2 (3) of Directive 76/207, inasmuch as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. That being so, such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely.

4. Directive 76/207 leaves Member States with a discretion as to the social measures which they adopt in order to guarantee, within the framework laid down by the directive, the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment. Such measures are closely linked to the general system of social protection in the various Member States. The Member States therefore enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation.

5. Articles 1, 2 and 5 (1) of Directive 76/207 must be interpreted as meaning that a Member State may, after the protective period has expired, grant to mothers a period of maternity leave which the State encourages them to take by the payment of an allowance. The directive does not impose on Member States a requirement that they shall, as an alternative, allow such leave to be granted to fathers, even where the parents so decide.

In Case 184/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landessozialgericht [Higher Social Court] Hamburg for a preliminary ruling in the proceedings pending before that court between

ULRICH HOFMANN, residing in Hamburg,

and

BARMER ERSATZKASSE, Wuppertal,

on the interpretation of Articles 1, 2 and 5 (1) of Council Directive 76/207 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,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, A. O'Keeffe, G. Bosco, O. Due, U. Everling, C. Kakouris and R. Joliet, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

Paragraph 6 (1) of the Gesetz zum Schutz der erwerbstätigen Mütter of 18 April 1968 (German Law for the Protection of Working Mothers, Bundesgesetzblatt I, p. 315, hereinafter referred to as the "Mutterschutzgesetz") provides that mothers are to enjoy a compulsory convalescence period of eight weeks' leave after childbirth. During that period they are relieved of all their duties at work and continue to receive their net remuneration, which is paid to them by the sickness fund and/or their employer.

By a Law of 25 June 1979 (Bundesgesetzblatt I, p. 797), the German legislature inserted a new provision, Paragraph 8a, into the Mutterschutzgesetz, under which a mother may, on the expiry of the period of convalescence provided for by Paragraph 6 (1) and until the day on which the child reaches the age of six months, take so-called "maternity leave" (Mutterschaftsurlaub). Throughout that leave the mother is relieved of her duties at work and the State, through the intermediary of the sickness fund, pays her a daily allowance not exceeding DM 25. On the expiry of her leave she enjoys a guaranteed right to resume her employment on the same conditions as before.

By virtue of Paragraph 8a, maternity leave comes to an end three weeks after the death of the child, and not later than the day on which the child would have reached the age of six months. The leave similarly comes to an end if the child dies during the period of convalescence — and is not granted if death occurs more than three weeks before expiry of that period.

Council Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and woman as regards access to employment, vocational training and promotion, and working conditions (Official Journal L 39, 1976, p. 40) provides, in Article 1, that its purpose 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, subject to the conditions referred to in paragraph (2), social security. Article 2 (1) stipulates that the principle of equal treatment means that there is to be no discrimination whatsoever on grounds of sex. Under the terms of Article 5 (1) the foregoing applies particularly to working conditions, including the conditions governing dismissal. Article 2 (3) provides a derogation in favour of provisions concerning the protection of women, particularly in the context of pregnancy and maternity.

On 21 May 1979, the plaintiff in the main proceedings, Ulrich Hofmann, became the father of an illegitimate child, of which he acknowledged paternity. In the period between the expiry of the mother's statutory period of convalescence and the day on which the child reached the age of six months, he obtained from his employer unpaid leave of absence. During that period he looked after the child, while the mother resumed employment as a teacher.

On 1 August 1979 the plaintiff in the main proceedings submitted to the competent sickness fund, the Barmer Ersatzkasse, a claim for maternity benefit in respect of the period of leave laid down by Paragraph 8a of the Mutterschutzgesetz.

Previously, on 8 July 1979, he had brought proceedings before the Bundesverfassungsgericht [Federal Constitutional Court] on a point of constitutional law, alleging that Paragraphs 1, 2, 3, 6 and 7 of the Law of 25 June 1979 introducing maternity leave were contrary to the Constitution on the ground that they contravened Article 3 (2) and (3) of the Grundgesetz [Basic Law], inasmuch as the leave benefited solely working mothers. The constitutional objection was declared admissible by the preliminary examination committee. The Bundesverfassungsgericht has stated that it is appropriate to await the outcome of the proceedings before the Court of Justice before it delivers judgment.

The pension fund refused the claim for maternity benefit. An administrative appeal which was lodged against that refusal was unsuccessful. By a judgment of 19 October 1982, the Sozialgericht [Social Court] Hamburg dismissed the action brought against the refusal. In the grounds of its decision the court states that, according to the wording of Paragraph 8a, it is only mothers who are entitled to maternity leave. It is apparent from the *travaux préparatoires* that the legislature deliberately did not create a period of leave capable of being granted to either parent. The biological differences due to pregnancy and childbirth, which were still present after the eight-week period of convalescence had expired, made it justifiable to take account of the special circumstances of motherhood.

The plaintiff in the main proceedings lodged an appeal against that judgment, arguing *inter alia* that the introduction of maternity leave was concerned, not with the protection of the mother's health, but exclusively with the care which she gave to the child. In the oral procedure before the First Senate of the Landessozialgericht Hamburg, he sought to have the proceedings stayed and to have questions on the interpretation of the Community directive referred to the Court of Justice.

The First Senate of the Landessozialgericht Hamburg took the view that the dispute raised the question whether the German legislation was in conformity with the Community directive, and noted the differing views on the application of that text, especially in the light of the action which the Commission had brought against the Federal Republic of Germany, claiming that the directive had been inadequately implemented. Accordingly, by an order of 9 August 1983, the court decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings until such time as the Court of Justice had given its preliminary ruling on the following two questions:

"1. Are Articles 1, 2 and 5 (1) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal of the European Communities, L 39, pp. 40 to 42) infringed if, on the expiry of the eight-week protective period for working mothers following childbirth, a period of leave which the State encourages by payment of the net remuneration of the person concerned, subject to a maximum of DM 25 per calendar day, and which lasts until the day on which the child reaches the age of six months can be claimed solely by working mothers and not, by way of alternative, if the parents so decide, by working fathers?

