Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

19 September 2013*

(Social policy — Directive 92/85/EEC — Protection of the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding — Article 8 — Maternity leave — Directive 76/207/EEC — Equal treatment for male and female workers — Article 2(1) and (3) — Right to leave for employed mothers after the birth of a child — Possible use by an employed mother or an employed father — Non-employed mother who is not covered by a State social security scheme — No right to leave for employed father — Biological father and adoptive father — Principle of equal treatment)

In Case C-5/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social nº 1 de Lleida (Spain), made by decision of 21 December 2011, received at the Court on 3 January 2012, in the proceedings

Marc Betriu Montull

v

Instituto Nacional de la Seguridad Social (INSS),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 February 2013,

after considering the observations submitted on behalf of:

— the Instituto Nacional de la Seguridad Social (INSS), by P. García Perea and A.R. Trillo García, acting as Agents,

— the Spanish Government, by A. Rubio González, acting as Agent,

— the Polish Government, by B. Majczyna and by J. Faldyga and A. Siwek, acting as Agents,

* Language of the case: Spanish.

— the European Commission, by M. van Beek and by C. Gheorghiu and S. Pardo Quintillán, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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), Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4), as amended by Council Directive 97/75/EC of 15 December 1997 (OJ 1998 L 10, p. 24) ('Directive 96/34') and of the principle of equal treatment laid down by European Union law.

2 The request has been made in proceedings between Mr Betriu Montull and the Instituto Nacional de la Seguridad Social ('the INSS') (National Social Security Agency) concerning the refusal to grant him maternity benefit because his child's mother is not covered by a State social security scheme.

Legal context

International law

3 Under Article 10(2) of the International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations General Assembly on 16 December 1966 and which entered into force on 3 January 1976:

'Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.'

European Union law

Directive 76/207

4 Directive 76/207, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15), was repealed, with effect from 15 August 2009, by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23). However, taking into account when the facts giving rise to the dispute in the main proceedings occurred, those proceedings remain governed by the initial version of Directive 76/207.

5 Article 1(1) of Directive 76/207 stated:

‘The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as “the principle of equal treatment”.’

6 Article 2(1) and (3) of Directive 76/207 was worded as follows:

‘(1) For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

...

(3) This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.’

7 Article 5 of Directive 76/207 provided:

‘(1) Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

(2) To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended;

(c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.’

Directive 92/85/EEC

8 Article 8 of 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1), concerning maternity leave, provides:

‘(1) Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

(2) The maternity leave stipulated in paragraph 1 must include compulsory maternity leave of at least two weeks allocated before and/or after confinement in accordance with national legislation and/or practice.'

Directive 96/34

9 The purpose of Directive 96/34, repealed by Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, was to put into effect the Framework Agreement on parental leave concluded between the general cross-industry organisations, that is to say the Union of Industrial and Employers' Confederations of Europe (UNICE), the European Centre of Employers and Enterprises promoting Public services (CEEP) and the European Trade Union Confederation (ETUC).

10 The Framework Agreement on parental leave, concluded on 14 December 1995 and which is contained in the annex to Directive 96/34 ('the Framework Agreement on parental leave'), set out minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.

11 Paragraph 9 of the general considerations of the Framework Agreement on parental leave was worded as follows:

'Whereas the present agreement is a framework agreement setting out minimum requirements and provisions for parental leave, distinct from maternity leave …'

12 Clause 2.1 of the Framework Agreement on parental leave stipulated as follows:

'This agreement grants, subject to Clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.'

Spanish law

13 The Workers' Statute, in the version resulting from Royal Legislative Decree 1/1995 approving the recast text of the Law on the Workers' Statute (Real Decreto Legislativo 1/1995 por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores) of 24 March 1995 (BOE No 75 of 29 March 1995, p. 9654), was amended by Law 39/1999 on the reconciliation of work and family life for employees (Ley 39/1999 para promover la conciliación de la vida familiar y laboral de las personas trabajadoras) of 5 November 1999 (BOE No 266 of 6 November 1999, p. 38934) ('the Workers' Statute').

