

International Labor Rights Case Law_Template for Commentaries

Author Name:	Nicole Busby
Author position:	Professor of Labour Law
Author Affiliation:	Law School, University of Strathclyde

Hyperlink to case:	http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130d561423d46df25426eb6ec9f6301c8eaf5.e34KaxiLc3eQc40LaxqMbN4Och4Se0?text=&docid=165905&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=686727
Decision-making body:	Court of Justice of the EU
Date of Decision:	16 July 2015
Case/Decision name:	Case No. C-222/14 Maïstrellis v Ypourgos Dikaiosynis, Diafaneias Kai Anthroponon Dikaionaton (CJEU, 16 Jul 2015, 4th Chamber)
Primary Issues:	Parental leave, sex equality
Related cases, if any:	Case No. C-104/09 Roca Álvarez v Sesa Start España ETT SA [2010] ECR I-8661; Case C-5/12 <i>Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)</i> , judgment 19 September 2013, nyr.

Paragraph/page numbers to be extracted from decision/case:	
--	--

Summary of decision (max. 250 words):	The case concerns a request for a preliminary ruling on whether European Union (EU) Directives 96/34 and 2006/54 must be interpreted as precluding certain national provisions. These provisions stipulate that a civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession, 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. The Court of Justice of the EU ruled that national legislation that deprives a male civil servant of the right to parental leave on the ground that his wife does not work or exercise any profession is contrary to EU law on parental leave and amounts to direct discrimination on grounds of sex.
Title of Commentary:	The Recognition of (Some) Men’s Parental Duties under EU Law

In this case, the Court of Justice of the EU (CJEU) was asked to consider whether provisions of the Greek Civil Service Code and the Code of the Status of Judges that restricts access to parental leave for fathers in circumstances where the mother of the child was working or was incapacitated by

illness or serious injury, were precluded by EU law relating to parental leave, specifically Directives 96/34/EC¹ and 2006/54/EC.²

Mr. Maïstrellis, a Greek judge, applied for nine months of paid parental leave following the birth of his child. His application was rejected by the Ypourgos Dikaiosynis, Diafaneias kai Anthroponon Dikaionaton (minister of justice), on the grounds that the Code on the Status of Judges provides that such leave is available for only female judges. Mr. Maïstrellis successfully appealed that decision before the Council of State, which ruled that in light of Directive 96/34/EC the Code must apply to fathers as well as mothers who serve as judges. The matter was referred back to the minister of justice, who rejected Mr. Maïstrellis's application on the grounds that Article 53(3) of the Civil Service Code restricted fathers' leave to those whose wives worked, thus precluding Mr. Maïstrellis, whose wife did not work. In a subsequent appeal against that decision, the Council of State followed case law and found that areas not specifically regulated for judges are subject to the Civil Service Code. The Greek court questioned the Code's compliance with Directive 96/34, as amended by Council Directive 97/75/EC of 15 December 1997, and Directive 2006/54/EC and, consequently, referred the case to the CJEU for a preliminary ruling under Article 267 TFEU. In its reference, the Greek Court asked whether the provisions of the directives must be interpreted as precluding national regulations such as those contained in Article 53(3) of the Civil Service Code.

CJEU Judgment

The CJEU held that such a provision was incompatible with EU law, specifically Directives 96/34, 97/75 and 2006/54. It opined that, under the provision of clauses 2.1 and 2.2 of the Framework Agreement, parental leave is an individual, nontransferable right granted to men and women workers to enable them to take care of a child. The Court noted that the Parental Leave Directive's minimum provision of three months of such leave cannot be the subject of derogation by the member states by legislation or collective agreements. Furthermore, in accordance with the opinion of Advocate General Kokott, the CJEU found that the detailed rules contained in the Directive and Framework Agreement did not "in any way provide that one of the parents can be denied the right to parental leave ... because of the employment status of his or her spouse."³