2. If the answer to Question 1 is in the affirmative, are Articles 1, 2 and 5 (1) of Council Directive 76/207/EEC directly applicable in the Member States?"

The order of the Landessozialgericht was lodged at the Court Registry on 29 August 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 11 November 1983 by the Commission of the European Communities, represented by M. Beschel, a member of its Legal Department, and on 1 December 1983 by the plaintiff in the main proceedings, Ulrich Hofmann, represented by K. Bertelsmann, Rechtsanwalt in Hamburg, by the Barmer Ersatzkasse, and by the Government of the Federal Republic of Germany, represented by M. Seidel, Ministerialrat, and E. Roeder, Regierungsdirektor in the Ministry of Economic Affairs.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the parties to the main proceedings, as well as the Commission and the German Government, to reply in writing to a number of questions; the request was acceded to within the prescribed periods.

II — Written observations submitted to the Court

Ulrich Hofmann, the plaintiff in the main proceedings, after recalling the facts of the case and setting out the relevant German and Community legislation, states that the questions referred to the Court by the Landessozialgericht seek to establish whether the exclusion of fathers in gainful employment from the benefit

of maternity leave under German law is contrary to the provisions of Directive 76/207. In resolving that question a decisive factor is whether the maternity leave is to be regarded as a "provision concerning the protection of women, particularly as regards pregnancy and maternity" within the meaning of Article 2 (3) thereof. The reply should give consideration to the history of the rules concerning maternity leave and to the meaning and purpose of those rules, taking account of the present state of the law, including the amendments made to maternity leave.

The social protection afforded to mothers on biological grounds has been constantly expanded, most recently in 1965 by an extension of post-natal leave from six to eight weeks. From various quarters, both political and trade unionist, demands were heard for the introduction of parental leave. In 1979 the Federal Government tabled a draft Law on the introduction of maternity leave, the main aims of which, as set forth in the preamble (Bundesratsdrucksache 4/79), were the reduction of the double burden imposed on a woman by her employment and her child, the need to take care of the child in its first phase of life and the extension of the period of rest beyond the existing maternity leave.

The first reasons adduced by the Government do not reveal a need to extend the existing eight-week leave on health grounds. The arguments relating to health, which occur only rarely in the draft Law, are merely intended to justify the grant of maternity leave to mothers alone. The educational leave, which was restricted to mothers, had been introduced contrary to the opinion of international committees (see the Charter for the Rights of Working Women, of the International Confederation of Free Trade Unions), of German trade unions, and of other organizations and parties, all of which had called for educational leave to be made available either to the mother or to the father, according to their wishes. Doubts were also expressed in the Federal Republic as to whether educational leave which was available exclusively to mothers was compatible with the Constitution.

On the strength of those political and constitutional considerations, the Bundesrat adopted the proposal that fathers should be included in legislation creating a period of leave entitled "parental leave". The proposal was based on the consideration that there was no clear reason for treating fathers and mothers differently, that there was no ground specifically identifiable with sex which argued in favour of the mother's role being pre-eminent in caring for the child, provided that it enjoyed the permanent presence of a person to whom it might relate (Bezugsperson) and that the aim of avoiding a double claim on the mother's attention was equally attained if the child was brought up by the father.

Following that statement by the Bundesrat, the Government changed its line of argument, emphasizing thereafter the protection of health. It was apparent from the texts and debates which led up to the adoption of the Law that the primary concern was not to extend the protection of the mother's health, but to introduce a period of leave for the purpose of child care. A draft law which brought fathers within the scope of such leave would have required the preliminary approval of the Bundesrat. However, the latter wished to extend the

parental leave to parents who were not gainfully employed, an idea which the Government rejected on financial grounds. It was only the desire to avoid the need to submit the Law for the prior assent of the Bundesrat which accounted for the exclusion of fathers.

It is further apparent from the actual wording of the Law that the true purpose of the leave is not to afford increased social protection to the mother on biological grounds, but to reduce the multiple burdens arising from her employment and the bringing up of the child. The fact that maternity leave is not granted, or terminates, in the event of the child's death proves that it relates to the bringing up of the child by the mother. If the biological or health reasons put forward by the German Government were essential, the leave would have to be granted to the mother irrespective of whether the child survived.

A recent case illustrates the unfortunate consequences to which the fallacious arguments based on biological and health considerations can lead; the applicant, a father, had asked to be awarded maternity leave by way of parental leave, since the mother had died shortly after the birth, but the request was rejected by the social courts on the ground that maternity leave, having been instituted for biological reasons, was available to mothers alone.

The optional nature of the leave also contradicts the Government's line of argument. If the Law were really based on those reasons, then the extension of maternity leave should have been compulsory.

According to the plaintiff, recent legal developments also bear out his contention. Under the Law of 25 June 1979 every mother was entitled to maternity leave, whereas the daily allowance was restricted to a mother who was insured under the social security scheme or held an employment contract for a certain period before the birth. Since the amendment of the Mutterschutzgesetz by the Law of 22 December 1981 (Bundesgesetzblatt I, p. 1523), employees who commence employment less than nine months before the birth are not entitled to the leave. No one could claim that the health of mothers who started work only a short time before the birth needs less protection than that of mothers who have been working for a longer period of time. In any event, that proves that maternity leave is a social benefit from the State which is intended to assist in the bringing up of the child, and yet is governed by certain qualifying periods on account of its cost. If the "biological" argument were accepted it would have been possible to prevent the risk of abuse, to which reference was made during the legislative procedure, by disallowing payment of the daily allowance, yet without affecting the basic option available to all mothers of enjoying a period of leave irrespective of the length of their employment.

