OPINION OF ADVOCATE GENERAL TRSTENJAK

delivered on 24 January 2008 [1]

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I — Introduction

1. By order of 13 December 2006 the House of Lords referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 7(1) and (2) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2] ('Directive 2003/88').

2. The questions referred to the Court have been raised in proceedings brought by former and existing employees ('the appellants') of HM Revenue and Customs against that authority ('the respondent'), in which the United Kingdom's highest appellate court in civil matters is called on to rule whether the appellants have rights against the defendant to paid annual leave or an allowance in lieu.

3. These questions essentially relate to whether or not a worker who is absent on sick leave is entitled to take paid annual leave during the period of sick leave and the extent to which a worker who has been absent on sick leave for all or part of the leave year in

2 — OJ 2003 L 299, p. 9.

question is entitled to an allowance in lieu on termination of the employment relationship.

II — Legal framework

A — *Community law*

4. Directive 2003/88 replaced Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time [3] on 2 August 2004. Its purpose, like that of the directive which preceded it, is to lay down specific minimum safety and health requirements for the organisation of working time. Article 7 thereof, which was taken over unchanged, states as follows:

'Annual leave

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

5. Article 17 of Directive 2003/88 provides that the Member States may derogate from certain provisions. Article 7 is not one of the provisions from which Directive 2003/88 permits derogation.

B — *National law*

6. Article 7(1) and in part also Article 7(2) Directive 2003/88 have been transposed in the United Kingdom by regulations 13 and 16 of

3 — OJ 1993 L 307, p. 18.

the Working Time Regulations 1998 (SI 1998/1833) ('WTR'). In the version amended by the Working Time (Amendment) Regulations 2001 (SI 2001/3256) they provide, in so far as is here relevant, as follows:

'Regulation 13

(1) Subject to paragraph (5), a worker is entitled to four weeks' annual leave in each leave year.

…

(5) Where the date on which a worker's employment begins is later than the date on which (by virtue of a relevant agreement) his first leave year begins, the leave to which he is entitled in that leave year is a proportion of the period applicable under paragraph (1) equal to the proportion of that leave year remaining on the date on which his employment begins.

…

(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but —

(a) it may only be taken in the leave year in respect of which it is due, and

(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

…

Regulation 16

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.'

7. The calculation of 'a week's pay' is specified in legislation. In broad terms, it equates to the worker's normal weekly earnings.

8. In order to exercise his entitlement to paid annual leave under regulation 13 WTR, a worker is required to give prior notice to his employer in compliance with regulation 15 WTR, which provides, in so far as is relevant here, as follows:

‘(1) A worker may take leave to which he is entitled under regulation 13 on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker’s employer may require the worker —

(a) to take leave to which the worker is entitled under regulation 13; or

(b) not to take such leave,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date —

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of

the earliest day specified in the notice as the number of days or part-days to which the notice relates; and

(b) in the case of a notice under paragraph (2) (b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.'

9. Regulation 14 WTR deals with the position where the employment relationship is terminated. It provides as follows:

'(1) This regulation applies where —

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be —

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) … a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula —

(A x B) — C

where —

A is the period of leave to which the worker is entitled under regulation 13;

B is the proportion of the worker's leave year which expired before the termination date; and

C is the period of leave taken by the worker between the start of the leave year and the termination date.'

III — Facts, main proceedings and questions referred

10. The appellants in the main proceedings ('the appellants') were all workers employed by the respondent.[4] They fall into two categories.

11. The first category concerns Mrs Khan. She was absent on indefinite sick leave for several months, receiving sick pay. On 10 October 2003, during the course of that sick leave, she gave notice to the employer that she wished to take 20 days' paid annual leave from 17 November to 11 December 2003. The employer refused that request. Mrs Khan brought proceedings before the Employment Tribunal based on regulation 13 WTR, claiming that she was entitled to take annual leave and to be paid during her annual leave under regulation 16 WTR. The Employment Tribunal upheld her claim and ordered the employer to pay her GBP 595.32.

12. The second category concerns Mr Ainsworth, Mrs Kilic and Mr Thwaites. They were each dismissed by the employer. Each had been absent on long-term sick leave and was absent on sick leave throughout the leave year in which he or she was dismissed. None of them had taken any annual leave during that year. They brought proceedings before the Employment Tribunal, claiming payments under regulation 14 WTR, which deals with the position of workers where the employment relationship is terminated. In each case the Employment Tribunal upheld their claims and calculated the compensation due in accordance with the formula in regulation 14(3) WTR. Accordingly, it awarded Mr Ainsworth GBP 16.14, Mrs Kilic GBP 454.74 and Mr Thwaites GBP 967.14.

13. The respondent appealed these decisions to the Employment Appeals Tribunal, which

4 — With the exception of Mrs Stringer, all the appellants in the main proceedings are represented in this case. Although she is also not represented in the appeal proceedings before the House of Lords, her name continues to be used to designate the case in the national proceedings.

dismissed the appeals but granted permission to appeal to the Court of Appeal.

14. The Court of Appeal heard the cases together and allowed the employer's appeal. It held (amongst other things) as follows:

— In the case of Mrs Khan, the Court of Appeal accepted the submission of the employer that a worker cannot take annual leave for the purpose of regulation 13 during a period in which the worker is on sick leave and is consequently not under an obligation to work.

— In the cases of Mr Ainsworth, Mrs Kilic, and Mr Thwaites, the Court of Appeal accepted the employer's argument that, for the purpose of calculating the compensation due on termination under regulation 14, if a worker had nil entitlement to take annual leave under regulation 13 because he or she was absent because of sickness, then he or she was not entitled to a compensation payment under regulation 14.

15. The employees thereupon appealed to the House of Lords. After hearing the parties, the House of Lords concluded that the interpretation of Article 7(1) and (2) of Directive 2003/88 is open to dispute. It takes the view that, although the issues raised by the present proceedings overlap with those which arise in C-350/06 *Schultz-Hoff*, they are in some respects different. The answers given by the Court of Justice in *Schultz-Hoff* may therefore not be determinative of the issues in the present appeal. It has therefore decided to refer the following questions to the Court for a preliminary ruling to enable it to dispose of the appeals:

'(1) Does Article 7(1) of Directive 2003/88/EC mean that a worker on indefinite sick leave is entitled (i) to designate a future period as paid annual leave and (ii) to take paid annual leave, in either case during a period that would otherwise be sick leave?

(2) If a Member State exercises its discretion to replace the minimum period of paid annual leave with an allowance in lieu on termination of employment under Article 7(2) of Directive 2003/88/EC, in

circumstances in which a worker has been absent on sick leave for all or part of the leave year in which the employment relationship is terminated, does Article 7(2) impose any requirements or lay down any criteria as to whether the allowance is to be paid or how it is to be calculated?'

IV — Proceedings before the Court of Justice

16. The order for reference was lodged at the Registry of the Court of Justice on 20 December 2006.

17. Written observations were lodged by the appellants in the main proceedings, the United Kingdom, Slovene, Belgian, Italian, Polish and Czech Governments, and by the Commission of the European Communities, within the period laid down in Article 23 of the Statute of the Court.

18. At the hearing on 20 November 2007 oral argument was presented by the agents of the appellants in the main proceedings, the United Kingdom and Netherlands Governments, and by the Commission.