14 Under Article 1(1) of the Workers' Statute, that statute applies to persons who voluntarily offer their services in return for payment by another within an organisation and under the direction of a natural or legal person, known as 'the employer or undertaking'.

15 Article 1(3) of that Statute makes clear that any activity performed outside the scope of Article 1(1) is to be excluded from the scope of the Workers' Statute.

16 Article 48(4) of the Workers' Statute states:

'In the case of childbirth, the contract shall be suspended for a continuous period of 16 weeks, which may be extended where there are multiple births by 2 weeks per child, starting with the second child. The period of suspension shall be allocated in accordance with the wishes of the person concerned on condition that six weeks are taken immediately following childbirth. In case of the mother's decease, the other parent may use all or, as the case may be, the remaining part of the period of suspension.

Notwithstanding the foregoing, and without prejudice to the period of compulsory leave for the mother during the six weeks immediately following the birth, where both parents work, the mother may, at the beginning of the maternity leave, elect for the other parent to take a designated and continuous part of the period of leave after the birth, either concurrently with or consecutive to that taken by the mother, except where, at the time she is about to do so, the mother's return to work would endanger her health.

...

In cases of adoption and fostering, whether preliminary to an adoption or permanent, of children up to the age of six, the contract shall be suspended for a continuous period of 16 weeks, which may be extended in the case of multiple adoptions or fostering by 2 additional weeks per minor child, starting with the second child, running either from the date of the adoption order or from the date of the administrative or judicial decision to place the child in foster care temporarily or permanently, at the worker's election. The contract shall also be suspended for a period of 16 weeks in the case of adoption or fostering of children over six years of age who have a disability or handicap or who, according to the relevant social services reports, have particular problems adapting to family and social life due to their circumstances or personal history or due to the fact that they originate in a country other than Spain. Where both parents work, the leave shall be allocated in accordance with the wishes of the persons concerned, who may take it concurrently or consecutively, provided that the periods of leave are continuous and fall within the limits set out.

In cases where the leave is taken concurrently, the total amount of the two periods of leave may not exceed the 16-week period referred to in the preceding paragraphs or such other period as may be applicable in the case of multiple births, adoptions or fostering.

The leave to which this article refers can be taken on a full-time or a part-time basis, subject to prior agreement between the employer and the worker in question, on such conditions as may be determined by legislation.

...'

17 Article 48(4) of the Workers' Statute was amended following occurrence of the facts giving rise to the dispute in the main proceedings by Organic Law 3/2007 on effective equality between women and men (Ley orgánica 3/2007 para la igualdad efectiva de mujeres y hombres) of 22 March 2007 (BOE No 71 of 23 March 2007, p. 12611). That provision was inter alia amended as follows:

'...

Notwithstanding the foregoing, and without prejudice to the period of compulsory leave for the mother during the six weeks immediately following the birth, where both parents work, the mother may, at the beginning of the maternity leave, elect for the other parent to take a designated and continuous part of the period of leave after the birth, either concurrently with or consecutive to that taken by the mother.

The other parent may continue to use the maternity leave initially transferred even if, at the time the mother plans to return to work, she is temporarily unfit to do so.

Where, by virtue of the legislation governing the mother's work, she is not entitled to suspend her employment and take paid leave, the other parent shall be entitled to suspend his contract of employment for the period which would have been applicable to the mother, and this shall be consistent with exercising the right provided for in the following article.

...'

18 The General Law on social security (Ley General de la Seguridad Social) was adopted by Royal Legislative Decree 1/1994 of 20 June 1994 (BOE No 154 of 29 June 1994, p. 20658) and amended by Law 39/1999 ('the General Law on social security'). Article 133a of that law states as follows:

'Childbirth, adoption and fostering (whether preliminary to an adoption or permanent) shall, for the purposes of maternity benefit, be deemed situations which are covered, for the duration of the periods of leave which may be taken in these circumstances, under Article 48(4) of the recast text of the Workers' Statute, approved by Royal Legislative Decree 1/1995 of 24 March 1995, and Article 30(3) of Law 30/1984 on measures to reform the civil service [ley de Medidas para la Reforma de la Función Pública].'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 According to the order for reference and the observations submitted to the Court, Mr Betriu Montull is an employee covered by the general social security system, which is part of the Spanish State social security system. Ms Macarena Ollé is a Procuradora de los Tribunales (a lawyer). The profession of Procurador de los Tribunales, which is exercised on a self-employed basis, involves the representation of clients in legal proceedings in cases prescribed by law.