It is apparent from the foregoing considerations that, in the light of the debates and texts leading up to the adoption of the law and in the light of its meaning, purpose and subsequent development, the intention of the legislature was to institute a period of leave facilitating the bringing up of the child, not to enlarge existing protection on biological and health grounds.

The present legal provisions give rise to two forms of discrimination. First,

fathers who are gainfully employed are discriminated against in an unacceptable manner by comparison with working mothers. Secondly, the Law lessens women's chances on the labour market, by making it even less attractive, in economic terms, to employ them. Parental leave benefiting either the father or the mother could mitigate that disadvantageous situation, since the employer would have to take account of the fact that fathers might also claim leave.

Consideration must also be given to the legal provisions governing maternity leave and child-care leave in various countries. Besides a compulsory leave period of six to eight weeks, before and after the birth, France, Italy, Norway and Sweden have introduced child-care leave which is available either to the mother or the father, according to preference. In the other Member States of the Community there is no such option. The Commission has brought an action for failure to fulfil a Treaty obligation against those States which, like the Federal Republic, have created a longer period of maternity leave, based on biological grounds, extending beyond the actual convalescent leave. It is apparent from a report by the Commission that the German legislation constitutes a discriminatory provision for the purposes of Article 5 of the directive.

The plaintiff states that the Federal Government, in a report on the application of the directive, takes the view that men are not discriminated against since the provisions of the Mutterschutzgesetz are designed to extend the protection for the mother and enable her to recover after childbirth. The object of limiting the leave to a mother whose child is still alive is to restrict the class of persons eligible to those who bear the heaviest burden as a result of pregnancy, childbirth and child-care. Maternity leave does not constitute a new form of child-care leave.

The essential question is whether maternity leave must be regarded as a special provision for the purposes of Article 2 (3) of the directive, or whether it falls within the scope of the prohibition of discrimination under Article 5 (1).

It is apparent from the foregoing considerations that maternity leave is not concerned with protection for women but serves as a measure of family policy, affording a period of leave intended to enable children to be cared for. Article 2 (3) deals with an area where there is no room for comparison between men and women, because biological differences predominate. Special protection for the woman is permissible during pregnancy and for some time after birth, and also during periods of nursing. Justification for the exclusive award of leave to a mother, in respect of a period of up to six months after the birth, cannot be afforded by biological or health considerations. The return to normal of physical functions and the physical readjustments are for the most part completed within four to seven weeks, and the mother is then normally quite capable of working. If that is not the case, a medical certificate to that effect will excuse her from resuming employment. Thus, under Paragraph 6 (2) of the Mutterschutzgesetz, a mother who has not recovered her full capacity and who holds a medical certificate may not be given work which exceeds her capacity. Further special provisions apply to nursing mothers.

The burden on the mother when she contends simultaneously with the after-effects of childbirth, her employment and the bringing up of her child disappear if, at the end of the convalescent leave, the domestic chores are taken over by the father. Moreover, the directive does not prevent an extension of the convalescent leave from eight to twelve weeks. In the case of a six-month period, however, the legislature cannot treat men and women differently by pleading the supposed protection of the mother. Nor can it create, from identical factual circumstances, differences between men and women by means of a legislative amendment which, in the special field of social welfare and employment law, relates to the protection to which mothers alone had previously been entitled. The attempt to mask an unjustified difference in treatment would be manifest if maternity leave of, say, one or more years were introduced.

Today it is well known that there is no cause to associate "biological maternity" with "social maternity". It is therefore unnecessary to consider the theory put forward by some that it is normally the role of women to bring up small children and that, by reason of the maternal instinct, the differences involved are biological and psychological. That state of affairs has been brought about rather by cultural and economic factors and by tradition and ideology; neither Article 2 (3) nor Article 5 (1) of the directive reflects a theory such as that. The view that, for functional reasons, the mother is better qualified than the father to give a child the love and special attention which it needs is not compatible with the directive either.

The Federal Government has relied on an expert opinion according to which there are biological or health grounds for limiting maternity leave to mothers, and it especially underlined the fact that 50% of mothers give up their employment shortly after childbirth. However, the expert opinion is dated 30 April 1979 and was therefore drawn up after the tabling of the draft law. The argument based on the instances when employment is given up is irrelevant because, at the end of the present maternity leave, 51% of women who have taken the leave terminate their employment. That demonstrates that the Law did no more than postpone the moment of departure by four months, without having any effect on the number of women leaving employment.

It is apparent from the foregoing that maternity leave reserved exclusively to mothers is contrary to Directive 76/207. The only solution to the infringment of the combined provisions of Articles 5 (1), 1 (1) and 2 (1) of the directive is to eliminate discrimination against fathers. Under Article 1 (1), Member States are required to put into effect the principle of equal treatment with regard to working conditions. Under Article 3 (2) they must take such measures as are necessary to ensure that any laws, regulations and administrative provisions contrary to that principle are abolished.

