Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 16 April 2015 [1]

Case C-222/14

Konstantinos Maïstrellis
v
Ypourgos Dikaiosynis, Diafaneias kai Anthropinon Dikaiomaton
(Reference for a preliminary ruling

from the Simvoulio tis Epikratias (Council of State, Hellenic Republic))

(Social policy — Directive 96/34/EC — Framework agreement on parental leave — Right of judges to parental leave — Grant of parental leave to working fathers where the mother does not work — Directive 2006/54/EC — Equal treatment for men and women in employment)

I – **Introduction**

1. This request for a preliminary ruling concerns the interpretation of Directive 96/34/EC, [2] which implements the Framework Agreement on parental leave.

2. The main proceedings, based on facts arising in 2010 and 2011, concern the right of male judges to parental leave. Under Greek law, such judges are not entitled to parental leave if their wife is capable from a health perspective, of bringing up the child and she does not work.

3. The referring court seeks to establish whether this restriction on parental leave may be reconciled with the Parental Leave Directive and if it must be regarded as unlawful discrimination on grounds of sex within the meaning of Directive 2006/54/EC. [3]

1 — Original language: German.

2 — Council Directive 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) ('Parental Leave Directive'). Pursuant to Article 4 of 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concluded by Businesseurope, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC, the Parental Leave Directive was repealed with effect from 8 March 2012; pursuant to Article 3 of Directive 2010/18, the latter directive was to be transposed by 8 March 2012. As the facts giving rise to the main proceedings took place in 2010 and 2011, in the present case, reference must be had to the Parental Leave Directive and not Directive 2010/18. This latter directive does not, however, involve any important amendments with regard to the matters raised in the request for a preliminary ruling.

3 — Directive 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) ('Equal Treatment Directive').

II – **Legal framework**

A – *EU law*

4. The EU law framework is established by the Parental Leave Directive and the Equal Treatment Directive.

1. Parental Leave Directive

5. The Parental Leave Directive implements the Framework Agreement on parental leave concluded on 14 December 1995 by the European cross-industry organisations — the union of European employer confederations (UNICE), the European central association of public sector employers (CEEP) and the European trade union confederation (ETUC) — and which is annexed to that directive.

6. The Framework Agreement on parental leave seeks to enable men and women to reconcile their occupational and family obligations.[4]

7. Clause 1 of the Framework Agreement sets out its purpose and scope:

‘1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.

2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State.’

8. Clause 2 of the framework agreement concerning parental leave provides:

‘1. 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.

2. To promote equal opportunities and equal treatment between men and women, the parties to this agreement consider that the right to parental leave provided for under clause 2.1 should, in principle, be granted on a non-transferable basis.

3. The conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreement in the Member States, as long as the minimum requirements of this agreement are respected. Member States and/or management and labour may, in particular:

(a) decide whether parental leave is granted on a full-time or part-time basis, …

(b) make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year;

(c) …

4 — See paragraph 4 of the general considerations of the Framework Agreement.

(d) establish notice periods to be given by the worker to the employer when exercising the right to parental leave, specifying the beginning and the end of the period of leave;

(e) define the circumstances in which an employer … is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the undertaking …

(f) …'

2. Equal Treatment Directive

9. Recital 11 of the Equal Treatment Directive states:

'The Member States … should continue to address … marked gender segregation on the labour market by means such as flexible working time arrangements which enable both men and women to combine family and work commitments more successfully. This could also include appropriate parental leave arrangements which could be taken up by either parent …'

10. Article 1 of the same directive provides:

'The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

…

(b) working conditions, including pay;

…'

11. Article 2 of the same directive provides:

'1. For the purposes of this Directive, the following definitions shall apply:

(a) "direct discrimination": where one person is treated less favourably on grounds of sex than another is, has been or would be, treated in a comparable situation; …'

12. Article 3 of the same directive provides:

'Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.'

13. Article 14 of the same directive is worded as follows:

'1. There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals, as well as pay …'

14. Article 28 of the same directive provides:

‘1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

2. This Directive shall be without prejudice to the provisions of Directive 96/34/EC and Directive 92/85/EEC.’

B – *National law*

15. Under the provisions of Greek law applicable at the material time, a judge who is pregnant has a right to a period of leave before and after childbirth in accordance with the rules applicable to civil administrative officials of the State. In addition, on request, she will be granted nine months’ paid leave for childcare purposes.

