporary servant (by that time Imsalud) seeking information about her administrative situation as regards taking up her post in view of the fact that she expected to be on maternity leave on that date. On 9 December 2002, Imsalud informed her that at the appropriate time, when the appointment to the post was published, if she was on maternity leave, she must inform it of her situation so that it could extend the period for taking up her post until the end of her maternity leave. According to that information, at the end of her maternity leave the institution would allow her to take up the post, and in that regard it referred to a specific Insalud decision of 3 December 1997, in which the criteria to be followed in such cases are apparently fixed.

13. On 20 December 2002 Ms Sarkatzis Herrero sought an extension of the period for taking up the post, in accordance with the information provided to her. At the same time, she also requested that the days on which she was on maternity leave be taken into account for the purposes of calculating her seniority, relying on the Spanish legislation on the reconciliation of the family and working life of workers. By communication of 8 January 2003 she was granted the extension, but there was no reference to her second request.

14. On the assumption that, as a result of taking maternity leave, the plaintiff in the main proceedings has suffered discrimination with respect to her career and the calculation of her seniority, the national court has referred the following questions to the Court of Justice for a preliminary ruling:

1. Must the Community provisions on maternity leave and equal treatment

for men and women in access to work be interpreted as meaning that a woman on maternity leave who while in that situation obtains a post in the public service must enjoy the same rights as the other applicants who have been successful in the competition for access to the public service?

2. Irrespective of what might have occurred in the case of an employee taking up a post for the first time, if the employment relationship was in force, albeit suspended, while she was on maternity leave, does access to the status of permanent employee constitute one of the rights associated with career advancement whose effectiveness cannot be affected by the fact that the person concerned is on maternity leave?

3. In application of the abovementioned provisions, and in particular those on equal treatment for men and women in access to employment or when employment has been obtained, is a temporary servant who is on maternity leave when she obtains a permanent post entitled to take up her administrative post and assume the status of official, with the rights inherent in such status, such as the initiation of her professional career and the calculation of her seniority, from that moment, and on the same conditions as all the other applicants who have obtained posts, notwithstanding that, according to the provisions of domestic law applicable in her case, the exercise of the rights associated with the actual performance of work may be suspended until such time as she actually commences work?

IV — Legal analysis

A — *Introductory observations on the questions referred for a preliminary ruling and the examination procedure*

15. The national court begins by asking whether the provisions of Community law concerning equal treatment and maternity leave should be interpreted as meaning that a woman on maternity leave who while in that situation obtains a post in the public service must enjoy the same rights as the other applicants who have been successful in the competition for access to the public service.

16. This is a very general question the answer to which can be directly derived

from the case-law of the Court. In its judgment of 18 November 2004 in the *Sass* case [4] the Court stated that 'a female worker is protected in her employment relationship against any unfavourable treatment on the ground that she is or has been on maternity leave', [5] without making any distinction as to whether the discrimination concerned an ongoing employment relationship or one that only followed upon maternity leave.

17. In this connection, the Court recalled that 'a woman who is treated unfavourably because of absence on maternity leave suffers discrimination on the ground of her pregnancy and of that leave. Such conduct constitutes discrimination on the grounds of sex within the meaning of Directive 76/207.' [6]

18. Even though the plaintiff in the main proceedings formally claims unfavourable treatment on taking up her new post — and not with respect to the existing employment relationship on the basis of which the maternity leave was granted, more or less as in *Sass* — it should be noted that in any event, as far as her new employment is concerned, she claims to have been less favourably treated 'because of absence on maternity leave', so that, in principle, it seems reasonable to transpose the solution reached in the *Sass* judgment.

19. However, in the third question referred for a preliminary ruling by the national court the first question is given concrete expression in relation to all the specific claims made by the plaintiff in the main proceedings. Thus, the national court would particularly like to know whether Community law conflicts with the requirement under national law that for a public service career to begin work must actually have been commenced, in so far as it leads to the unfavourable treatment — described in more detail in the order for reference — of women unable to take up their post because they are on maternity leave. In order to answer this question properly, the prohibition on discrimination needs to be examined in the light of the — specific — unfavourable treatment described by the national court. Thus, the first and third questions can be dealt with together.