V — Main arguments of the parties

A — *The first question*

19. The *appellants* take the view that the right to paid annual leave provided for in Article 7 of Directive 2003/88 is a fundamental social right from which there can be no derogations. The objective of Directive 2003/88, namely to improve the living and working conditions of workers by approximating national rules concerning leave, would, they submit, be undermined if a worker were denied the right to designate a particular period as leave. Furthermore, under the Court's case-law the right to take a period of leave guaranteed by Community law cannot affect the right to take another period of leave guaranteed by that law and serving a different purpose. Finally, an interpretation of Article 7 of Directive 2003/88 to the effect that absence on sick leave removes or reduces the right to take annual leave would interfere with the practical exercise of that right.

20. The *Belgian*, *Czech*, *Slovene* and *United Kingdom Governments* take a different view.

21. In the view of the *Belgian Government*, the first question must be answered in the negative in view of the objective of the directive. That objective, namely to improve the working environment with a view to

protecting workers' health and safety, is evident inter alia from the preamble to the directive and its predecessor Directive 93/104, the summary of the grounds for the proposal for the directive, Article 1(1) of the directive, and the legal basis thereof, that is to say, Article 137 EC. This objective is confirmed by case-law. An affirmative answer to the first question would run counter to this objective inasmuch as the possibility of taking annual leave during a period of absence on sick leave would not help improve the working environment. The objective can reasonably be attained only if a worker takes leave when he is actually working or under an obligation to work. Furthermore, these questions are subject to national case-law and practice.

22. The *Czech Government* also takes the view that the first question must be answered in the negative. It points out that the directive does not expressly refer to the right of a worker to take leave during his illness and therefore the intentions of the Community legislature are relevant to the answer to the first question. The decisive question is whether the employee's right to paid annual leave must be respected in all Member States unconditionally and regardless of the existing legal situation. The Czech Government submits that the answer to this question must be in the negative. The right to leave is granted only in the context of specific national law since the general objective of the directive can be achieved in a number of ways. The questions raised in this dispute do not concern the actual existence of the right to paid annual leave but merely the detailed provisions for granting it, which must be laid down by national law alone.

23. In the view of the *Slovene Government*, the question must be analysed in the light of the objective of annual leave, which is to preserve workers' short-term and long-term health. The objective of the directive is clear from the preamble thereto and also from the Court's case-law, according to which the right to paid annual leave is a particularly important principle of social law from which there may be derogations only in the exceptional cases provided for in the directive. Article 7(1) of Directive 2003/88 does not permit a worker who is absent on indefinite sick leave to define this continuing absence as annual leave, nor does it permit him to take his annual leave during his sick leave since annual leave and sickness leave are, by virtue of their objectives, mutually exclusive.

24. In the view of the *United Kingdom Government* the spirit and purpose of Article 7 of Directive 2003/88 consist in protecting the health of those who are actually working by

guaranteeing leave. Leave would ultimately be of no use to workers who are not actually working and therefore the question has to be asked 'leave from what?'

25. The question of annual leave during sick leave is in fact a question of maintaining pay, which in the case of annual leave is greater than in the case of continuation of pay in the event of illness. However, this financial aspect is irrelevant in view of the directive's objective of protecting workers' health. The payment of holiday pay to a worker already on sick leave would be no more than a windfall for the worker and an unjustified cost upon the employer. Furthermore, the requirement to make such payment could have the unwanted effect that in the case of long-term sickness employers would instead terminate employment contracts in order to avoid this cost risk.

26. The *Italian* and *Polish Governments* and the *Commission* take a somewhat more qualified view.

27. The *Italian Government* takes the view that Article 7 of Directive 2003/88 must be understood as meaning that a worker who is absent on indefinite sick leave is entitled to take annual leave extending beyond the current year, since it appears incompatible with Community principles for the right to leave to be lost even though the worker has been legitimately absent from work on health grounds. The Italian Government refers to the case-law of the Court, according to which in the event of the aggregation of several periods of leave guaranteed by Community law at the end of a year, the carrying forward of leave to the following calendar year is inevitable. Nevertheless, the different objectives of holiday leave and sick leave preclude a worker from taking annual leave during his sick leave.

28. The *Polish Government* considers that the first question must be examined in the light of the objectives and of the principles contained in Directive 2003/88. Thus, the purposes of exempting a worker from work on health grounds and annual leave are different. The first case involves exemption from work so that the worker can recover the capacity for work by convalescing. In the second case, the worker is granted an exemption from work so that he may recover physically and continue his normal work. The Polish Government accordingly concludes that Article 7(1) of Directive 2003/88 must be interpreted as meaning that a worker on sick leave may not take annual leave at the same time.

29. In the view of the *Commission*, in interpreting the directive account must be taken of its objective to improve workers' living and working conditions. It takes the view that answering the first question in the affirmative poses certain risks to workers' rights. Since the continued payment of remuneration in

the event of sickness is less than the worker's average wage, the possibility cannot be excluded that a sick worker may be tempted, for financial reasons, to ask for paid annual leave.

30. Moreover, the Commission considers that it is illogical to permit a worker to take annual leave at a time when he is just recovering from illness or injury. Furthermore, it considers that the recovery function of annual leave can be safeguarded only if periods of leave follow on from one another since otherwise there is a danger that a worker will give up sick leave for annual leave under possible pressure from his employer.

31. In its oral observations the *Netherlands Government* questions the applicability in principle of Directive 2003/88 to cases in which workers are absent on sick leave on the ground that this is not the regulatory subject-matter of the provision. The scope of Directive 2003/88, it argues, is limited solely to active workers, with the result that national law alone applies in the present case. However, the large number of national rules does not allow generally valid conclusions to be drawn with regard to the rights of sick workers.

B — *The second question*

32. The *appellants* take the view that the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88 may not be reduced where the worker has been absent on sick leave for all or part of the year in which the employment relationship is terminated.

33. In the alternative, the appellants argue that Article 7(2) of Directive 2003/88 imposes no particular requirements as to how the entitlement to an allowance in lieu is to be exercised.

34. In the view of the *Belgian Government* the answer to the second question is, as in the case of the first question, evident from the spirit and purpose of the directive to improve working conditions to protect workers' health and safety, which are no longer at risk once the employment relationship is terminated. The Belgian Government therefore proposes that the second question be answered in the negative, to the effect that the conditions and detailed provisions relating to financial compensation do not fall within the scope of the directive and are instead a matter for national legislation and practice.

35. The *Czech Government* too relies on the objective of the directive as grounds for answering the second question in the negative. Under Article 2 of Directive 2003/88, 'working time' is defined as any period during which the worker is actually at the employer's disposal and 'rest period' as any period which is not working time. The fact that no daily rest periods are likewise granted, for example, during absence by reason of illness demonstrates that any grant of leave is contingent on the worker working or being at the employer's disposal. Therefore, no entitlement to leave in respect of these periods and thus no corresponding entitlement to an allowance in lieu arises during absence on sick leave. Consequently, even though it does not preclude a corresponding national rule, the directive lays down no requirements relating to a possible entitlement to an allowance in lieu in respect of leave which was not taken due to illness.

36. The *Slovene Government* also takes the view that the second question must be answered in the negative. It refers to its arguments regarding the first question and adds that the directive does not guarantee a worker a right to an allowance in lieu of his leave. The Member States can make provision for such an allowance and a comparison of Slovene and United Kingdom law shows that the Member States have adopted different rules in this regard. However, where a Member State does provide for such an allowance, the calculation thereof is subject solely to national law.

37. With regard to the second question the *United Kingdom Government* points out that the — negative — answer follows necessarily from its answer to the first question. Since in the case of absence on sick leave throughout the entire reference period no entitlement to leave exists, there is logically also no entitlement to payment in lieu in this case. Furthermore, although Article 7(2) Directive 2003/88 permits the Member States to make provision for an allowance for untaken leave where the employment relationship is terminated, it does not require them to do so. Therefore, the Member States alone are responsible for laying down the detailed provisions relating to any allowance that may be provided for.