16. According to national case-law, notwithstanding the wording of the legislation which is tailored to women, a corresponding right to parental leave is available, in principle, also to judges when they become fathers.

17. However, the third sentence of Article 53(3) of the Civil Service Code,[5] applicable at the material time — in the absence of specific rules for judges[6] — by analogy,[7] included the following restriction:

‘If the civil servant’s wife does not work or exercise any profession, the male spouse shall not be entitled to the advantages provided for in paragraph 2 [including an entitlement to paid parental leave for childcare purposes], unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child …’

III – **The main proceedings and the question referred**

18. The applicant in the main proceedings is a Greek judge. In December 2010, he requested paid leave for the purposes of bringing up his child who was born on 24 October 2010.

19. The competent authority dismissed this request in 2011 by reference to the third sentence of Article 53(3) of the Civil Service Code on the basis that the applicant’s wife was unemployed and, as a consequence, he had no entitlement to parental leave.

20. The applicant contested this refusal decision before the Simvoulio tis Epikratias (Council of State). The Simvoulio tis Epikratias (Council of State) takes the view that the leave sought by the applicant can be granted only if the third sentence of Article 53(3) of the Civil Service Code is incompatible with Directives 96/34 and 2006/54.

5 — Code on the status of civil servants and of employees of legal persons governed by public law (Law 3528/2007).

6 — See paragraph 7 of the order for reference.

7 — In 2012, a provision was adopted specifically for judges corresponding in substance to the third sentence of Article 53(3) of the Civil Service Code. This provision continues to apply. In relation to civil servants, however, the third sentence of Article 53(3) of the Civil Service Code was repealed by Law 4210/2013 of 21 November 2013 (see paragraphs 6 to 9 of the written observations of the Hellenic Republic).

21. It therefore decided to stay the proceedings and submit the following question to the Court for a preliminary ruling:

'Must the provisions of Directive 96/34 and Directive 2006/54, in so far as they are applicable, be interpreted as precluding national regulations, such as the contested provision of the third sentence of Article 53(3) of the Civil Service Code, providing that if the civil servant's wife does not work or exercise any profession the male spouse is not entitled to parental leave, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child?'

22. In the proceedings before the Court, written observations have been submitted by the Government of the Hellenic Republic, the European Commission and the applicant in the main proceedings.

IV – **Appraisal**

23. By its question, the referring court seeks, in essence, to establish whether the Parental Leave Directive and the Equal Treatment Directive must be interpreted as precluding national provisions by which a judge is not entitled to parental leave if his wife does not work,[8] unless on health grounds she is unable to care for the child.

A – *Interpretation and admissibility of the question*

24. Although the question does not mention *judges* and refers, instead, to *civil servants*, as the applicant in the main proceedings is in fact a judge and not a civil servant, to provide the referring court with a useful answer, the question must be interpreted as referring to judges.

25. The request for a preliminary ruling is admissible. In particular, the objection[9] raised by the applicant in the main proceedings, by which he claims that Article 53 of the Civil Service Code is not in any way applicable to his case, cannot render the request for a preliminary ruling inadmissible.

26. Admittedly, for the request to be admissible, Article 267 TFEU requires that the question referred must be relevant for the final decision of the national court. However, as regards the assessment of its relevance, the prerogative to determine this lies with the referring court, which, in principle, other than for obvious errors,[10] the Court does not review.

27. Errors of that kind are not evident in the request of the referring court. In particular, it provides a detailed reasoning of why it presumes the contested provision governing civil servants also to apply in the case of judges. For that reason, the question is not hypothetical and a connection exists with the matter at issue in the main proceedings.

B – *Parental Leave Directive*

28. The referring court seeks to establish, first, if it is compatible with the Parental Leave Directive to deny a period of parental leave to a judge whose wife does not work and where, at the same time, she is capable, from a health perspective, of raising the child.

8 — From the perspective of the German language, the second alternative specified in the referring court's question, that is that the civil servant's wife 'does not ... exercise any profession', is included within the notion of the first alternative, namely, that she does not work.

9 — No express objection of admissibility is raised by the applicant.