The German Mutterschutzgesetz should be regarded as one of the laws, regulations and administrative provisions to which Article 3 (2) of the directive refers. The legislation, in existence since 1979, contained and still contains provisions which are contrary to the principle of equality, and the Federal Republic has

failed to abolish them. Even during the legislative procedure, doubts were expressed as to whether it was compatible with the Constitution and with Community law to exclude fathers from maternity leave. As a result of those doubts the Bundesrat called for the inclusion of fathers. When bringing its action against the Federal Republic for failure to observe a Treaty obligation, the Commission emphasized that the exclusion was incompatible with Community directives. When amending the provisions of the Law in 1981, the government did not carry out the requisite changes. Similarly, the draft law adopted in November 1983 made provision only for the reduction of the financial benefits, without making the leave available to fathers who were gainfully employed.

That intransigent attitude cannot be founded on financial arguments. Extending the benefit of parental leave to the father would have only minimal consequences, since the leave may only be claimed by one person, either by the working father or by the working mother. From a financial point of view, it would be immaterial which parent claimed the leave. It fathers were to apply for leave when mothers would not have done so, some increase in expenditure would result, but only to a minimal extent, since 95% of wage-earning mothers who have a child actually claim the leave.

In view of the Federal Republic's refusal to repeal the provisions which conflict with the principle of equal treatment, domestic German courts are at liberty to hold the legislative provisions in question to be contrary to the directive and inapplicable under domestic law. In view of its inadequate implementation, the directive, which renders the discriminatory provisions ineffective, is directly applicable. It is clear from the case-law of the Court that a directive is directly applicable whenever the provisions requiring Member States to follow a certain course of conduct are, by their nature, capable of direct application. The directive must be sufficiently precise and must allow the national legislature no discretion as to whether to implement it, although there may be discretion as regards the manner in which it is to be implemented, without the direct applicability of the directive being thereby affected. Article 5 (2) of the directive stipulates clearly that States must take the measures necessary to ensure that any provisions contrary to the principle of equal treatment are abolished. That provision is clear, and nationals of Member States whom it concerns may avail themselves of it before national courts. The plaintiff in the main proceedings therefore proposes that the following answers be given to the questions submitted to the Court:

Question 1

In pursuance of Article 5 (1) 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, men and women must be granted the same working conditions without discrimination as to

sex. It is contrary to Article 5 (1) thereof to award, after the birth of a child and on expiry of an eight-week protective period of leave granted to the mother alone, a period of leave to which the State contributes by the payment of her net remuneration, subject to a minimum of DM 25 *per diem*, and which lasts until the day on which the child reaches the age of six months, where such leave is available exclusively to mothers in gainful employment and fathers in gainful employment are not entitled to take the leave instead of the mother, when the parents so agree.

Article 2 (3) of the directive, which provides that the directive is to be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, does not apply to such leave when it extends beyond the 12 weeks following the birth of a child.

Question 2

Since the provisions governing maternity leave in the Federal Republic of Germany are contrary to Article 5 (1) of the directive, the latter is directly applicable by national courts. It follows from the direct applicability of the directive that, whenever parents so agree, maternity leave may be claimed either by a mother in gainful employment or by a father in gainful employment, as preferred.

The *Barmer Ersatzkasse*, the defendant in the main proceedings, refers to a judgment of the Bundessozialgericht [Federal Social Court] of 19 October 1983, in a case of which the facts were similar. The Bundessozialgericht took the view that the limitation of benefits awarded in connection with maternity leave to the mother alone was not contrary to the Constitution. In order to care for the mother beyond the statutory maternity leave of eight weeks following the birth, and on account of the physical and psychological changes entailed by pregnancy and childbirth, the Mutterschutzgesetz offers maternity leave so as to enable her to be free of the special burden which her employment represents during that period. The Sozialgericht, giving judgment at first instance, had held on the basis of a convincing expert opinion that the mother does not recover from the physical and psychological changes which she has undergone by the end of the statutory post-natal leave of eight weeks, but only some months thereafter. It was held that it was not essential to refer the matter to the Bundesverfassungsgericht or to the European Court of Justice.

A careful legal examination of Directive 76/207 reveals that it is not contrary to Articles 1, 2 and 5 (1) to reserve the leave in question exclusively to mothers in gainful employment. The provisions of the Mutterschutzgesetz which deal with maternity leave are not directly concerned with working conditions within the meaning of Article 5 (1) of the directive. The main purpose of those provisions is to extend the protection enjoyed by working mothers beyond the eight weeks following childbirth. In its decision of 19 October 1983, the Bundessozialgericht rightly held that it was a matter of relieving the mother of the special burden represented by her employment during the period when she was in need of care, since her recovery from the physical and psychological changes which had occurred was not complete until several months after the birth. The statements made by the Bundessozialgericht show that, contrary to

the plaintiff's opinion, entitlement to the leave derives from biological considerations.

The same point emerges from a further judgment delivered by the Bundessozialgericht on 3 June 1981 in proceedings brought by an adoptive mother. According to that court, the intention of the legislature was to confer a right to maternity allowances only in the case of maternity in the physical sense of the word. Adoptive mothers were denied both maternity leave and the financial benefits attached to it, because they were not subject to the consequences of pregnancy and childbirth. In that light there can *a fortiori* be no question of discrimination against fathers on grounds of sex, within the meaning of Article 2 of the directive. Article 2 (3) confirms that the directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. It is reasonable to assume that it was provisions such as those contained in the Mutterschutzgesetz which induced the Council to insert that provision, thereby restricting the scope of Article 2 (1). No contravention of the objective referred to in Article 1 (1) of the directive is in evidence.

Reserving to mothers in gainful employment the financial benefits attaching to maternity leave is not inconsistent with the implementation of the principle of equal treatment for men and women, either as regards access to employment, including promotion, and to vocational training, or as regards working conditions and social security.