20 When the facts in the main proceedings occurred, a Procurador de los Tribunales could inter alia choose to be covered by the special scheme for self-employed workers (Régimen Especial de Trabajadores Autónomos), which is an integral part of the State social security system, or the lawyers' mutual insurance scheme (Mutualidad General de los Procuradores), an occupational scheme independent of the State social security scheme. The special scheme for self-employed workers allowed for maternity leave, unlike the lawyers' mutual scheme, which provided only for an allowance. Ms Ollé had opted to be covered by that mutual scheme.

21 Following the birth of Ms Ollé and Mr Betriu Montull's son in Lleida on 20 April 2004, Mr Betriu Montull applied for the maternity benefit provided for in Article 133a of the General Law on social security, which is intended to compensate for the loss of income from employment for the parent as a result of the suspension of their employment contract in the context of the 16-week maternity leave. Mr Betriu Montull's request related to the period of 10 weeks following the 6 weeks' compulsory leave which the mother must take immediately following childbirth, referred to in Article 48(4) of the Workers' Statute.

22 By decisions of 28 July and 8 August 2004, the INSS refused to grant Mr Betriu Montull that maternity benefit, on the ground that, under Article 133a of the general law on social security, in conjunction with Article 48(4) of the Workers' Statute, the right to leave is a right of mothers who are covered by a State social security scheme and that, in the case of biological parenthood, the father does not have his own autonomous, separate right to leave, independent of the mother's right, but only a right which necessarily derives from that of the mother. In the present case, since Ms Ollé is not covered by any State social security scheme, she does not herself have a primary right to maternity leave, meaning that Mr Betriu Montull cannot enjoy leave or, therefore, the maternity benefit which goes with it.

23 Mr Betriu Montull brought an action contesting those decisions of the INSS before the Juzgado de lo Social nº 1 de Lleida (Social Court No 1, Lleida) (Spain), seeking a ruling to the effect that he was entitled to maternity benefit. He argued, inter alia, that his right to equal treatment had been infringed in so far as, in the case of adoption or fostering of minors younger than six years of age, Article 48(4) of the Workers' Statute provides that each parent has their own primary right to maternity leave.

24 By order of 20 April 2005, the Juzgado de lo Social nº 1 de Lleida referred to the Tribunal Constitucional (Constitutional Court) a question concerning the conformity of Article 48(4) of the Workers' Statute with the Spanish Constitution.

25 By judgment of 19 May 2011, the Tribunal Constitutional ruled that Article 48(4) of the Workers' Statute was not contrary to Article 14 of the Spanish Constitution, which declares that everyone is equal before the law, to Article 39 thereof, which enshrines the protection of the family and children or, finally, to Article 41 thereof, concerning social security.

26 However, the Juzgado de lo Social nº 1 de Lleida has doubts about the compatibility with European Union law of Article 48(4) of the Workers' Statute.

27 In that regard, the referring court states that that provision provides for a six-week period of compulsory leave for the mother following childbirth, a period during which the father cannot take maternity leave and that that difference in treatment of the mother and the father, which is not a matter of dispute between the parties to the main proceedings, is justified by the protection given to the mother owing to her having given birth.

28 On the other hand, in respect of the period of 10 weeks following those six weeks of compulsory leave for the mother, although the situation of the father and that of the mother, who are employees, is comparable, they are treated differently in so far as the father's right is framed as a right which derives from that of the mother. In that regard, according to the referring court, that period of 10 weeks must be understood as parental leave and as a measure intended to reconcile work and family life, since the biological fact of the pregnancy and birth, which affect only the woman, is covered by the period of compulsory leave for the mother. For that reason, the mother or the father without distinction must be able to take the leave in question in the context of the dispute in the main proceedings, where both are employed and in their capacity as parents of the child.