10 — On this point, see, for example, judgments in *Križan and Others* (C-416/10, EU:C:2013:8, paragraph 54) and *Quelle* (C-404/06, EU:C:2008:231, paragraph 19 et seq.) and my Opinion in Joined Cases *Airport Shuttle Express and Others* (C-162/12 and C-163/12, EU:C:2013:617, point 18 et seq.).

1. Application of the Parental Leave Directive to Greek judges

29. As laid down in the Court's case-law, the scope of the Parental Leave Directive is not limited to employment relationships governed by private law. Instead, the directive applies also to civil servants. The Court expressly clarified this in relation to public officials, relying on the principle of equal treatment for men and women, on which that directive is based, to interpret the concept of worker specified in clause 1.2 of the Framework Agreement.[11]

30. The same must apply in relation to judges. As is true for public officials, there is nothing in the Parental Leave Directive to permit the inference that judges are excluded generally from its scope. If Greek public officials are covered by the Parental Leave Directive, as was expressly recognised in *Chatzi*,[12] the same must apply to Greek judges, for whom parental leave rights are determined by a *mutatis mutandis* application of civil service law.

31. Nor does the special legal nature of the profession of a judge, characterised by appointment for life and whose professional activity is governed by the principle of judicial independence, preclude the inclusion of judges from the scope of the Parental Leave Directive. It is not evident how the specific nature of that profession could give rise to special circumstances with regard to parental leave that would justify treating judges differently from public servants and other workers.

32. Even if in relation to judges, as the Court held in *O'Brien* as regards their inclusion under the Framework Agreement on part-time work,[13] one wished to afford national legislatures a broad discretion to determine whether, and, if so, to what extent, they constitute workers covered by the Parental Leave Directive,[14] for the implementation of the directive in conformity with EU law it would have to be ensured all the same that this does not lead to 'the arbitrary exclusion of [judges] from the protection offered by [the] directive ... and [the] framework agreement. An exclusion from that protection may be allowed only if the relationship ... [by which the profession of a judge is characterised] is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers'.[15] Special features of that kind rooted in the nature of the profession of a judge cannot be discerned in relation to Greek judges and their rights to parental leave, especially given the fact that at the material time those rights were determined by a *mutatis mutandis* application of the Greek Civil Service Code and thus — also from the perspective of national law — the comparability of the situations is self-evident.

2. Right to parental leave provided for in the Framework Agreement annexed to the Parental Leave Directive

33. The Government of the Hellenic Republic seeks to infer from the wording of clause 1.1, by which the reconciliation of parental and professional responsibilities for 'working parents' is to be facilitated, that, according to the model of the Parental Leave Directive, both parents must work for any right to parental leave to exist. Where only one parent is in work, that Government questions whether the issue of reconciliation of work and family life arises and the objective of the Parental Leave Directive is affected.

11 — See judgment in *Chatzi* (C-149/10, EU:C:2010:534, paragraphs 27 to 30) and my View in that case (C-149/10, EU:C:2010:407, points 20 and 21 and the case-law cited therein).

12 — See footnote 11.

13 — Judgment in *O'Brien* (C-393/10, EU:C:2012:110, paragraph 41 et seq.) concerning the interpretation of Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9), as amended by Council Directive 98/23/EC of 7 April 1998 (OJ 1998 L 131, p. 10).

14 — In my Opinion in *O'Brien*, I argued that, having regard to the particular importance of the equal treatment principle, the concept of worker in the Parental Leave Directive must be determined autonomously as a matter of EU law, whereas in the context of the Framework Agreement on part-time work Member States retain a discretion in the matter (Opinion in *O'Brien*, C-393/10, EU:C:2011:746, point 25 et seq.).

15 — Judgment in *O'Brien* (C-393/10, EU:C:2012:110, paragraph 51).

34. However, the wording of the Parental Leave Directive does not necessarily have to be interpreted in that way.

35. Admittedly, the Parental Leave Directive refers in clause 1.1 of the Framework Agreement to 'parents' in the plural and not to a working *parent*. However, in clause 2.1 of the Framework Agreement it refers to 'men and women workers', which implies a separate assessment in relation to each parent and does not make any statement whether or not the relevant individuals are married to one another.