The *Government of the Federal Republic* submits that the first question is concerned with whether it is compatible with Articles 1, 2 and 5 (1) of Directive 76/207 to deny a father the right to maternity leave. Article 1 sets out the objective of giving effect to the principle of equal treatment. Under Article 2 (1), that principle entails a prohibition of discrimination on grounds of sex. Article 5 (1) reiterates that prohibition with reference to working conditions.

The question whether the refusal to grant men the right to take maternity leave contravenes the prohibition which Directive 76/207 places on discrimination on grounds of sex should receive a negative reply. Reserving to women alone the right to take maternity leave is consistent with Article 2 (3) thereof, since the leave is intended to contribute solely to the protection of the mother's physical health. According to the Bundesverfassungsgericht, the statutory protection is designed to reduce the conflict between the role of the woman as a mother and her status as wage-earner, in order to preserve her own health and that of the child.

In drafting the Mutterschutzgesetz and instituting the maternity leave, the legislature was primarily concerned to ensure the protection of the mother's health. As soon as the child is born, the woman must be relieved of her duties at work on account of the physical and psychological changes due to pregnancy and childbirth. That is an undisputed characteristic inherent in a woman's nature. Opinions differed over the length of the leave, which by 1965 had been increased from the original period of three weeks to eight weeks in line not only with the current state of medical

knowledge and the views of the legislature on the form and extent of protection, but also with the size of the financial resources available. On the occasion of the latest extension of the leave, in 1965, medical experts based themselves on the fact that the reversion of the major organic changes attibutable to pregnancy and childbirth takes about eight weeks, and that a complete cessation of work during that period is indispensable. Since the introduction of the Mutterschutzgesetz in 1952, however, there has been an awareness that, when the period of convalescence expires, a woman has still not regained the capacity for work which she has prior to pregnancy. According to an expert report, she has recovered only from the most basic organic changes, not from the alterations to the hormonal and endocrinal systems and to the central nervous system or from the psychological changes. Since a woman's capacity for work is diminished beyond the period of convalescence, a cessation of work for several months thereafter was suggested on health grounds. The expert report endorsed the conclusion reached by the Bundesministerium für Arbeit und Sozialordnung [Ministry of Labour and Social Security], namely that the Mutterschutzgesetz did not afford sufficient protection for the female wage-earner. Every year about 50% of women who have given birth resign shortly afterwards. 20% of mothers who return to work on expiry of the period of convalescence become unfit to work for varying lengths of time. Cessation of work for the mother is justified on grounds connected with a woman's biological characteristics. That aim, indeed, underlies the Law introducing maternity leave and is expressed with sufficient clarity in the Law itself and in the *travaux préparatoires.*

The cessation of work by the employee on expiry of the period of convalescence is regarded as maternity leave enabling her to recover after childbirth, not simply as a period of leave for mothers (Mutterurlaub). In principle, the leave is not granted unless it immediately follows the period of convalescence, the object being to safeguard a mother's chances of recovery initially offered by the convalescent leave.

Entitlement to maternity leave under Article 8 (a) (1) of the Mutterschutzgesetz is conferred only on mothers who have just given birth, to the exclusion of adoptive mothers and foster mothers. The decisive criterion for the entitlement therefore lies, not only in the sex of the claimant and the care of the child, but also in the fact of pregnancy and childbirth, with their attendant consequences for a woman's health.

The provisions of the Law which exclude entitlement to the leave in the case of the child's death are not, the Federal Government maintains, inconsistent with the above viewpoint and do not support the contention that the leave was created mainly to enable a person to care for the child and to bring it up. The legislature intended to limit the category of mothers enjoying maternity leave to those whose children were alive. That distinction, determined by the need to assist those mothers on whom the constraints due to pregnancy, childbirth and the attention demanded by the child weighed most heavily, does not contravene the principle of equality.

Since the objective of the Law was solely to improve the health protection afforded to the mother, it is readily

understandable that the protection should be conferred directly and exclusively upon her by relieving her of her work. In fulfilling its obligations to provide protection and assistance under the Grundgesetz, the Federal Government did not exceed its discretion by limiting the category of those eligible for the leave.

No argument may be derived from the fact that, by contrast with convalescent leave, the mother is relieved of her duties at work during the maternity leave, not as the result of a prohibition on working, but by virtue of a right to take leave. The effects of pregnancy and childbirth become increasingly diverse as time goes by. Furthermore, the duties involved in caring for a child differ widely from case to case. Consequently, the legislature deliberately left the decision to the individual mother. She must be given that freedom of choice for the further reason that during maternity leave, by contrast with the convalescent period, the allowance which she draws only partly offsets her loss of earnings.

The preparatory documents disclose that the law introducing maternity leave is designed to improve the protection enjoyed by the mother. According to Bundestagsdrucksache [Parliamentary Paper] No 8/2613, the purpose of the Law is to release the mother from her duties at work so as to enable her to continue her recovery beyond the period of convalescent leave, and to relieve her of the double responsibility which she incurs as both wage-earner and mother and which is particularly onerous during the first months following childbirth. Owing to the changes connected with pregnancy and childbirth, the mother still requires careful protection even after the period of convalescence. The extension by four months of the period of exemption from work enables a mother who is in employment to devote herself to her child during the first months following its birth.