38. In the view of the *Italian Government*, the answer to the second question is clear from its arguments regarding the first question. Accordingly, a worker is always entitled to an allowance in lieu of paid leave that he has not been able to take due to illness during the current year up to the time the employment relationship is terminated. In calculating that allowance, account must be taken of the number of months which the worker worked after the periods of leave, with periods of sick leave being equated to periods of service.

39. The *Polish Government* points out that the entitlement to an allowance in lieu of leave is a substitute for annual leave. When the employment relationship is terminated, the right to annual leave is converted into a right

to an allowance in lieu of untaken leave. Accordingly, Article 7(2) of Directive 2003/88 must be interpreted as meaning that a worker is entitled to compensation for the period in respect of which he has acquired a right to paid annual leave.

VI — Legal assessment

A — *The first question*

1. Preliminary remarks

40. In the view of the *Commission*, Article 7(2) Directive 2003/88 grants financial compensation for the loss of annual leave which a worker has been unable to take before the end of the employment relationship. Periods of absence for reasons beyond the control of the worker, such as illness or accidents, must be counted as periods of service and thus taken into account in calculating the entitlement to paid annual leave. Furthermore, the directive does not authorise the Member States to restrict or withdraw this right of a worker. Therefore, the Commission considers that an entitlement to an allowance in lieu should be granted to a worker in spite of his absence on sick leave.

41. As regards the amount of the allowance in lieu in individual cases, the Commission takes the view that this should, in so far as an entitlement to paid annual leave has actually arisen, be assessed at the same rate as the remuneration due to a worker.

42. By the first question, the House of Lords raises a problem in the interpretation of Article 7(1) of Directive 2003/88 which concerns the legislative scope of the right of workers to paid annual leave which is safeguarded by this provision. Specifically, the question is whether by virtue of Community law workers who are rendered incapable of work through illness are in principle entitled to paid annual leave and, if so, whether they may exercise this leave entitlement during a period in which they are on sick leave.

43. The problem raised concerns two different aspects of the entitlement to paid annual leave between which, in my view, a clear distinction must be drawn. The first relates to the very existence of the right itself and the second to the conditions governing the practical exercise of it. For the sake of clarity, the two aspects should be considered in turn.

44. In the present case the Court is being asked to rule positively on whether Commu-

nity law confers certain rights on workers. However, the question of what requirements Directive 2003/88 places on national law to enable these workers' rights to be exercised is also implicitly raised. Consequently, the legal analysis below amounts to an interpretation of the expression 'in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice' contained in Article 7(1) of Directive 2003/88.

45. As regards the division of legislative powers between the Community and its Member States in connection with the grant of the right to paid annual leave, it should first be pointed out that in adopting Directive 2003/88 the Community legislature availed itself of a legal instrument which, under the third paragraph of Article 249 EC, grants the national authorities a degree of discretion as regards the choice of form and methods of transposition but at the same time imposes requirements in so far as the directive is binding, as to the result to be achieved, upon each Member State. [5] Consequently, with regard to the transposition of the right to paid annual leave the national legal systems are given considerable, but not unlimited, options. [6] Therefore, in fulfilling the obligation, laid down in Article 7, to take the necessary measures, the Member States must always take account of the objectives of Directive 2003/88.

2. The entitlement to paid annual leave as a fundamental social right

46. I consider that, in order to be able to give a meaningful answer to the national court, it is necessary to step back and view the entitlement to paid annual leave both as implemented in secondary law within the Community legal system and in the wider context of fundamental social rights.

47. As regards the purpose of Directive 2003/88, it is clear both from Article 137 EC, which is its legal basis, and from recitals (1), (4), (7) and (8) in its preamble as well as the wording of Article 1(1) itself that its purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. [7] The harmonisation at Community level in relation to the organisation of working time is intended to guarantee better protection of the safety and health of

5 — See the leading judgment in Case 48/75 *Royer* [1976] ECR 497, paragraphs 69 and 73, according to which '[t]he Member States are … obliged to choose, within the bounds of the freedom left to them by Article [249 EC], the most appropriate forms and methods to ensure the effective functioning of the directives, account being taken of their aims'.

6 — See L. Stärker, *Kommentar zur EU-Arbeitszeit-Richtlinie*, Vienna 2006, p. 81.

7 — Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 37; Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraphs 45 and 47; Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 91; and Case C-14/04 *Dellas and Others* [2005] ECR I-10253, paragraph 40.

workers by ensuring that they are entitled to daily, weekly and annual minimum rest periods and adequate breaks and by providing for a ceiling on the average duration of the working week. [8]

48. However, in interpreting Article 7 of Directive 2003/88 it should be borne in mind that the right to minimum paid annual leave was not upheld for the first time in the Working Time Directive: it has long been included, together with an indication of the period of leave guaranteed, amongst fundamental social rights recognised by international law. At international level this fundamental right is mentioned, for example, in Article 24 of the Universal Declaration of Human Rights, [9] which confers on everyone 'the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.' It is also upheld in Article 2(3) of the Social Charter of the Council of Europe [10] and in Article 7(d) of the International Covenant on Economic, Social and Cultural Rights [11] as a manifestation of the right of everyone to fair and equitable working conditions.

49. Within the framework of the International Labour Organisation (ILO), which is a special agency of the United Nations, the right to a minimum period of paid annual leave has thus far been the subject-matter of two multilateral conventions. In this respect Convention No 132, [12] which entered into force on 30 June 1973, amended Convention No 52, [13] which was previously in force. They place mandatory requirements on the signatory States with regard to the implementation of this fundamental social right within their national legal systems.

50. However, these varied international instruments are distinct from one another both in terms of their substantive regulatory content and their legislative scope since in some cases they are international conven-

8 — Case C-303/98 *Simap* [2000] ECR I-7963, paragraph 49; *BECTU*, cited in footnote 7, paragraph 38; *Jaeger*, cited in footnote 7, paragraph 46; Case C-313/02 *Wippel* [2004] ECR I-9483, paragraph 47; and *Dellas and Others*, cited in footnote 7, paragraph 41.

9 — Universal Declaration of Human Rights, which the United Nations General Assembly adopted on 10 December 1948 by Resolution 217 A (III).

10 — The European Social Charter was opened for signature by the Member States of the Council of Europe in Turin on 18 October 1961 and entered into force on 26 February 1965. Article 2(3) thereof states that, with a view to ensuring the effective exercise of the right to just conditions of work, the Contracting Parties undertake to provide for a minimum of two weeks annual holiday with pay.

11 — The International Covenant on Economic, Social and Cultural Rights was adopted unanimously by the United Nations General Assembly on 19 December 1966. Article 7 (d) thereof states that '[t]he States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: ... [r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.

12 — Convention No 132 concerning Annual Holidays with Pay (revised 1970), adopted by the General Conference of the International Labour Organisation on 24 June 1970, which entered into force on 30 June 1973.

13 — Convention No 52 concerning Annual Holidays with Pay, adopted by the General Conference of the International Labour Organisation on 24 June 1936, which entered into force on 22 September 1939. This convention was revised by Convention No 132 but itself remains open for ratification.

tions, in others merely solemn declarations with no legal force. [14] The persons to whom they apply are also different, with the result that the class of persons covered is by no means identical. In addition, the signatory States, as the addressees of these instruments, are generally granted broad discretion with regard to implementation and therefore the beneficiaries are unable to rely directly on their rights. However, it is significant that in all those international instruments the right to a period of paid leave is unequivocally included among workers' fundamental rights.