36. Moreover, the approach taken by the Hellenic Government runs up against teleological and systematic concerns given, in particular, that a reading of the kind suggested by Article 53 of the Greek Civil Service Code would, in fact, render the right of one *spouse* to parental leave conditional on the work status of the other spouse without any regard to that individual's *parenthood*.

37. First, this approach is contrary to clause 2.1 of the Framework Agreement, which confers on each parent 'an individual right to parental leave'.[16] Moreover, pursuant to clause 2.2 of the Framework Agreement, this right is, in principle, non-transferable, which underlines the fundamentally personal nature[17] of the right which would be undermined if its existence were to depend on the occupational situation of an individual's spouse or of the other parent.

38. Second, an objective of the Framework Agreement is to foster equality between men and women in the assumption of family responsibilities and, specifically, to encourage men to take parental leave.[18] Consequently, both parents — and in particular men — should have the opportunity to be involved in the upbringing of their children without suffering occupational disadvantages or finding themselves obliged to give up work.

39. This interpretation of the Parental Leave Directive finds support in the *Chatzi* judgment. There, the Court held that the right to parental leave is not a right conferred upon the child but on the parents.[19] Consequently, the Parental Leave Directive must be examined primarily from the perspective of each parent and not from that of the child. Thus, the decisive question is not whether the child's care is ensured even in the absence of parental leave. Rather, the directive seeks to give each parent the opportunity to decide whether he or she — regardless of his or her occupational status — wishes to share in family responsibilities by caring for the child.[20] In this way, the traditional distribution of the roles of men and women in the raising of children — in particular that of fathers — is to be overcome. If, however, a father is denied the right to a period of parental leave when his wife does not work this is liable precisely to perpetuate the traditional distribution of the roles of men and women,[21] which would, moreover, undermine the objective of promoting women's participation in the labour force[22] and allowing for an easier 'return to working life'.[23]

40. Further support for the view that the model contemplated by the EU legislature was of an individual right to which each parent is entitled is provided by the measure's legislative history.

16 — Judgment in *Chatzi* (C-149/10, EU:C:2010:534, paragraph 33).

17 — Clause 2.2 of the revised Framework Agreement on parental leave annexed to Directive 2010/18 clarifies that at least one month of parental leave must be provided on a non-transferable basis.

18 — See paragraph 8 of the general considerations of the Framework Agreement on parental leave.

19 — Judgment in *Chatzi* (C-149/10, EU:C:2010:534, paragraph 34).

20 — See paragraph 5 of the general considerations of the Framework Agreement on parental leave.

21 — See in relation to 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 judgment in *Roca Álvarez* (C-104/09, EU:C:2010:561, paragraph 34).

22 — See paragraphs 4 and 7 of the general considerations of the Framework Agreement and the first paragraph in the preamble thereto.

23 — See paragraph 5 of the general considerations of the Framework Agreement.

41. A first proposal for a Council Directive on parental leave and leave for family reasons was presented by the Commission in the early 1980s;[24] it was, however, not adopted. Also the revised proposal of 1984[25] failed to gather sufficient support. From a historical and teleological perspective, these proposals — although ultimately not adopted — are nonetheless of interest. Article 4 of the directive proposed on 24 November 1983 provided expressly that parental leave shall be granted to enable a parent to stay at home to take 'sole or principal' charge of his or her child. The 1984 amended proposal specified, additionally, in Article 4(2), that parental leave could 'not be granted simultaneously ... to both parents'. Limitations of that kind are not included in the Framework Agreement at issue in this case. However, nor does it expressly prohibit the Member States from structuring the parental leave entitlement of two working parents such that they cannot take their entire parental leave simultaneously. Whether the Parental Leave Directive might preclude a national rule of that kind does not need to be examined here since the third sentence of Article 53(3) of the Greek Civil Service Code does not deal with the temporal allocation of two rights to parental leave of two working parents but denies, as a rule, the sole working parent his right to parental leave on the basis that his spouse does not work. A provision of that kind runs contrary to the objectives pursued by the EU legislature and expressed in the Framework Agreement, that is, to grant parents an individual right to parental leave.

42. Nor can the Greek Government in any way rely on clause 2.3 of the Framework Agreement that leaves it to the Member States to determine 'the conditions of access and detailed rules for applying parental leave'. This provision does not authorise the Member States to completely deny one parent his right to parental leave but, accommodates, in essence, as a general example, legitimate concerns relating to an *employer's* internal arrangements, which must be reconciled with the grant of parental leave. There is no suggestion that the right to parental leave is conditional on the spouse working.