20. However, it is first necessary to determine which provisions of Community law are applicable in this case. In this respect, the first question refers generally to 'the

4 — Case C-284/02 [2004] ECR I-11143

5 — Loc. cit., paragraph 35

6 — Loc. cit., paragraph 36.

Community provisions on maternity leave and equal treatment for men and women in access to work', whereas in the third question the latter provisions are stressed. The second question concerns the relevant provisions of Community law in so far as, in posing this question, the national court essentially seeks to learn whether the plaintiff in the main proceedings is to be regarded as taking up a new post or advancing in her career within an existing employment relationship.

21. However, it should be noted that this second question is formulated in hypothetical terms, in so far as the national court prefaces it with the words 'irrespective of what might have occurred'. Nevertheless, the question is closely connected with the initial case since — as already pointed out — it ultimately seeks to ascertain whether Ms Sarkatzis Herrero's appointment to a permanent post, when before taking maternity leave she was already doing the same job as a temporary servant, is ultimately to be regarded as the continuation of an occupation within the framework of an existing employment relationship or — given the fundamental change in her legal status — as access to a new occupation.

22. Since the answers to the first and third questions referred for a preliminary ruling depend on the answer to the second, it seems appropriate to begin by establishing the legal framework while at the same time answering the second question.

B — *The relevant legislation*

23. In its order for reference the national court repeatedly refers to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC[7] (hereinafter: 'Directive 96/34'). In particular, it points out that this directive defines the basic right to occupy the same post or to carry out equivalent work at the end of parental leave. The national court also cites paragraph 6 of Clause 2 of Part II of the Annex to the framework agreement, according to which 'rights acquired or in the process of being acquired by the worker on the date on which parental leave starts are to be maintained as they stand until the end of parental leave, when those rights, including any changes arising from national law, collective agreements or practice, are to apply.'

7 — OJ 1996 L 145, p. 4.

24. However, it should be noted that at the time when she was supposed to take up her post the plaintiff in the main proceedings was on maternity leave — not parental leave — so that Directive 96/34 — as argued by the defendant in the main proceedings, the Spanish Government and the Commission — cannot be regarded as relevant to the issue.

25. In so far as the national court refers to the 'Community provisions on maternity leave', it is clearly seeking an interpretation of Directive 92/85. Whether this directive is applicable to the present case again hinges on whether the unfavourable treatment claimed by the plaintiff in the main proceedings relates to rights that can be ascribed to the protection [8] guaranteed by Directive 92/85.

26. In this connection, it appears significant that the plaintiff in the main proceedings qualified for maternity leave as a temporary servant. However, she has not argued that her rights under Directive 92/85 [9] have been infringed with respect to the existing employment relationship. The reinstatement of the young mother in her existing employment relationship is not explicitly governed by Directive 92/85. Only Directive 2002/73/EC of the European Parliament and the Council, [10] which took over the substantive regulatory content of Directive 92/85 and codified it in Directive 76/207, provides for a right of return to the previous job or an equivalent post, on terms and conditions which leave the person concerned no worse off. Thus, Article 2 of Directive 76/207, as amended by Directive 2002/73, stipulates, inter alia, that 'a woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence.

Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this directive.'

8 — At this point it may be useful to recall the protective purpose of maternity leave under Directive 92/85: '[The right to maternity leave] serves the purpose, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth' — so reads the judgment in Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 32. See also the judgments in Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25, Case C-136/95 *Thibault* [1998] ECR I-2011, paragraph 25 and Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 41.

9 — These include the right to continued payment of wages and/or the right to appropriate social benefits, and the guarantee of other rights linked with the contract of employment, as well as protection against dismissal.