In support of its interpretation of Directive 96/34 as being designed to "facilitate the reconciliation of parental and professional responsibilities for working parents,"⁴ the Court drew on several sources, including the Community Charter of the Fundamental Social Rights of Workers, its earlier judgment in *Chatzi*⁵ and Article 33(2) of the Charter of Fundamental Rights, which provides that:

2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Turning to consider the principle of equality under Directive 2006/54, the Greek Court invoked the prohibition of direct discrimination provided by Article 2(1)(a), finding that "the situation of a male employee parent and that of a female employee parent are comparable as regards the bringing-up

¹ Of 3 June 1996, on the Framework Agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145/4.

² 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 (recast), OJ L 204/23.

³ Judgment, para 36.

⁴ *Ibid.*, para 38.

⁵ Case No. C-149/10 *Chatzi* [2010] ECR I-8489.

of children.”⁶ Consequently, the Greek Civil Service Code’s denial of parental leave to a father whose spouse does not work or is unable to meet the needs of the child due to serious illness or injury could not be upheld because, under national law, “mothers who are civil servants are always entitled to parental leave.”⁷ The Court also found the Greek rule in question to be contrary to the provision of Article 3 of Directive 2006/54 because it was “liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a subsidiary role to that of women in relation to the exercise of their parental duties.”⁸

Analysis

In confirming the extent of the protection of parental leave, this case illustrates the growing importance of the Charter of Fundamental Rights (CFR) to EU equality law. Article 33(2) CFR, despite being somewhat anodyne in its written form, is beginning to pack a punch in being used to achieve the reconciliation of family and professional life for men and women. This approach has been used successfully to clarify and strengthen parental rights through its ability to apply teleological reasoning which goes beyond the black letter and enables consideration of contextual factors and overriding objectives. The Court took a similar approach in *Roca Álvarez*,⁹ in which it held that leave available to fathers could not be restricted to cases where the mother was employed, thus precluding Mr. Roca Álvarez, whose partner was self-employed. The Court used the same language and reasoning in both cases, cautioning against perpetuation of the “traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.”¹⁰

The reference to men’s subordination to women in the context of caregiving is particularly welcome. By acknowledging that parental care is a duty, the court imbues it with value, elevating it above its currently ascribed low status below paid work. However, though perhaps indicative of a welcome shift in the Court’s attitude to gender relations and caregiving, this approach is by no means ensured. This uncertainty is illustrated by *Montull*,¹¹ also heard by the fourth chamber, in which the Court held that a national rule denying the transfer of maternity benefit to an employed father whose partner was self-employed did not contravene the principle of equal treatment or the provisions of Directive 92/85.¹² In its judgment, the Court focused on protection of a “woman’s biological condition during and after pregnancy”¹³ and of “the special relationship between a woman and her child over the period which follows childbirth,”¹⁴ a stance reminiscent of an earlier era in the Court’s jurisprudence.¹⁵

⁶ Judgment, para 47.

⁷ *Ibid.*, para 49.

⁸ The article provides for the use of positive action as a way to “ensuring full equality in practice between men and women in working life.” Judgment, para 50.

⁹ Case No. C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-8661.

¹⁰ Judgment in *Roca Álvarez*, para 36.

¹¹ Case No. C-5/12, *Betriu Montull v Instituto Nacional de la Seguridad Social (INSS)*, judgment 19 September 2013, nyr.

¹² 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 L 348/01.

¹³ Judgment in *Montull*, para 50.

¹⁴ *Ibid.*, para 62.

¹⁵ See, for example, Case No. C-163/83 *Commission v Italy* [1983] ECR 3273; Case No. C-184/83 *Hoffman v Bermer Ersatzkasse* [1984] ECR 3047; Case No. C-207/98 *Mahlburg Lan Mecklenborg-Vorpommern* [2000] ECR I-549).