51. Even more significant, in my view, is the fact that the inclusion of this right in the Charter of Fundamental Rights of the European Union [15] appears to provide the most reliable and definitive confirmation that it constitutes a fundamental right. [16] Article 31(2) of the Charter declares that: 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'. Historically, this provision is modelled on Article 2(3) of the Social Charter of the Council of Europe and Point 8 of the Community Charter of the Fundamental Social Rights of Workers. [17] According to the explanatory notes of the Praesidium Secretariat, Directive 93/104, as the predecessor directive to the present Directive 2003/88, was decisive in this respect. [18]

52. Consequently, Article 31(2) of the Charter of Fundamental Rights establishes the right to annual paid leave as a human right available to all. [19] Admittedly, like some of the international instruments cited above, the

14 — M. Zuleeg, 'Der Schutz sozialer Rechte in der Rechtsordnung der Europäischen Gemeinschaft', *Europäische Grundrechte-Zeitschrift* 1992, Issue 15/16, p. 331, points out that instruments having no binding legal effect, such as the Community Charter of the Fundamental Social Rights of Workers, serve primarily as a roadmap. At most, they acquire legal relevance where courts of law cite them for the purpose of interpreting or further developing the law. W. Balze, Überblick zum sozialen Arbeitsschutz in der EU, *Europäisches Arbeits- und Sozialrecht*, 38, 1998 Supplement, paragraph 4, correctly states that, although the Community Charter of the Fundamental Social Rights of Workers, as a solemn declaration, itself produces no binding legal effects, it was a significant catalyst for the Commission Action Programme for implementing the Community Charter of the Fundamental Social Rights of Workers of 28 November 1989, which was adopted at the end of 1989. The action programme provided for a total of 23 specific proposals for directives, inter alia in the field of the health and safety of workers, most of which were implemented by 1993. Therefore, it follows that even solemn declarations can, as a source of inspiration for legislative activity, ultimately acquire relevance in the implementation of the fundamental social rights proclaimed therein.

15 — Charter of Fundamental Rights of the European Union, promulgated on 7 December 2000 in Nice (OJ 2000 C 364, p. 1).

16 — Advocate General Tizzano reaches the same conclusion in his Opinion in *BECTU*, cited in footnote 7, point 26.

17 — The Community Charter of the Fundamental Social Rights of Workers was adopted in Strasbourg on 9 December 1989 by the Heads of State and Government of the Member States of the European Community. Point 8 of the Community Charter states that '[e]very worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be harmonised in accordance with national practices while the improvement is being maintained'. E. Eichenhofer, *Handbuch des EU-Wirtschaftsrechts* (edited by M. A. Dauses), Munich 2004, volume 1, D. III., paragraphs 38 and 39, speaks in this context expressly of the right to paid annual leave as a 'fundamental social right' contained in the Community Charter.

18 — See, to this effect, H.-W. Rengeling, *Grundrechte in der Europäischen Union*, Cologne 2004, paragraph 1016, p. 812.

19 — E. Riedel, *Charta der Grundrechte der Europäischen Union* (edited by Jürgen Meyer), 2nd edition, Baden-Baden 2006, Article 31, paragraph 20, takes the view that the relevance of Article 31(2) of the Charter of Fundamental Rights lies primarily in its having indisputably established, as a social minimum, the principles of limitation of maximum working hours, of daily rest periods and of weekly rest periods, even in the case of employment relationships involving shifts or variable working hours, and of paid annual leave as a right available universally as a human right.

Charter of Fundamental Rights of the European Union has not been recognised as having genuine legislative scope and therefore it primarily constitutes a political declaration. However, I take the view that it would be wrong to deny the Charter any relevance in interpreting Community law. [20] Irrespective of the question of the definitive legal status of the Charter within the legal system of the European Union, which will have to be clarified in future, it already constitutes a concrete expression of shared fundamental European values. [21]

53. Furthermore, it also reflects constitutional traditions common to the Member States to a substantial degree. So far as I can see, this conclusion can indeed be drawn in relation to the right to a minimum period of paid annual leave since Article 31(2) of the Charter is modelled on the constitutions of a large number of Member States. [22] Consequently, it is perfectly reasonable to refer to the principle underpinning Article 31(2) of the Charter in interpreting Article 7 of Directive 2003/88 in a legal dispute concerning the nature and scope of a funda-

20 — I expressed this view most recently in my Opinion in Case C-62/06 *Zefeser*, point 54 and footnote 43, in connection with the right to a fair trial guaranteed in Article 47 of the Charter of Fundamental Rights, as did previously Advocate General Tizzano in his Opinion in *BECTU*, cited in footnote 7, point 28, and Advocate General Léger in his Opinion in Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, points 73 to 86. The Court of Justice too is increasingly relying on the provisions of the Charter of Fundamental Rights. See most recently Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 38, with reference to the reference to the Charter in the preamble to the directive at issue, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37, and Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 46.

21 — See, to this effect, M. Poiares Maduro, 'The double constitutional life of the Charter of Fundamental Rights', *Unión Europea y derechos fundamentales en perspectiva constitucional*, Madrid 2004, p. 306; T. Schmitz, 'Die Charta der Grundrechte der Europäischen Union als Konkretisierung der gemeinsamen europäischen Werte', *Die Europäische Union als Wertegemeinschaft*, Berlin 2005, p. 85, and U. Beyer/C. Oehme/F. Karmrodt, *Der Einfluss der Europäischen Grundrechtecharta auf die Verfahrensgarantien im Unionsrecht, Beiträge zum Transnationalen Wirtschaftsrecht*, Issue 34, November 2004, p. 14. I. García Perrote Escartín, 'Sobre el derecho de vacaciones', *Scritti in memoria di Massimo D'Antona*, volume 4 (2004), p. 3586, assumes that the right to paid annual leave, as enshrined in Article 40(2) of the Spanish Constitution, is a product of all international instruments relating to the protection of fundamental rights. He takes the view that these instruments together have contributed to the emergence of a universal or even specifically European awareness of the existence of that fundamental social right.

22 — Under Community law, it is primarily for the Member States to lay down rules on working conditions. Several constitutions contain safeguards relating to working conditions which include the right of workers to rest. For example, Article 11(5) of the Constitution of *Luxembourg* and Article 40(2) of the Constitution of *Spain* require the State to create healthy working conditions and to provide or ensure rest for workers (see S. González Ortega, 'El disfrute efectivo de la vacaciones anuales retribuidas: una cuestión de derecho y de libertad personal, de seguridad en el trabajo y de igualdad', *Revista española de derecho europeo*, No 11 [2004], p. 423 et seq.). A much more comprehensive rule, which is much closer to the wording in Article 31 of the Charter, is to be found in Article 36 of the Constitution of *Italy*, which provides inter alia for a right to a weekly rest day and paid annual leave. The constitution of *Portugal* would appear to have been one of the models for the rules of the Charter since Article 59(1)(d) thereof establishes the right to rest and leisure, an upper limit on daily working hours, a weekly rest period and regular paid leave (see J. C. Vieira De Andrade, 'La protection des droits sociaux fondamentaux dans l'ordre juridique du Portugal', *La protection des droits sociaux fondamentaux dans les États membres de l'Union européenne — Étude de droit comparé*, Athens/Brussels/Baden-Baden 2000, p. 677). In the majority of the old Member States of the European Union the right to a minimum period of paid annual leave is based on ordinary legislation which mirrors the secondary legislation requirements of the directive, in so far as ambits of Community law are concerned. By contrast, the new Member States, other than *Cyprus*, have very comprehensive codification of this right. This is the case, for example, with regard to Article 36(f) of the *Slovak*, Article 66(2) of the *Polish*, Article 70/B(4) of the *Hungarian*, Article 107 of the *Latvian* and Article 49(1) of the *Lithuanian* Constitutions, which guarantee a minimum period of paid annual leave. Working conditions in general are addressed in the constitution of *Slovenia* (Article 66), the *Czech Republic* (Article 28) and *Estonia* (Article 29(4)) (see E. Riedel, loc. cit., footnote 19, Article 31, paragraphs 3 and 4)

mental right such as that at issue in the present case. [23]