10 — Directive of 23 September 2002 on the amendment of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 2002 L 269, p. 15). As the transposition period for this directive only expired on 1 October 2005, it is *not* directly applicable to the main proceedings

27. However, even without this clarification based on Directive 2002/73, the reinstatement of a young mother in her post after maternity leave appears to be directly linked by regulation to the right to maternity leave. Without the right of reinstatement on no less favourable terms the right to maternity leave would be illusory, since the possibility of 'time off' would be attended by the risk of a worsening in working conditions, which in all likelihood might deter women from going on maternity leave.

28. At the same time, the case of a new employment relationship or, as in the main proceedings, public service relationship, overlapping with maternity leave clearly differs from that of a return to a previous — or equivalent — post after maternity leave has ended: the appointment to a permanent post creates a new service relationship. Both the defendant in the main proceedings and the Spanish Government draw attention to the fundamental differences between the legal status of a temporary servant and that of an official, which, in their opinion, exist in national law, so that, in their view, the new employment relationship cannot be regarded as an extension of the old. [11] Although the interpretation of Community law should not be modelled on national law, these observations nevertheless clarify the presumed 'break' between the old and the new employment, especially as a public servant can be made permanent only after going through a selection procedure — and being duly appointed — and never on the basis of promotion from his or her previous employment relationship.

29. The fact that in the present case the public service relationship involves the same post as that previously occupied by the plaintiff on a temporary basis is not strictly relevant: the question of possible unfavourable treatment based on the requirement that the post actually be taken up might still have been raised if the plaintiff in the main proceedings had changed jobs, which again goes to show that the present case is concerned not with reinstatement in a previously held post but access to a new one.

30. Moreover, from the case-law of the Court it follows that refusal to establish an employment relationship with a pregnant woman does not fall within the scope of Directive 92/85. In its judgment of 4 October 2001 in *Jiménez Melgar* [12] the Court ruled, in particular, that the non-renewal of a fixed-term contract of employment does not fall within the scope of the protection against dismissal under Article 10 of Directive 92/85; none the less, it made clear that 'where non-renewal ... is motivated by the worker's state of pregnancy, it constitutes direct discrimination on grounds of sex, contrary to

11 — However, this does not affect any allowance for past employment for grading purposes or for assessing seniority.

12 — Case C-438/99 [2001] ECR I-6915.

Articles 2(1) and 3(1) of Directive 76/207'. In its judgment of 3 February 2000 in *Mahlburg* [13] the Court had already come to the conclusion that 'Article 2(1) and (3) of Directive 76/207/EEC ... precludes a refusal to appoint a pregnant woman to a post for an indefinite period on the ground that a statutory prohibition on employment attaching to the condition of pregnancy prevents her from being employed in that post from the outset and for the duration of the pregnancy'. Thus, a refusal to appoint a woman because she is pregnant [14] must be tested against the equal treatment requirement of Directive 76/207.

31. If Directive 92/85 does not apply to a refusal to appoint a woman who is either pregnant or on maternity leave, then a fortiori it does not apply to a case in which, although an appointment is made, it is made on terms which suggest discrimination on grounds of sex. In the present case, Ms Sarkatzis Herrero was not refused employment, particularly as her request for a delay in taking up the post was accepted. [15] However, she claims unfavourable treatment, inasmuch as the delay in taking up her post due to her maternity leave could have a detrimental effect on her future career and the calculation of her seniority. Thus, Directive 92/85 is, in any event, not applicable to this kind of unfavourable treatment within the context of a new post.

32. In the present case, therefore, the main issue is whether Article 2(1) and (3) and Article 3 of Directive 76/207 preclude making the beginning of a public service career and the calculation of seniority dependent upon when the post is actually taken up.

33. Admittedly, in the present case, it is a question of access to the public service; however, as early as 21 May 1985, in its judgment in *Commission* v *Germany*, [16] with reference to the 'general application' of the principles laid down in Directive 76/207, the Court ruled that 'both Directive 76/207 and Directive 75/117 apply to employment in the public service'. [17]

13 — Case C-207/98 [2000] ECR I-549.