29 In addition, Article 48(4) of the Workers' Statute treats biological fathers and adoptive fathers differently. In the case of adoption, that provision allows the father and the mother to allocate the period of leave after birth between them as they wish, since such a right to leave does not primarily belong to the mother. Thus, in the case of adoption, an employed father covered by a State social security scheme can take the whole of the maternity leave and receive the corresponding benefit, even where the mother is not an employee covered by a State social security scheme, whereas in the case of childbirth, the biological father in employment cannot take any leave where the mother is not covered by a State social security scheme.

30 In those circumstances, the Juzgado de lo Social nº 1 de Lleida decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does a provision of national law, specifically Article 48(4) of the Workers' Statute, which, in the case of childbirth – once the six-week period following the birth has elapsed and except in cases where the mother's health is at risk – recognises employed mothers as holders of a primary and autonomous right to maternity leave and employed fathers as holders of a secondary right, which can be enjoyed only where the mother is also an employed person and elects for the father to take a designated part of that leave, contravene Directive 76/207 … and Directive 96/34 …?

(2) Does a provision of national law, specifically Article 48(4) of the Workers' Statute, which, in the case of childbirth recognises the primary right of mothers, but not of fathers – even after the six-week period following the birth has elapsed and except in cases where the mother's health is at risk – to suspend their contract of employment and to return to the same job, paid for by the social security system, so that the taking of leave by a male employee is dependent on the child's mother also being an employed person, contravene the principle of equal treatment, which prohibits any discrimination on grounds of sex?

(3) Does a provision of national law, specifically Article 48(4) of the Workers' Statute, which recognises employed fathers as holders of a primary right to suspend their contract of employment and to return to the same job, paid for by the social security system, when they adopt a child but, by contrast, when they father their own child, does not give employed fathers their own autonomous right, independent of that of the mother, to suspend the contract, recognising only a right deriving from that of the mother, contravene the principle of equal treatment, which prohibits discrimination?'

Admissibility of the question referred for a preliminary ruling

31 The Spanish Government argues that the questions are hypothetical and, consequently, that the request for a preliminary ruling should be dismissed as inadmissible. According to the order for reference, the refusal of the maternity benefit requested by Mr Betriu Montull was based on Article 133a of the General Law on social security, which assumes that the worker is entitled to the leave provided for in Article 48(4) of the Workers' Statute under his employment contract. However, the order for reference gives no indication as to whether Mr Betriu Montull took such leave or, at least, whether he requested it from his employer. On the contrary, according to that decision, Mr Betriu Montull did not obtain that leave under his employment contract on the ground that that leave entitlement is a primary right of the child's mother.

32 Furthermore, at the hearing, the INSS contended that the questions referred for a preliminary ruling are inadmissible on the ground that a reply given nine years after childbirth is of no use to the referring court, the grant of the leave provided for in Article 48(4) of the Workers' Statute and of the maternity benefit having become impossible.

33 In that regard, it must be borne in mind that, in proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and the Court of Justice, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling (see, inter alia, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43, and Case C-534/11 *Arslan* [2013] ECR, paragraph 33).

34 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, for example, *Lucchini*, paragraph 44, and Case C-290/12 *Della Rocca* [2013] ECR, paragraph 29).

35 In the present case, it is clear from the request for a preliminary ruling that an interpretation of European Union law is required in order to resolve the dispute in the main proceedings.

36 Article 133a of the General Law on social security states that childbirth, adoption and fostering are, for the purposes of maternity benefit, to be deemed situations which are covered, for the duration of the periods of leave which may be taken in those circumstances, under Article 48(4) of the Workers' Statute, which lays down the conditions under which the father or mother's employment contract may be suspended. As a result, as stated by the Spanish Government, the worker, in order to be entitled to maternity benefit, must be entitled to the leave provided for in Article 48(4) of the Workers' Statute.