3. The entitlement to a minimum period of paid annual leave in Community law

(a) Community competence in determining the scope of protection afforded by the rule

54. The Court has upheld the scope of the right to paid annual leave and found that '[t]he entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law from which there can be no derogations and the implementation of which by the competent national authorities must be confined within the limits expressly laid down by Directive 93/104 itself.' [24] The provisions in Article 7 of Directive 2003/88 are drawn up as a rule that a worker must be entitled to actual rest, with a view to ensuring effective protection of his health and safety. [25]

55. According to case-law, the Member States have an essential role to play in implementing this right since the obligation, contained in Article 7(1) of Directive 2003/88, to take the necessary measures requires them to lay down the requisite detailed national implementing rules. [26] This includes laying down conditions for the exercise and implementation of the right to paid annual leave, the Member States being free to prescribe the specific circumstances in which workers may exercise that right, which is theirs in respect of all the periods of work completed. [27]

56. The reference to national legislation contained in Article 7(1) of Directive 2003/88 is intended in particular to allow the Member States to provide a legislative framework governing the organisational and procedural aspects of the taking of leave, such as, for instance, the planning of holiday periods, the possibility that a worker may be required to give advance notice to the employer of the

23 — In the view of S. Smismans, 'The Open Method of Coordination and Fundamental Social Rights', *Social Rights in Europe* (edited by Gráinne de Búrca and Bruno de Witte), Oxford 2005, p. 229, the question of the relationship between Article 7 of Directive 2003/88 and the fundamental rights, particularly Article 31(2) of the Charter of Fundamental Rights of the European Union, will inevitably arise in proceedings before the Court of Justice. According to S. Krebber, *Kommentar zu EU-Vertrag und EG-Vertrag* (edited by Christian Calliess/Matthias Ruffert), 1st edition, Neuwied 1999, Article 136 EC, paragraph 35, p. 1365, the European Social Charter and the Community Charter provide significant aids for interpreting the meaning of concepts of employment law at Community level. L. Stärker, *Kommentar zur EU-Arbeitszeit-Richtlinie*, Vienna 2006, p. 81, appears even to attribute legislative character to Article 31(2) of the Charter of Fundamental Rights by pointing out that this provision prescribes the establishment of paid annual leave. In the view of G. Benedetti, 'La rilevanza giuridica della Carta Europea innanzi alla Corte di Giustizia: il problema delle ferie annuali retribuite', *Carta Europea e diritti dei privati*, 2000, p. 128, at p. 129, in a legal dispute concerning the scope of the right to a minimum period of paid annual leave the Charter of Fundamental Rights cannot be ignored, despite the fact that it is not legally binding, since it contains statements which mirror the constitutional traditions common to the Member States. It therefore functions as a reference point or aid for interpreting Community law.

24 — Case C-124/05 *Federatie Nederlandse Vakbeweging* [2006] ECR I-3423, paragraph 28; *Dellas and Others*, cited in footnote 7, paragraph 49; Case C-342/01 *Merino Gómez* [2004] ECR I-2605, paragraph 29; and *BECTU*, cited in footnote 7, paragraph 43.

25 — *BECTU*, cited in footnote 7, paragraph 44.

26 — Joined Cases C-131/04 and C-257/04 *Robinson-Steele and Others* [2006] ECR I-2531, paragraph 57.

27 — *BECTU*, cited in footnote 7, paragraph 53.

period in which he intends to take leave, the requirement of a minimum period of employment before leave can be taken, the criteria for proportional calculation of annual leave entitlement where the employment relationship is of less than one year, and so forth. [28] These are, however, always precisely measures intended to determine the conditions for entitlement to, and granting of, leave and as such are allowed by Directive 2003/88.

57. As I have observed in my Opinion in *Schultz-Hoff*, which is also pending before the Court, [29] a clear distinction must be drawn between these detailed implementing provisions and those national rules which concern the very existence of the right to a minimum period of paid annual leave, for example by laying down preconditions for the acquisition and/or discontinuation of the entitlement to leave. Unlike the requirement on an employee, cited as an example of such a detailed implementing provision, to notify the employer of when he would like to take annual leave, which merely performs a coordinating function in operational holiday planning, the question at issue here of whether an employee rendered incapable of work through illness in principle has a right to paid annual leave concerns the very existence of such a fundamental right.

58. This case relates not to a decision on the way in which paid annual leave is implemented, [30] that is to say, specific transposition of that right, but to the definition of the scope of a provision of Community law, namely Article 7(1) of Directive 2003/88.

59. To interpret this provision as meaning that workers rendered incapable of work through illness have no right to annual leave from the outset would be tantamount to excluding certain workers from this entitlement by restricting its protective scope *ratione personae*. [31]

60. However, as a consequence of the harmonisation in this field of social employment law, which is sought under Article 137(2)(b) EC as the legal basis for Directive 2003/88, the Community now has the

28 — As listed in the Commission's observations in *BECTU*, which Advocate General Tizzano addressed in his Opinion in that case, cited in footnote 7, point 34.

29 — See points 45 to 49.

30 — In paragraph 61 of *BECTU*, cited in footnote 7, the Court ruled that Directive 93/104 did not prevent the Member States from 'organising the way in which the right to paid annual leave may be exercised by regulating, for example, the manner in which workers may take the annual leave to which they are entitled during the early weeks of their employment'.

31 — However, this is precisely what the Member States are not permitted to do (see *BECTU*, cited in footnote 7, paragraph 52). Accordingly, Member States are precluded from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it.

competence to define the scope of this entitlement. [32] If that competence were available to the Member States, it would be impossible in practice to ensure a comparable level of protection across the Community and thus guarantee the objective of harmonisation. For this reason, it is necessary to reject the Belgian and Czech Governments' argument that the entitlement to annual leave of a worker rendered incapable of work through illness is one of the details relating to the granting of leave and is subject to the regulatory power of the Member States.

(b) The level of protection guaranteed by Community law

61. I also consider it important to recall that the freedom of Member States in laying down national implementing measures is restricted by the fact that Article 137(2)(b) EC seeks, by adopting minimum requirements, to guarantee a certain level of protection established by Community law below which the Member States must not fall. As the Court stated in its judgment in *United Kingdom* v *Council* [33] in relation to the concept of 'minimum requirements' within the meaning of the previous legal basis in Article 118a of the EC Treaty, that provision does not limit Community action to the lowest common denominator, that is to say, the lowest level of protection established in a Member State. This concept must instead be construed as meaning that Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be.