The objective of improving the social protection of the mother is also set out in the report of the competent committee of the Bundestag and was emphasized in the readings of the bill in plenary session. The fact that some of the parliamentary speeches concentrated on the care of the child and that leave was withheld from the father in order to avoid the need for the Bundesrat's approval is explicable mainly in terms of the political debate on a Federal draft law on family allowances tabled by members of the opposition. When it came to voting, the majority of the Bundestag drew a clear distinction between the aims connected with family policy and those connected with the legal protection of the mother. According to a resolution of the Bundestag of 10 May 1979, the introduction of maternity leave in the interests of female wage-earners and their children constituted a remarkable step forward, inasmuch as it had the effect of enhancing the protection of the female wage-earner's health, while contributing to the reduction of the double burden of pursuing a career and attending to the child. The Bundestag confirmed that making provision for the care of the child and for its upbringing was an objective of prime importance, but one which entailed new political endeavours going beyond the present concept of protecting the mother. It was necessary that parents should be able to devote themselves to bringing up their children without being compelled by economic factors to take up employment, and should be able to decide freely whether it was the mother or the father who interrupted his work; adoptive parents should also come within the scope of such legislation. It is therefore apparent

that the legislature reserved for future legislation the creation of parental leave for the purpose of bringing up the child.

The German Government does not overlook the fact that the Law on maternity leave has favourable repercussions in the sphere of family policy, inasmuch as it enables the mother to devote herself to her child without being subject to the constraints arising from her employment. Those repercussions, however, are not a specific feature of the leave. They were essentially already part of the existing social protection of the mother.

The Law introducing maternity leave further serves to give effect to the principle of equality between the sexes at work, by assisting a woman to retain her employment after childbirth; 50% of mothers give up their work after the birth of their child. The drawbacks which childbirth formerly entailed for a woman with regard to her employment and under social security law are now reduced. The mother retains her employment and she is covered by the social insurance scheme free of charge. For the first time, the period spent in bringing up the child is taken into account for old-age pension purposes.

In a recent decision of 2 February 1982 the Bundesverfassungsgericht took the view that maternity leave serves to protect the physical health of the mother and does not constitute leave intended for bringing up the child.

The second question inquires whether Articles 1, 2 and 5 (1) of the directive are directly applicable in Member States. Since the first question has been answered in the negative, no reply to the second question is called for.

The *Commission*, after recalling the facts of the case and setting out in detail the relevant national and Community legislation, maintains that the legal debate should centre on the question whether the provisions of German law, which base themselves explicitly on the sex of the claimants, are covered by Article 2 (3) of the directive, which expressly excludes from the ambit of the principle of equal treatment any provisions concerned with the protection of women during pregnancy.

It is apparent from a study of the content and purpose of the directive that it seeks to give effect to the principle of equal treatment as regards access to, and pursuance of, employment including matters of social security. The principle at issue is a particular form of the general principle of equality and shares the character, status and importance of a fundamental right at the Community level. By referring to both direct and indirect discrimination, Article 2 (1) of the directive emphasizes the broad scope of the principle. Articles 3 to 5 extend its ambit to cover access to employment, training, working conditions and dismissal.

To take account of the fact that legislation explicitly based on a person's sex may be justified in the case of an objective difference determined by sex, the directive, in Article 2 (2) to (4), provides certain exceptions to the principle of equal treatment, which should nevertheless be recognized as

such and accordingly be interpreted restrictively.

Article 2 (3), which deals with the protection of women, particularly as regards pregnancy and maternity, encompasses only those provisions referring to sex which are necessary to ensure such protection. The availability in all Member States of periods of convalescence for the benefit of mothers after childbirth proves, even if they are not of standard duration, that the principle is generally acknowledged.

On the other hand, a national rule which is described as a provision for the protection of the mother may not *ipso facto* fall within the scope of that derogation, which encompasses only those provisions which serve objectively to protect the mother and in which the reference to sex is a necessary condition for ensuring the desired protection.

A distinction based on sex is not permissible, however, in the context of a body of rules also designed to release the mother from her duties at work in order to enable her to attend to the child's upbringing. Indeed, the facility thereby granted could equally be provided by means of a non-discriminatory measure allowing the father, too, to attend to the child and thus relieve the mother in the household.

It follows from the foregoing considerations that national legislation on the protection of the mother, such as the Law in question, cannot be regarded as justified. The fact that the leave terminates after the death of the child demonstrates that the care of the child constitutes one of the essential reasons for the German legislation. That is, indeed, also apparent from the statement of the reasons on which the Law is based. It is equally possible to provide protection for the mother beyond the period of convalescence by releasing her from household chores, assigning them to the father. Since non-discriminatory legislation would attain the desired purpose, discrimination on grounds of sex is forbidden.

The contentions of the Commission are borne out by the position in other Member States, where a clear distinction is drawn between maternity leave as such, which is compulsory, and other measures of family policy. Where on expiry of the compulsory protection period, which is reserved to the mother alone, special benefits are made available on account of changed family circumstances, they must be granted to the father or mother of the child, as preferred. The Court itself has distinguished clearly between the very difficult period which follows immediately the birth of the child, on the one hand, and the later period, on the other.

The Commission points out that it was on the basis of those considerations that it brought an action against the Federal Republic of Germany for failure to fulfil a Treaty obligation. In the context of a preliminary ruling, however, the Court may not, directly and specifically, give judgment on the compatibility of national provisions with Community law. With that proviso, it proposes that the first question be answered as follows:

National legislation which, on expiry of the compulsory eight-week period of convalescence after the birth of a child, provides a special four-month period of paid leave for the benefit of the mother alone, at least one of whose objectives is

to enable her to take care of her child, is contrary to the principle of equal treatment laid down in Directive 76/207/EEC and is not justified in terms of the derogation provided for by Article 2 (3) thereof.

The second question, on the direct effect of the directive, is concerned with the interpretation of Article 5 (1), which makes provision for the implementation of the principle of equal treatment in relation to working conditions. The disputed legislation is, the Commission claims, discriminatory in character because it is only the mother of a child who may enjoy paid leave.