14 — Refusal to appoint a woman on maternity leave appears to be comparable with refusal to appoint on grounds of pregnancy inasmuch as it is the pregnancy that makes the maternity leave necessary.

15 — The fact that, in this respect, under national law it is clearly a question of a discretionary decision cannot easily be reconciled, in the case of a refusal, with the prohibition on discrimination in Directive 76/207 and the protective purpose of Directive 92/85; however, this point was not raised in the main proceedings.

16 — Case 248/83 [1985] ECR 1459.

17 — Loc. cit., paragraph 16.

C — *The prohibition of discrimination in Community law*

34. Article 2(1) of Directive 76/207 prohibits any discrimination whatsoever on grounds of sex, while Article 3 et seq. of the directive define the areas in which there is to be no discrimination. According to these provisions, there is to be no discrimination, direct or indirect, in relation to: conditions for access to employment, including selection criteria and recruitment conditions, access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience, employment and working conditions, and membership of, and involvement in, an organisation of workers or the like.

35. From the case-law of the Court it may be concluded that the non-appointment of a woman on grounds of pregnancy falls under the prohibition on discrimination of Article 2(1) and (3) and Article 3 of Directive 76/207.[18] In *Mahlburg*[19] the defendant sought to justify the non-appointment, inter alia, on the grounds that there was a prohibition on employment to protect the pregnant woman. In this connection, the Court held that 'the application of provisions concerning the protection of pregnant women cannot result in unfavourable treatment regarding their access to employment, so that it is not permissible for an employer to refuse to take on a pregnant woman on the ground that a prohibition on employment arising on account of the pregnancy would prevent her being employed from the outset and for the duration of the pregnancy'.

36. The special protection due to pregnant women and young mothers — the legitimacy of which is explicitly recognised in Article 2(3) of Directive 76/207 with reference to the principle of non-discrimination — cannot be allowed to work to their disadvantage, as already made clear by the Court in its judgment in *Thibault*[20] where it held that 'the exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive, not formal, equality'.[21]

37. The special provisions for the protection of women under Article 2(3) of Directive 76/207 include statutory provisions regard-

18 — *Mahlburg* judgment (cited in footnote 13), paragraph 30.
19 — Judgment cited in footnote 13.
20 — Cited in footnote 8.
21 — Loc. cit., paragraph 26.

ing maternity leave. [22] In its judgment in *Sass* [23] concerning the taking into account of periods of maternity leave for purposes of promotion to a higher-paid group, the Court referred to its case-law, especially in the *Thibault* case, and held that 'a female worker is protected in her employment relationship against any unfavourable treatment on the ground that she is or has been on maternity leave'. [24] By way of explanation, the Court added that 'a woman who is treated unfavourably because of absence on maternity leave suffers discrimination on the ground of her pregnancy and of that leave. Such conduct constitutes discrimination on the grounds of sex within the meaning of Directive 76/207'. [25] The Court concluded by stating that taking maternity leave 'should interrupt neither the employment relationship of the woman concerned nor the application of the rights derived from it and cannot lead to discrimination against that woman'. [26]

38. Admittedly, the *Sass* case differs from the present one inasmuch as in the former the maternity leave led to discrimination within an existing employment relationship, as the United Kingdom Government has correctly pointed out.

39. However, if the result pursued by Directive 76/207 is 'substantive, not formal, equality', then Article 2(1) and (3) and Article 3 of the directive should be interpreted as meaning that these articles preclude any unfavourable treatment of the woman concerned on grounds of or in connection with the taking of maternity leave as statutory protective leave, irrespective of whether the unfavourable treatment relates to the existing or a new employment relationship. This also follows from the principle laid down in paragraph 48 of the *Sass* judgment, in so far as in that judgment the Court distinguishes between the interruption of the existing employment relationship and the application of the derived rights, on the one hand, and the discrimination against the woman, on the other.