62. This interpretation is confirmed by the wording of Article 136 EC, which lays down 'improved living and working conditions' as an objective of social policy. This objective is expressly to be attained through harmonisation 'while the improvement is being maintained'. [34] In order to attain this objective of primary law, Article 15 of Directive 2003/88 authorises Member States to apply, or facilitate the application of, measures which are more favourable to the protection of the health and safety of workers. Similarly, Article 23 of Directive 2003/88 states in respect of the level of protection for workers that, whilst Member States may provide for different measures in the field of working time, subject to compliance with the

32 — Article 137 EC is the most important basis for adopting directives in the chapter concerning social policy. It requires a certain objective in harmonisation, as is clear from the linking of paragraph 2 to paragraph 1. Accordingly, harmonisation must be effected in order to promote the supporting and supplementing function of the Community's activities in the areas referred to in paragraph 1(a) to (i). According to paragraph 1(a), this includes protection of workers' health and safety. Until recently the basis was Article 118 of the EC Treaty, which also had a primarily social-policy orientation and consequently differed from the other provision defining competence in Article 100a of the EC Treaty (Article 94 EC) with its internal market function (see S. Krebber, loc. cit., footnote 23, Article 137 EC, paragraph 18, p. 1373).

33 — Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 56.

34 — W. Balze, loc. cit., footnote 14, p. 38, 1998 Supplement, paragraph 3.

minimum requirements it lays down, implementation of the directive does not constitute a valid ground for reducing the general level of protection afforded to workers. [35]

63. The minimum level of protection which the Community legislature has laid down in respect of the right to leave can be ascertained from reading Directive 2003/88. In this regard it should be observed that, contrary to the submission of the Netherlands Government, Article 7(1) of Directive 2003/88 contains no restriction of the class of persons entitled to leave and precisely draws no distinction between workers who are 'healthy and capable of working' and workers who are 'incapable of working through illness'. Rather, it is unambiguously clear from the wording of this provision that Member States are to take the measures necessary to ensure that 'every worker' is given a minimum period of paid annual leave. Moreover, Article 7(1) is not one of the provisions from which Article 17 of Directive 2003/88 expressly allows derogations. [36]

(c) The level of protection guaranteed by ILO Convention No 132

64. In relation to the legal position of workers rendered incapable of work through illness the Community legislature thus seeks to provide a level of protection at least comparable to ILO Convention No 132. [37] For example, Article 3(1) of the Convention states that 'every person' to whom the Convention applies is to be entitled to an annual paid holiday.

65. Like Article 7(1) of Directive 2003/88, this convention contains no exemptions which adversely affect workers rendered incapable of work through illness. This leads to the conclusion that the protection which Community law seeks to guarantee workers may not, as the Community legislature intended, fall below the level of protection afforded by the employment-law rules contained in international law. However,

35 — *United Kingdom* v *Council*, cited in footnote 33, paragraph 42. W. Balze, Arbeitszeit, Urlaub und Teilzeitarbeit, *Europäisches Arbeits- und Sozialrecht*, 79, Supplement (October 2002), B 3100, paragraph 6, p. 9, construes the rules contained in the Working Time Directive as minimum provisions in accordance with the rationale underlying Article 137 EC and therefore the Member States may introduce or maintain more stringent rules on working time. However, under Article 14 of Directive 2003/88 specific Community provisions take precedence over the provisions of the directive, irrespective of whether or not the level of protection afforded by them falls below that afforded by the Working Time Directive.

36 — See *Robinson-Steele and Others*, cited in footnote 26, paragraph 62, and *BECTU*, cited in footnote 7, paragraph 41. To this effect, see also W. Balze, 'Die Richtlinie über die Arbeitszeitgestaltung', *Europäische Zeitschrift für Wirtschaftsrecht*, No 7 (1994), p. 207, who sees no substantive power to derogate from these rules.

37 — It must be remembered in this respect that, according to recital (6) in the preamble to Directive 2003/88, account should be taken of the principles of the ILO with regard to the organisation of working time. This is also pointed out by Advocate General Kokott in footnote 8 of her Opinion in *Federatie Nederlandse Vakbeweging* (judgment cited in footnote 24). An interpretation of Directive 2003/88 which takes account of the essential principles laid down in ILO Convention No 132 would appear to me essential in view of the fact that the law of the ILO has set the relevant international standards in the field of employment law. Viewed broadly, there is a large degree of convergence between the two legal instruments. However, on closer inspection it is evident that some of the rules contained in Directive 2003/88 go beyond the provisions of ILO Convention No 132. For this reason it can rightly be said of Directive 2003/88 that it constitutes a further development of this convention which is specific to the Community (see J. Murray, *Transnational Labour Regulation: The ILO and EC Compared*, Den Haag 2001, p. 185).

there would be cause to fear a failure to provide this minimum level of protection precisely if a fundament social right were withheld from the outset from a particular category of workers.

66. The fact that the right to leave may not be made subject to a worker's capacity for work under ILO Convention No 132 is also demonstrated by the unequivocal wording of Article 5(4) of the Convention, under which 'absence from work for such reasons beyond the control of the employed person concerned as illness, injury or maternity shall be counted as part of the period of service'. Moreover, Article 6(2) of the Convention specifically stipulates that 'periods of incapacity for work resulting from sickness or injury may not be counted as part of the minimum annual holiday with pay prescribed'.

67. These provisions must be construed, in accordance with their objective, as meaning that the acquisition of the right to leave may not in principle be made subject to circumstances the causes of which lie outside the sphere of influence of the worker concerned on the grounds, for instance, that they are the result of natural occurrences or constitute cases of *force majeure*.

68. Consequently, the rules of ILO Convention No 132 and of Directive 2003/88 on the establishment of leave entitlement are essentially the same in terms of their basic legal content. [38] The Member States are required to interpret these rules and organise their national legal systems in such a way that acquisition of the right to a minimum period of paid annual leave is not made subject to a worker's capacity for work.

69. From these considerations it follows that a worker acquires rights to leave as from his first day of employment and does not lose them as a result of incapacity for work caused by illness [39] He is therefore entitled to designate a future period as paid annual leave during a period that would otherwise be sick leave.

4. The employment-law prohibition of adverse effects as a barrier to exercise of the right to a minimum period of paid annual leave

70. Although every worker is entitled to a minimum period of paid annual leave under Article 7(1) of Directive 2003/88, the possi-

38 — Consequently, there is no need to examine the extent to which the Member States are bound by substantively different obligations stemming from ILO Convention No 132 and Directive 2003/88. See, to this effect, the comments by Advocate General Tesauro in his Opinion in Case C-345/89 *Stöckel* [1991] ECR I-4047, point 11.

39 — See, clearly to similar effect, also Advocate General Tizzano, who at point 50 of his Opinion in *BECTU*, cited in footnote 7, expresses doubt as to the compatibility with Community law of a national rule which prevents workers from acquiring rights to leave as from the first day of employment.

bility cannot be ruled out that the actual exercise thereof in individual cases may be subject to certain conditions which, without calling into question the very existence of this right, are designed to ensure that the objectives of the directive are attained.

(a) The prohibition of adverse effects under ILO Convention No 132

71. Further relevant regulatory content can be derived from Articles 5(4) and 6(2) of ILO Convention No 132, namely that leave taken due to illness may not adversely affect the right to a minimum period of paid annual leave. [40] The equation of periods of illness with periods of service and the prohibition on including periods of incapacity for work as a consequence of illness or injury in the prescribed minimum period of leave is intended to prevent annual leave coinciding with a period which is actually reserved for sick leave as a specific kind of leave. This prohibition on the duplication of periods of leave takes account of the fact that sick leave and annual leave serve different purposes and therefore must not, for legal purposes, be regarded as interchangeable.

40 — See, to this effect, also I. García Perrote Escartín, loc. cit., footnote 22, p. 3584, at p. 3595.