In principle a directive does no more than require Member States to incorporate its objectives into national law. In some circumstances, however, the Court has conferred on individuals the right, in legal proceedings against a Member State, to rely on the provisions of a directive whose content is unconditional and sufficiently precise, where the State in question has failed to adopt the requisite implementing measures within the prescribed period, or has adopted national measures which are inconsistent therewith. The Court thereby wishes to prevent States from using their own omissions to deprive of practical effect a directive which is mandatory in its terms. So far the Court has not had occasion to state its views on the effect of directives which give effect to the principle of equal treatment, because the cases which have been brought before it so far did not disclose any discrimination or else were capable of being resolved directly on the basis of Article 119 of the Treaty.

The direct effect of that type of directive raises special problems. A directive such as that does, it is true, require the national legislature to abstain from any discriminatory treatment by reference to sex, but does not require it either to introduce any legislation of a specific content or to offer particular benefits. Where certain legislation is not in conformity with the principle of non-discrimination, the legislature generally has at its disposal a number of means of ensuring equal treatment. The principle may possibly have direct effect where the legislature is vested with no such discretion and the inclusion of persons of the opposite sex is the only means of creating a situation which is in conformity with the directive.

It should further be borne in mind that the legal points at issue are the subject of proceedings under Article 169 of the Treaty, which are now pending before the Court. In those proceedings the German provisions are contested specifically, not abstract terms, as here. The judgment of the Court must be awaited before it can be known whether, and to what extent, the national legislature has infringed Community law. If unsuccessful, the Federal Republic will have to comply with the judgment completely and ensure that any injured parties obtain a proper remedy. As matters stand, the Commission takes the view that it is not necessary to broach that question, and suggests that the Court should not answer it.

III — Replies to questions from the Court

The *Commission* was requested, on the subject of current legislation governing

maternity leave in the various Member States, to give more detailed explanations than those which appear in the comparative table published in the 12th Edition of "Comparative Tables of the Social Security Schemes in Member States of the European Communities", and was asked whether it had observed similar problems in other Member States. In reply, the Commission forwarded to the Court a synoptic table of the schemes for compulsory or optional maternity leave and for parental leave in the various Member States. It emerges from that table that the total length of compulsory maternity leave ranges from 12 weeks (Greece) to 20 weeks (Italy), while the length of the protective period following childbirth ranges from 6 weeks (Greece) to 14 weeks (Denmark). In addition to the Federal Republic of Germany, voluntary maternity leave is available in Luxembourg, Ireland and the United Kingdom. The schemes applicable in those countries are comparable in structure to the German scheme. Consequently, the Commission is considering whether it is necessary to bring proceedings against the Member States involved for failure to fulfil their obligations. it does not know whether and, if so, to what extent the various national schemes have given rise to litigation similar to that in this case.

The *parties to the main proceedings and the Government of the Federal Republic of Germany* were requested to answer the following questions concerning the grant of maternity leave and the payment of the pecuniary allowance which the Law attaches to the leave: On the basis of whose employment are the leave and the allowance awarded? Is the Court right in thinking that, under the present law, the leave and the allowance are granted on the basis of the mother's employment? If that is so, what would be the situation if the leave and the allowance were awarded to the father? Would the benefits then derive from the employment of the father? If so, what consequences would that have should the mother not be in employment?

(a) The *plaintiff in the main proceedings* states that the maternity leave and the allowance attaching thereto depend on the employment of the person entitled to the leave under the present law, that is to say, the mother. It is a prerequisite that the mother should either have held employment for at least nine months during the year preceding the birth of the child or else be entitled to benefits under the Arbeitsförderungsgesetz.

Under the present legal arrangements, the mother may claim leave even when she is unemployed. That entitlement is not subject to any obligation on her part to furnish proof that she personally is taking care of the child. Moreover, it is independent of the occupational and social circumstances of her spouse, the father of the child.

Leave for the purpose of child-care which was available to the mother or father, as preferred, would not be granted unless the person claiming it met the conditions laid down. As under the present system, entitlement to child-care leave should be independant of the other parent's social or occupational circumstances. Even if the mother is not in employment, the father should be entitled to parental leave. If only one

spouse is in employment, child-care leave is not really possible since the only source of family revenue thereby disappears and the present allowance during leave is inadequate. Even under the present system maternity leave is less frequently claimed by single women or those taking care of their children single-handed than by mothers married to spouses in gainful employment.

(b) According to the *Barmer Ersatzkasse* the defendant in the main proceedings, the wording of the Mutterschutzgesetz, read in conjunction with the relevant provisions of the Reichsversicherungsordnung [German Insurance Regulation], might seem to suggest that maternity leave and its concomitant allowance are granted on the basis of the mother's employment. That supposition does not stand up to closer examination and cannot support the inference that analogous provisions should be created for the father as well. If the meaning and objective of the Law and the intention of the legislature are taken into consideration, it may be seen that the mother's employment is not the decisive factor for the purposes of the leave and the allowance attaching to it. Under the terms of the Reichsversicherungsordnung, payment of the allowance presupposes not only employment but also pregnancy. According to the Government's statement of reasons, the mother engaged in employment should be released from the double burden of being both mother and wage-earner during a period in which she needs special care. It is true that a double burden is borne by the father as well, but the mother's situation is different in the sense that she has to tackle that double burden in a weakened physical and mental state. The Bundessozialgericht correctly held, in its judgment of 19 October 1983, that the stated aim of the Law introducing maternity leave was to improve the health of the female wage-earner and not to ensure the child of care and attention. The latter was, at most, a secondary aim which the Law sought to achieve only indirectly.