40. Accordingly, national laws should be so formulated that taking maternity leave does not adversely affect a woman's rights when she is appointed to a permanent post.

41. The national court describes the unfavourable treatment allegedly received by the plaintiff in the main proceedings as follows: at the time she was supposed to take up her post the plaintiff was on maternity leave. [27] Since she had been granted an extension of the period for taking

22 — See *Thibault* judgment (cited in footnote 8), paragraph 24.

23 — Cited in footnote 4.

24 — Loc. cit., paragraph 35.

25 — Loc. cit., paragraph 36.

26 — Loc. cit., paragraph 48.

27 — One month from 20 December 2002.

up the post, she actually took up her post on 5 April 2003. However, national law [28] clearly attaches various legal consequences to the actual taking up of the post which affect the commencement of the employment relationship, on the one hand, and the rights [29] deriving therefrom, on the other. Since, in the present case, the taking of maternity leave led to a delay in taking up the post, the final outcome of the linkage between national law and the time of actually taking up the post was that the career began to run only from that time and seniority — subject to allowance for previous employment in the public service, according to the submission by the Spanish Government [30] — was also calculated from that date — with corresponding implications for the granting of components of the remuneration that depend on seniority and eligibility for promotion. Thus, on the basis of the facts as reported by the national court, taking maternity leave did indeed lead to discrimination against the woman concerned.

42. It might be argued that the plaintiff has not been subject to discrimination on grounds of sex inasmuch as she was not treated any worse than a male colleague who took up his post on the same day as she did. [31] However, this would be to ignore the fact that the time of taking up the post was unavoidably affected by the taking of maternity leave, in so far as national law does not provide for a 'fictitious' means of taking up a post — possibly by signing a document — so that a comparison with the situation of a male colleague does not seem particularly apt in this case.

43. Finally, it should be noted that it is for the national court, in interpreting national law in conformity with Community law, to establish the relevant date of commencement of a public service career in such a way that a woman on maternity leave suffers no discrimination regarding access to the public service as compared with other successful applicants in a selection procedure.

28 — It should be noted that the interpretation of national law is reserved exclusively for the national court (see judgment in Case 32/76 *Saieva* [1976] ECR 1523, paragraph 7). In so far as the Spanish Government disputes the interpretation of national law adopted by the referring court with respect to the decisive importance of the time of taking up the post for purposes of calculating seniority — essentially by pointing out that under Ley 70/1978 all periods of service in the civil service are recognised, regardless of the basis of employment — its submission seems irrelevant, since in principle the Court must rule on the basis of the information set out in the order for reference.

29 — According to the file, the case involves remuneration rights and entitlement to social insurance benefits, on the one hand, and the calculation of seniority, which ultimately affects remuneration through seniority increments, on the other. Concerning the notion of 'trienios', see also pending Case C-205/04 *Commission* v *Spain*.

30 — In any event, it is not clear from the Spanish Government's written submission to what extent the calculation of seniority under national law takes maternity leave into account (for example, by recognising it as service).

31 — See the judgment in *Sass* (cited in footnote 4), paragraph 58: the Court compares the position of a woman who has taken the leave in question with that of a male colleague who started work on the same day as she did.

V — Conclusion

44. In the light of these considerations it is proposed that the questions referred by the national court be answered as follows:

Article 2(1) and (3) and Article 3 of Council Directive 76/207/EEC are to be interpreted as meaning that a temporary servant who is on maternity leave when she obtains a permanent post is entitled to commence her public service career, with all the rights directly and indirectly associated with such status, on the same conditions as all the other applicants who have obtained posts at the same time as she, regardless of when she is actually able to start work on account of being on maternity leave.

It is for the national court, in interpreting national law in conformity with Community law, to establish the relevant date of commencement of a public service career in such a way that a woman on maternity leave suffers no discrimination regarding access to the public service as compared with other successful applicants in a selection procedure.