37 Mr Betriu Montull could not receive the maternity benefit provided for under Article 133a of the General Law on social security on the ground that, applying Article 48(4) of the Workers' Statute, he did not have a right of his own to maternity leave and that, since Ms Ollé was not covered by a State social security scheme, he had no derived right to that leave.

38 Thus, it must be examined whether European Union law, in a situation such as that at issue in the main proceedings, precisely permits the father of the child to take all or part of the maternity leave provided for under Article 48(4) of the Workers' Statute, which would confer on him, in the affirmative, the right to receive the related maternity benefit.

39 In those circumstances, the request for a preliminary ruling must be regarded as admissible.

Consideration of the questions referred

The first and second questions

Preliminary observations

40 In the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it. The Court has a duty to interpret all provisions of European Union law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts (see, inter alia, Case C-243/09 *Fuß* [2010] ECR I-9849, paragraph 39, and Case C-342/12 *Worten* [2013] ECR, paragraph 30).

41 Consequently, even if, formally, the referring court has limited its questions to the interpretation only of the provisions of Directives 76/207 and 96/34, that does not prevent this Court from providing the referring court with all the elements of interpretation of European Union law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in this regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of European Union law which require interpretation in view of the subject matter of the dispute (see *Fuß*, paragraph 40, and *Worten*, paragraph 31).

42 In the present case, the national court seeks to ascertain whether Mr Betriu Montull is entitled to receive maternity benefit in respect of the birth of his son. As stated in paragraph 38 above, that question makes it necessary to examine whether Mr Betriu Montull is entitled to the leave provided for under Article 48(4) of the Workers' Statute.

43 In that regard, it should be pointed out that under that provision, first, the mother's contract is suspended for a continuous period of 16 weeks, that period of suspension being allocated in accordance with the wishes of the person concerned, provided that a compulsory 6 weeks are taken

immediately after childbirth. Second, Article 48(4) of the Workers' Statute permits the mother, where both parents work, to elect for the father to take all or part of a maximum of 10 weeks out of the 16 weeks of maternity leave except where, at the time she is about to do so, the mother's return to work would endanger her health.

44 In those circumstances, in order to respond usefully to the referring court, and as contended by the Spanish Government, Directive 92/85 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 must be taken into account, even if that directive is not explicitly mentioned in the order for reference.

45 The leave in question in the main proceedings must be taken when the child is born. Article 8 of Directive 92/85 precisely guarantees a right to maternity leave of at least 14 continuous weeks, including a period of compulsory leave of at least 2 weeks allocated before and/or after confinement in accordance with national legislation and/or practice. In addition, the fact that legislation grants women maternity leave of more than 14 weeks does not preclude that leave from being considered to be maternity leave as referred to in Article 8 of Directive 92/85 (see Case C-284/02 *Sass* [2004] ECR I-11143, paragraph 44).

46 Furthermore, while the referring court appears to consider that the period of leave after the six weeks which the mother must take following childbirth must be regarded as parental leave within the meaning of Directive 96/34, there is no information in the order for reference relating to the content of the national legislative rules on parental leave which would make it possible to reply to the questions referred in the light of that directive. In that regard, as stated by the INSS and the Spanish Government, Article 48(4) of the Workers' Statute, which is the exclusive subject of the three questions referred by the national court, does not concern parental leave within the meaning of Directive 96/34.

47 Accordingly, the first and second questions referred must be understood as seeking, in essence, to ascertain whether Directives 92/85 and 76/207 must be interpreted as precluding a national measure, such as that at issue in the main proceedings, which provides that the father of a child, who is an employed person, is entitled, with the consent of the mother, who is also an employed person, to take maternity leave for the period following the six weeks of compulsory leave which the mother must take after childbirth except where her health would be at risk, whereas the father of a child who is an employed person is not entitled to take such leave where the mother of his child is not an employed person and is not covered by a State social security scheme.