(b) Applicability of the principles developed in case-law

72. This underpinning principle is to be found in the premise on which the Court based its judgments in *Merino Gómez* [41] and *FNV*. [42]

73. In *Merino Gómez* the Court considered the relationship under Community law between annual leave and maternity leave. The case specifically concerned the question whether under Article 7(1) of Directive 2003/88, Article 11(2)(a) of Directive 92/85/EEC [43] and Article 5(1) of Directive 76/207/EEC [44] a worker has, in cases where collective agreements between an employer and workers' representatives fix the timing of leave for the entire workforce, and where the dates concerned coincide with those of maternity leave, an entitlement to take annual leave during a period other than the period agreed, which does not coincide with her period of maternity leave. In this respect the Court found that the purpose of the entitlement to annual leave is different from that of the entitlement to maternity leave. Maternity leave is intended, first, to protect a woman's biological condition during and after pregnancy and, second, to protect the special relationship between a woman and her child

41 — *Merino Gómez*, cited in footnote 24.

42 — *Federatie Nederlandse Vakbeweging*, cited in footnote 24.

43 — Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

44 — Council Directive 76/207/EEC 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).

over the period which follows pregnancy and childbirth. [45] The Court therefore ruled that a worker must be able to take her annual leave during a period other than the period of her maternity leave. [46]

74. The Court upheld this principle in *FNV* and clarified it as meaning that in the event of the aggregation of several periods of leave guaranteed by Community law at the end of a year, the carrying forward of annual leave or part thereof to the following year may be inevitable [47] because a period of leave guaranteed by Community law may not affect the right to take another period of leave guaranteed by that law. [48]

75. Although pregnancy certainly cannot be equated with a pathological condition, several grounds can be adduced for applying this case-law *mutatis mutandis* to the relationship between annual leave and sick leave. Like maternity leave, sick leave is intended to safeguard the physical and psychological integrity of the worker by giving him or her an opportunity, through exemption from work and the grant of a period of rest, to recover physically and reintegrate into the workplace. Unlike annual leave, which serves to provide rest, time to recover, and recuperation, sick leave is therefore intended solely to provide convalescence and healing, that is to say, to cure a pathological condition the causes of which, moreover, lie outside the sphere of influence of the worker concerned. [49]

76. In this respect it is necessary to concur with the view taken by the Italian and Polish Governments and state that, having regard to the principles developed by the Court, it is not possible to conclude that sick and annual leave may coincide in the same period if the different purposes of recuperative leave and sick leave are not to be brought into question. On the basis of the principle underpinning the abovementioned case-law, the grant of sick leave to the detriment of paid annual leave must be prohibited since otherwise this fundamental right could be deprived of its substance.

45 — *Merino Gómez*, cited in footnote 24, paragraph 32; Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 41; Case C-136/95 *Thibaut* [1998] ECR I-2011, paragraph 25; Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 20; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 21; and Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25.

46 — *Merino Gómez*, cited in footnote 24, paragraph 38.

47 — *Federatie Nederlandse Vakbeweging*, cited in footnote 24, paragraph 24, and Case C-519/03 *Commission* v *Luxembourg* [2005] ECR I-3067, paragraph 33.

48 — *Federatie Nederlandse Vakbeweging*, cited in footnote 24, paragraph 24, *Commission* v *Luxembourg*, cited in footnote 47, paragraph 33, and *Merino Gómez*, cited in footnote 24, paragraph 41.

49 — S. González Ortega, loc. cit. in footnote 22, p. 432, states that the first stage of maternity leave is intended to allow the mother to recover physically and to protect her biological condition following the birth. It therefore serves a different purpose from the second stage of this leave, which is to allow the mother to care for her child and to promote the relationship which exists between a mother and her child. The author draws parallels between this first stage of maternity leave and sick leave and therefore advocates the application *mutatis mutandis* of case-law on the relationship between maternity and annual leave to the relationship between sick leave and annual leave.

(c) Incompatibility with the spirit and purpose of Article 7(1) of Directive 2003/88

77. In addition to the doubts expressed concerning an interpretation of Article 7(1) of Directive 2003/88 which grants a worker an opportunity to take his annual leave while on sick leave, it can further be argued that such an interpretation would be incompatible with the purpose of Directive 2003/88 to improve workers' health and safety.

78. At first view the grant of such an opportunity would appear to be an extension of the rights which he can claim and thus legally advantageous. Furthermore, a worker taking annual leave is quite often put in a better financial situation than if he were on sick leave since during his annual leave he enjoys the right to continued payment of his wages under Article 7(1) of Directive 2003/88 without any reduction, whilst his right to continued payment of wages in the event of illness under the relevant national rules is only a fraction thereof. This is the case, for example, in the main action since, according to the information provided by the referring court, [50] Regulation 16(1) WTR provides for payment at the rate of a week's pay in respect of each week of leave. On the other hand, as stated by the United Kingdom Government in the written procedure [51] and clarified at the request of the Court at the hearing, the contractual arrangements with the appellants for cases of illness provided for six months' sick leave on full pay followed by six months on half normal pay.

79. However, on more detailed legal examination the exercise of this right by the worker would amount to waiving a fundamental right [52] in return for continued payment of his normal wages. On account of their purpose the two types of leave are not interchangeable and are therefore mutually exclusive, as the Slovene Government correctly stated. The overlapping of annual leave and periods of illness associated with the exercise of the entitlement to annual leave would result in a voluntary waiver of the right

50 — Paragraph 13 of the order for reference of the House of Lords of 13 December 2006.

51 — Paragraph 22 of the UK Government's observations of 13 April 2007.

52 — According to P. Fischinger, 'Der Grundrechtsverzicht', *Juristische Schulung* (2007), Issue 9, p. 808, waiver of a fundamental right is to be construed as meaning the agreement by the holder of a fundament right to specific impairment of and prejudice to fundamental rights. What is not meant, however, is a permanent, complete and in practice scarcely imaginable complete waiver of the protection afforded by one or more fundamental rights. A strict distinction must also be drawn between a waiver of a fundamental right construed thus and purely factual non-exercise of a fundamental right. In contrast to purely factual non-exercise of fundamental freedoms, a legal element is inherent in a waiver since the person granting consent is bound by the agreement in such a way that he cannot subsequently plead that his fundamental right was unlawfully impaired. The so-called 'negative dimension' to fundamental rights, which implies, for example, the right of the individual to have no opinion or not belong to any school of thought, likewise has no connection with the waiver of a fundamental right. In the view of R. Adam, Der 'Grundrechtsverzicht des Arbeitnehmers', *Arbeit und Recht* (2005), Issue 4, p. 130, such a waiver obtains where a worker's fundamental right is restricted by a contract or the employer's management power without mutual concessions such as in the case of a settlement. Where a right to leave is exercised during periods of illness there can be no question of any concession by the employer since he merely undertakes to pay the worker his normal pay without the employee being compensated for sacrificing his annual leave.

to leave in so far as a worker would, by exercising this right, agree not to use annual leave for the purpose for which it was actually intended in return for a financial allowance.