The judgments in *Roca Álvarez* and *Maïstrellis* presumably benefited from the clear and progressive stance taken by Advocate General Kokott in her opinions, which the Court followed in both cases. However, it would be simplistic to conclude that that was what made the difference. In his opinion in *Montull*, which the Court did not follow, Advocate General Wathelet deemed the case indistinguishable from *Roca Álvarez*, concluding that the principle of sex discrimination had been infringed upon because the denial of leave to the fathers in both cases amounted to direct sexual discrimination.

The key to understanding the different approaches the Court took in these cases seems to lie in the nature of the provisions in question: *Roca Álvarez* and *Maïstrellis* are concerned with provision of parental leave, albeit paid in *Maïstrellis*, whereas *Montull* is primarily concerned with payment of maternity benefit. That Article 33(2) CFR was referred to in the first two cases but not in the last is perhaps not particularly surprising in light of the article's careful wording, which specifies "paid maternity leave" but is silent on the issue of payment for parental leave. It would thus appear that although the court is willing to encourage sharing or transfer of leave or time away from work between parents, it is less open to the transfer of what are intended to be maternity-related payments to fathers. Had the mother of Mr. Montull's baby been employed, her entitlement to maternity leave (and related benefit) following the compulsory period of six weeks prescribed by Directive 92/85 could, with her consent, have been transferred to Mr. Montull. This highlights the fragility of derived rights, which are available to fathers only in certain restricted circumstances dependent on the mother's employment status. In justifying such a distinction, the court returns to its dominant ideology of motherhood invoking biological difference and the need for "special protection" following pregnancy and childbirth.¹⁶

Implications of the Judgment for EU Equality Law

The court's judgment in *Maïstrellis* has led to speculation regarding the sustainability of national schemes, such as that recently introduced in the United Kingdom (UK), which enable the transfer of a certain proportion of the maternity leave available under domestic provision to the birth father or the mother's partner. On the face of it, the Greek legislation precluded by EU law looks similar to the UK's shared parental leave (SPL) scheme. Although SPL requires that any parent who wishes to participate must show that they have a partner who is in some form of employment, an employed mother whose partner does not work will have an alternative right to take statutory maternity leave of the same length as SPL, whereas a father whose partner does not work will not be entitled to a comparable period of paternity leave. The resulting inequality of treatment results largely from EU law's emphasis on women's need for protection during and following pregnancy. That such provision should rely on the mother's economic activity prior to the birth emphasizes the importance placed on the allocation of resources rather than any commitment to provide a fundamental right to protection for all mothers and the allocation of leave for all fathers. The approach adopted by the UK and similar national schemes is in line with that taken by the Court in *Montull* and does at least enable (some) men the opportunity to participate in parental care. Furthermore, unlike Greece, the UK offers the minimum three months' unpaid parental leave provided for by Directive 96/34 on equal terms to either parent making it compatible with Article 33(2) CFR.

Although the Court's judgment in *Maïstrellis* is to be welcomed, not least for its confirmation of the approach taken in *Roca Álvarez*, the provision of parental leave for all fathers and mothers across the EU is far from ensured. The inequality of treatment that continues through deriving fathers'

¹⁶ C. McGlynn, "Ideologies of Motherhood in European Community Sex Equality Law," *European Law Journal* 6 (2000): 1, 29.

rights to pay entitlement and related benefits from those directly applicable to mothers is a substantial barrier to reconciling the private and professional lives of Europe's citizens. Although the Court's recent jurisprudence does recognize fathers' parental duties, the lack of financial compensation for many men seeking leave for family reasons and a continued emphasis on the "special relationship" between mother and child means that the EU parental rights' regime remains fragile and divisive. A shift in this approach on the basis that it perpetuates gender inequality by reaffirming stereotypes would require an explicit commitment to the social value of parenthood and its separation from the distinct state of pregnancy.¹⁷

¹⁷ S. Fredman 'Reversing Roles: Bringing Men into the Frame' *International Journal of Law in Context* 10 (2014) 4, 442, at 442.