Substance

48 According to the case-law of the Court, the right to maternity leave granted to pregnant workers must be regarded as a particularly important mechanism of protection under employment law. The European Union legislature thus considered that the fundamental changes to the living conditions of the persons concerned during the period of at least 14 weeks preceding and after childbirth constituted a legitimate ground on which they could suspend their employment, without the public authorities or employers being allowed in whatever way to call the legitimacy of that ground into question (see Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 49).

49 Pregnant workers and workers who have recently given birth or who are breastfeeding are in an especially vulnerable situation which makes it necessary for the right to maternity leave to be granted to them but which, particularly during that leave, cannot be compared to that of a man or a woman on sick leave (Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 40).

50 That maternity leave from which the female worker benefits 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 over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment (see, inter alia, Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25, and *Kiiski*, paragraph 46).

51 It must be examined whether Directive 92/85 precludes a mother who has the status of an employed person from electing that the father who also has that status will take all or part of the maternity leave for the period after the mother's weeks of compulsory leave following childbirth.

52 In that regard, Article 8(1) of Directive 92/85 provides that Member States are to take the necessary measures to ensure that women workers are entitled to a continuous period of maternity leave of 'at least' 14 weeks, allocated before and/or after confinement in accordance with national legislation and/or practice.

53 In the present case, Article 48(4) of the Workers' Statute, by providing for a period of 16 weeks' continuous maternity leave for the mother, goes further than the minimum provisions of Article 8(1) of Directive 92/85.

54 In addition, Article 8(2) of Directive 92/85 states that the maternity leave must include compulsory maternity leave of 'at least' two weeks, allocated before and/or after confinement in accordance with national legislation and/or practice.

55 Article 48(4) of the Workers' Statute, which provides that the mother must take six weeks' compulsory leave immediately after childbirth, also goes beyond those minimum provisions.

56 It must be added, as follows from the case-law cited in paragraph 48 above, that a woman's right to suspend her employment during that limited period of at least 14 weeks which precedes and follows childbirth may not be called into question, in whatever way, by the public authorities or by employers. Consequently, the maternity leave provided for under Article 8 of Directive 92/85 may not be withdrawn from the mother against her will so as to be assigned, in whole or in part, to the child's father.

57 By contrast, according to the case-law of the Court, although the Member States are required, pursuant to Article 8 of Directive 92/85, to take the necessary measures to ensure that women workers are entitled to a period of maternity leave of at least 14 weeks, those workers may waive that right, with the exception of the 2 weeks' compulsory maternity leave provided for in Article 8(2) of Directive 92/85 (*Boyle and Others*, paragraph 58).

58 Consequently, Directive 92/85 does not preclude the mother of the child who has the status of an employed person from deciding that the child's father, who has the same status, will take all or part of the maternity leave in respect of the period after the period of compulsory leave.

59 That directive also does not preclude such a father from not being entitled to such leave where the child's mother is self-employed and not an employed person and where she has chosen not to be covered by a State social security scheme which guarantees her such leave. Such a situation does not fall within the scope of Directive 92/85, which covers only pregnant workers and workers who have recently given birth or are breastfeeding and who work under the direction of an employer.

60 With regard to Directive 76/207, the measure at issue in the main proceedings establishes a difference on grounds of sex, within the meaning of Article 2(1) of that directive, as between mothers who are employed persons and fathers with the same status. That measure reserves the right to maternity leave at issue in the main proceedings to the mothers of children who are employed persons, the

father of a child being entitled to that leave only on the condition that he is also an employed person and that the mother confers on him all or part of the available leave, in so far as the mother's return to work does not entail a risk to her health.

61 With regard to the justification for such a difference in treatment, Article 2(3) of Directive 76/207 lays down that that directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity (see Case C-104/09 *Roca Álvarez* [2010] ECR I-8661, paragraph 26).

62 In that regard, the Court has repeatedly held that, by reserving to the Member States the right to retain or introduce provisions which are intended to protect women in connection with pregnancy and maternity, Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, 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 childbirth (see, inter alia, *Hofmann*, paragraph 2, and *Roca Álvarez*, paragraph 27).