43. Nor can the Greek understanding of the directive be supported from the perspective of preventing an abuse of rights. Admittedly, it is a recognised principle that misuse can result in the loss of legal rights established in EU law.[26] It is also conceivable that a parent does not use his parental leave for child raising and thus diverts it from its proper purpose. However, the reference from the national court does not contain any indications that the father of the child seeks to use his parental leave for purposes other than those recognised in the Framework Agreement.

44. Consequently, on the basis of the foregoing, it must be stated that clause 2 of the Framework Agreement on parental leave implemented by the Parental Leave Directive precludes national regulations which provide that if a judge's wife does not work or exercise any profession the male spouse is not entitled to parental leave, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child.

C – *Equal Treatment Directive*

45. In addition, the question arises whether the national regulations are precluded also by reason of the Equal Treatment Directive.

46. The purpose of Directive 2006/54 is to put into effect in the Member States the principle of equal treatment for men and women in a professional context. Accordingly, it prohibits both direct and indirect discrimination on grounds of sex. In particular, Article 14(1)(c) thereof prohibits all discrimination in relation to working conditions.

24 — COM(83) 686 final.

25 — COM(84) 631 final.

26 — See, for example, judgment in *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraphs 34 to 38).

47. On the question whether Directive 2006/54 applies also to judges, I refer to my observations on the scope of the Parental Leave Directive,[27] and turn now to examine whether the Greek regulations in question concerning the right to parental leave and, hence, a period of leave as such, and, consequently, working conditions within the meaning of the Equal Treatment Directive, result in discrimination on grounds of sex.

48. The third sentence of Article 53(3) of the Civil Service Code grants the father of the child a right to parental leave only if his wife also works or, on grounds of health problems, is not capable of raising the child, whereas no comparable restriction is laid down in relation to the mother's right to parental leave.

49. As that provision establishes a restriction on the grant of parental leave only in relation to the child's father, this constitutes direct discrimination on grounds of sex within the meaning of Article 2(1)(a) of Directive 2006/54.[28]

50. This discrimination cannot be justified on the basis of Article 28(1) of the Equal Treatment Directive according to which that directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. The Greek regulations at issue are not included within that provision because they do not establish special protection for women as regards pregnancy and maternity but, on the contrary, deny their husbands a right to parental leave.

51. Nor do the Greek provisions constitute positive action with a view to promoting equal treatment within the meaning of Article 3 of the Equal Treatment Directive. It is not evident that the restriction on parental leave to the detriment of fathers could be appropriate as a measure in women's favour to eliminate or reduce existing factual inequalities. Instead, there even exists a risk that a rule of that kind could entrench a traditional distribution of the family roles of men and women and make it more difficult for non-working wives to take up or resume an occupational activity. Moreover, in recital 11 of the Equal Treatment Directive, with a view to facilitating the reconciliation of family and work commitments, Member States are specifically encouraged to adopt parental leave arrangements that *either* parent can take and, in that regard, there is no mention of any distinction on grounds of sex.

52. Finally, Article 28(2) of the Equal Treatment Directive expressly includes the Parental Leave Directive as an EU legal act whose provisions are not to be affected by the Equal Treatment Directive. It follows from that that a right to parental leave granted to fathers under the Parental Leave Directive cannot be taken away as a result of the Equal Treatment Directive and, consequently, no justification is evident for direct discrimination of that kind.

53. In conclusion, therefore, it must be stated that Article 14(1) of the Equal Treatment Directive also precludes national provisions such as those at issue here.

V – **Conclusion**

54. In the light of the foregoing, I propose that the Court should answer the question referred as follows:

Clause 2 of the Framework Agreement on parental leave implemented by Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP, and the ETUC and Article 14 of 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

27 — See point 30 et seq. of this Opinion.

28 — See judgment in *Griesmar* (C-366/99, EU:C:2001:648, paragraphs 46 and 56).

and women in matters of employment and occupation must be interpreted as precluding national regulations which provide that if a judge's wife does not work or exercise any profession the male spouse is not entitled to parental leave, unless it is considered that due to a serious illness or injury the wife is unable to meet the needs related to the upbringing of the child.