80. In my view, such a waiver cannot be declared compatible with Community law without frustrating the legislative aim of Article 7 of Directive 2003/88. Not only would the intended recovery function of the right to annual leave be thwarted if this right were exercised inappropriately, and thus in abuse of rights,[53] during periods of illness. Such a possibility of waiving leave also poses certain risks to workers' rights, as the Commission has correctly stated. The prospect of greater continued pay during periods of illness could create an incentive for workers to accept the loss of this legal position. Moreover, there is a danger that an employer might encourage an employee to waive that position.[54] However, such an agreement between the parties to the employment contract, which essentially provides for the 'redeeming' of annual leave, would clearly run counter to the rule contained in Article 7(2) of Directive 2003/88, which expressly provides that the minimum period of paid annual leave may not be replaced by an allowance in lieu. Such a rule would also be contrary to the employer's interests since, despite paying greater payment for leave, he could not require an employee actually to use the leave taken to convalesce in order to recovery his capacity for work.

81. In order to protect employees and employers and to avoid undermining the fundamental right to a minimum period of paid annual leave enshrined in Community law, it must be concluded that this fundamental right is in principle not available to an employee to do with it as he wishes and therefore he is unable to waive it with legal effect.

53 — Abuse of rights is defined as the inappropriate use of a legal position and limits the possibility of exercising an existing right. This means that the exercise of a formal legal entitlement is restricted by the principle of good faith. Even a person who has a formally enforceable right may not exercise that right abusively. See, to similar effect, Creifelds, *Rechtswörterbuch* (edited by Klaus Weber), 17th edition, Munich 2002, p. 1109, according to which the exercise of a subjective right is abusive where, although it is formally consistent with the law, it is exercised in bad faith by reason of the particular circumstances of the individual case.

54 — At point 32 of her Opinion in *Federatie Nederlandse Vakbeweging* (judgment cited in footnote 24), Advocate General Kokott pointed to a similar risk in the case of financial compensation in respect of the minimum period of annual leave carried over. In her view this possibility would create incentives, incompatible with the objectives of the Working Time Directive, not to take annual leave or to encourage employees not to do so.

5. Conclusion

82. Consequently, it follows from the foregoing considerations that the existence of the right to paid annual leave cannot be made

subject to a worker's capacity for work and therefore in principle a worker rendered incapable of work through illness has a corresponding right to annual leave under Article 7(1) of Directive 2003/88. However, he may not take this leave during a period in which he is otherwise on sick leave.

B — *The second question*

83. The second question referred concerns the legislative scope of the entitlement to an allowance in lieu provided for in Article 7(2) of Directive 2003/88. An allowance in lieu, that is to say, payment for untaken annual leave, replaces time off work where leave can no longer be granted on the ground that the employment relationship concerned has been terminated. This entitlement constitutes the only derogation from the fundamental prohibition of compensation laid down by the directive which otherwise categorically prohibits the parties to an employment contract from replacing annual leave by an allowance in lieu, irrespective of whether it is to be taken in the current year or in the carry-over period.

84. According to the Court's case-law, that prohibition is intended to ensure that a worker is normally entitled to actual rest, with a view to ensuring effective protection of his health and safety. [55] This is intended to prevent the abusive 'redemption' of the right to leave by the employer or the waiver thereof by the employee for purely financial reasons. [56]

85. Article 7(2) of Directive 2003/88 underlines the function of maintaining pay during a period of leave, which consists in putting the worker, during that period, in a position which is, as regards remuneration, comparable to periods of work. [57] In other words, the requirement to make this payment for leave ensures that the worker is financially capable of actually taking his annual leave. [58] The allowance in lieu has no other purpose. The allowance in lieu is intended, in principle, to enable a worker, even following termination of the employment relationship, to take a period of paid rest before embarking on a new employment relationship. [59] The withdrawal of this allowance would mean that the objective, pursued by Directive 2003/88, of allowing employees to recover could not be attained.

55 — *BECTU*, cited in footnote 7, paragraph 44, *Merino Gómez*, cited in footnote 24, paragraph 30, and *Robinson-Steele and Others*, cited in footnote 26, paragraph 60.

56 — In *Federatie Nederlandse Vakbeweging*, cited in footnote 24, paragraph 32, the Court ruled that the possibility of financial compensation in respect of the minimum period of annual leave would create an incentive, incompatible with the objectives of the directive, not to take leave or to encourage employees not to do so. M. Fenski, 'Urlaubsrecht im Umbruch?', *Der Betrieb*, Issue 12 (2007), p. 688, and K. Jacobsen, *Münchener Anwaltshandbuch Arbeitsrecht* (edited by Wilhelm Moll), 1st edition 2005, § 25, paragraph 102, refer to the unlawful practice of 'redeeming' leave during an existing employment relationship.

57 — *Robinson-Steele and Others*, cited in footnote 26, paragraph 58.

58 — A. L. Bogg, 'The right to paid annual leave in the Court of Justice: the eclipse of functionalism', *European Law Review*, volume 31 (2006), No 6, p. 899.

59 — See also, to this effect, Advocate General Tizzano in his Opinion in *BECTU* (judgment cited in footnote 7), point 38.

86. In *Robinson-Steele and Others*,[60] the Court ruled that Directive 2003/88 treats entitlement to annual leave and to a payment on that account as being two aspects of a single right. In my view, precisely this identical function of the entitlement to pay and an allowance in lieu militates in favour of treating the latter as an inseparable aspect of the entitlement to a minimum period of paid annual leave.

87. In that respect the answer to the second question follows from my comments on the first limb of the first question. In addition, in this context I would like to refer to the conclusions at points 77 and 78 of my Opinion in Case C-350/06 *Schultz-Hoff*, which is also pending. According to that Opinion, not only may the entitlement to paid annual leave not be made subject to the worker's capacity for work. Rather, it follows from a teleological interpretation of Article 7 of Directive 2003/88 and the rationale underlying Article 5(4) of ILO Convention No 132 that a period of illness must be equated with a period of service since the absence is due to reasons beyond the control of the worker and is therefore justified.

88. Therefore, all of the worker's entitlements arise during the same period, including the entitlement to paid annual leave, which can be taken when capacity for work is restored or which — if the employment relationship is terminated — is replaced by a payment in lieu even where complete incapacity for work occurs.

89. Therefore, the answer to the second question must be that where an employment relationship is terminated workers are in any event entitled under Article 7(2) of Directive 2003/88 to an allowance in lieu as a replacement for leave which has been acquired but not taken due to illness. This is also the case where the worker was on sick leave for all or part of the leave year in question.

90. As regards the broader question concerning calculation of the compensation due, the answer must be that Article 7(2) of Directive 2003/88 does not lay down any particular method of calculation and instead leaves the adoption of precise rules to the national legislature. However, in so far as workers are in principle entitled to an allowance in lieu, in the assessment of the amount of this entitlement account must be taken of the fact that the worker had originally acquired an entitlement in the amount of his normal pay. This gives rise to the requirement on the Member States under Article 7(2) of Directive 2003/88 to ensure that the amount of the allowance in lieu that the worker receives is equivalent to that of his normal pay.

60 — *Robinson-Steele and Others*, cited in footnote 26, paragraph 58.

VII — Conclusion

91. In view of all the foregoing considerations, I suggest that the Court reply as follows to the questions submitted to it by the House of Lords for a preliminary ruling:

(1) Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be construed as meaning that a worker on indefinite sick leave is entitled to designate a future period as paid annual leave, during a period in which he would otherwise be on sick leave.

However, he may not take this leave during a period in which he would otherwise be on sick leave.

(2) Article 7(2) of Directive 2003/88 must be construed as meaning that, where an employment relationship is terminated, workers are in any event entitled to a compensatory payment as a replacement for leave which has been acquired but not taken due to illness (allowance in lieu). This is also the case where the worker was on sick leave for all or part of the leave year in question.

In assessing the amount of this entitlement it is necessary to ensure that the amount of the allowance in lieu that the worker receives is equivalent to that of his normal pay.