63 A measure such as that at issue in the main proceedings is, in any event, intended to protect a woman's biological condition during and after pregnancy.

64 Moreover, in a case such as that in the main proceedings, the mother of a child who is a self-employed person not covered by a State social security scheme does not enjoy any primary right to maternity leave. Consequently, the mother of the child does not have a right to such leave which she could grant to the father of that child.

65 It follows that, in those circumstances, Directive 76/207 does not preclude a measure such as that at issue in the main proceedings.

66 In the light of the foregoing considerations, the answer to the first and second questions as reformulated is that Directives 92/85 and 76/207 must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which provides that the father of a child, who is an employed person, is entitled, with the consent of the mother, who is also an employed person, to take maternity leave for the period following the compulsory leave of six weeks which the mother must take after childbirth except where the mother's health would be at risk, whereas a father of a child who is an employed person is not entitled to take such leave where the mother of his child is not an employed person and is not covered by a State social security scheme.

The third question

67 By its third question, the referring court asks, in essence, whether the principle of equal treatment enshrined in European Union law must be interpreted as precluding a national measure such as that at issue in the main proceedings which provides that an employed person has the right to maternity leave where he adopts a child, even if the adoptive mother is not an employed person, whereas an employed person who fathers his own child is entitled to such leave only where the mother of that child is also an employed person.

68 It should be recalled that, in the context of a request for a preliminary ruling under Article 267 TFEU, the Court may interpret the law of the European Union only within the limits of the powers conferred on it (see Case C-400/10 PPU *McB.* [2010] ECR I-8965, paragraph 51, and order of the Court of 6 July 2012 in Case C-16/12 *Hermes Hitel és Faktor,* not published in the ECR, paragraph 13).

69 According to settled case-law, where national legislation falls within the scope of application of European Union law, the Court, in a request for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation

with European Union law the observance of which the Court ensures. By contrast, the Court has no such jurisdiction where, first, the subject matter of the dispute in the main proceedings has no link with European Union law and, second, the legislation the interpretation of which is sought lies outside the scope of European Union law (see Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 15, and order in *Hermes Hitel és Faktor*, paragraph 14).

70 With regard to the requirements arising from the general principles of European Union law and from the protection of fundamental rights, it is settled case-law that they bind the Member States in all cases where they are called upon to apply European Union law (see Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 23, and order in *Hermes Hitel és Faktor*, paragraph 15).

71 In the present case, the third question concerns the application of the principle of equal treatment enshrined in European Union law to biological fathers and to adoptive fathers in relation to maternity leave such as that provided for in Article 48(4) of the Workers' Statute.

72 However, it must be held that the legislation applicable to the dispute in the main proceedings concerns a situation which does not fall within the scope of European Union law.

73 As the Advocate General stated in point 82 of his Opinion, at the time of the facts in the main proceedings, there was no prohibition in the EC Treaty, in any European Union directive or in any other provision of European Union law of discrimination between the adoptive father and the biological father in relation to maternity leave.

74 Furthermore, whereas, under Clause 2.1 of the Framework Agreement on parental leave, an individual right to parental leave is granted to men and women workers on the grounds of the birth or adoption of a child, it must be observed that, as is stated in paragraph 46 above, the order for reference does not contain any information on the content of national legislation relating to parental leave which would make it possible to reply to the questions referred in the light of Directive 96/34 and that Article 48(4) of the Workers' Statute does not concern parental leave within the meaning of that directive.

75 In those circumstances, the Court does not have jurisdiction to answer the third question.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Council Directives 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 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) and 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 must be interpreted as not precluding a national measure, such as that at issue in the main proceedings, which provides that the father of a child, who is an employed person, is entitled, with the consent of the mother, who is also an employed person, to take maternity leave for the period following the compulsory leave of six weeks which the mother must take after childbirth except where her health would be

at risk, whereas a father of a child who is an employed person is not entitled to take such leave where the mother of his child is not an employed person and is not covered by a State social security scheme.

[Signatures]