The question whether, if the leave and the allowance attached to it were granted to the father, they would be based on the father's employment, is addressed primarily to the legislature and is a matter for its discretion, subject only to the general principle of equality. Statutory provisions which make the leave and the allowances available to the father as well as to the mother may be desirable in terms of social policy but are not required by law. The present provisions do not constitute either direct or indirect discrimination for the purposes of Directive 76/207.

The question of the consequences which the hypothetical legislation envisaged by the Court would have where the mother was not in employment may be left unanswered on account of the negative reply given to the earlier question.

(c) The *Government of the Federal Republic of Germany* agrees that the mother's being employed is a condition both for the payment of an allowance during the protective period before and after childbirth and for the grant of maternity leave. Dispensation from work is conceivable only in the context of employment. It is not inconsistent with that basic principle that the allowances at issue should also be paid to mothers

whose employment either is lawfully terminated by the employer during pregnancy or comes to an end after the protective period has elapsed, since those mothers must be released from the need to re-enter the labour market before the expiry of the six-month period following childbirth. To award a period of leave and an allowance to the wage-earning father would not contribute to the protection of the mother, which German law seeks to achieve, if the mother herself were not engaged in employment. As a housewife she would not bear the extra burden of employment. Where both parents are employed, leave taken by the mother releases her from the burdens arising from her employment and enables her to recover from the aftermath of pregnancy and childbirth. The aim of the maternity leave is thereby fulfilled. If leave were taken by the father, the mother would be obliged to return to work eight weeks after childbirth. The degree of protection for the mother would depend on the extent to which the father, once released from his duties at work, relieved her of the tasks of caring for the child and bringing it up. In any event, the mother would incur the extra burden of her employment. It is only a dispensation from work which makes it possible to improve, without restriction, the protection of the mother in the first six months following childbirth.

The question whether (and why) maternity leave such as that under consideration here, on the assumption that it serves to safeguard mother and child simultaneously and that it is impossible to separate the two aspects, falls within the ambit of Article 2(3) of the directive, or is necessarily excluded therefrom because it benefits the child, received the following answers:

(a) The *plaintiff in the main proceedings* subscribes to the Commission's opinion, namely that the protection of the mother from a multiple burden may be ensured without there being discrimination if the father attends to the housekeeping and the care of the children. The fact that maternity leave is not granted, or terminates, in cases where the child dies further demonstrates that it is intended to release the mother from a multiple burden. The death of the child does nothing to change the biological condition of the mother or her health, and has no effect on household responsibilities; yet the legislature takes account of that circumstance and withholds entitlement to maternity leave. That indicates that the true purpose of maternity leave is solely to enable the mother to care for her child.

(b) According to the *Commission*, even on the assumption that the German system is founded on the single, indivisible objective of protecting the mother and ensuring the care of the child, special rules concerning employment reserved to the mother alone are justified under Article 2 (3) of the directive only if the exclusion of the father is necessary for the attainment of the goal pursued. If the single objective of the Law could be achieved without treating persons differently on grounds

of sex, the legislature would be obliged to take that non-discriminatory course. Protection for the mother and care of the child can be ensured if the mother is released from her employment and looks after the child. In a situation such as the present one it is, for reasons of discrimination, impermissible to reserve the leave to the mother alone.

(c) According to the *Federal Government*, relieving the mother of her duties as an employee during both the period of convalescence and the maternity leave is of benefit not only to the mother but to the child as well. The fact that those two aspects may not be separated becomes apparent when the question is raised whether it might be beneficial to the infant to require its mother to work during the first months after childbirth. The line of argument which seeks to exclude maternity leave from the ambit of Article 2 (3) of the directive on the ground that it benefits the child as well is mistaken.

The Government of the Federal Republic of Germany, having stated that one of the fundamental reasons for the legislation on maternity leave is that it enables the mother to retain her employment, was requested to supply the Court with statistics on the number of women who have made use of maternity leave since the introduction of the new Law, and the influence which it may have had in keeping women in employment.

(a) According to the *Federal Government*, the rules on maternity leave are not directly designed to guarantee the mother's employment; rather, its retention is a logical consequence of maternity leave. The leave presupposes that the post is available when work is resumed. The guarantee of employment is also intended to enable the mother to claim the benefit of the leave. If she ran the risk of losing her employment, the mother would hardly ever avail herself of the option of maternity leave. For that reason, protection from dismissal has been extended to two months after expiry of the leave. The German Government produced a table showing the number of women taking advantages of maternity leave between 1980 and 1983. It reveals that the percentage of women who did so during the four years under consideration increased from 88% to 96%.

(b) The *plaintiff in the main proceedings* points out that, according to the Federal Government, maternity leave was intended to assist women in retaining their employment. However, since the introduction of the leave there has been an increase in the number of women giving up their employment on expiry of the first six months following the birth. Similarly, the Government's argument that the Law serves to promote the equality of women at work is a dubious one. The Law has caused employers to recruit even fewer women, since it is only female employees who are entitled to maternity leave. By obliging the mother to look after the child despite the possibility that the parents might decide otherwise, the Law also prevents women from pursuing their careers.

IV — Oral procedure

The plaintiff in the main proceedings, Ulrich Hofmann, represented by Dr Klaus Bertelsmann and Professor Heide Pfarr, Rechtsanwalt, Hamburg, the Government of the Federal Republic of Germany, represented by Dr Ernst Roeder, the Government of the United Kingdom, represented by Richard Plender of the Inner Temple, and the Commission, represented by Manfred Beschel, presented oral argument at the sitting on 22 May 1984.

The representative of the Government of the United Kingdom, after describing the relevant United Kingdom legislation, argued that the provisions of the Mutterschutzgesetz are, just like certain United Kingdom legislative provisions, covered by Article 2 (3) of the directive inasmuch as they seek to protect the woman, especially as regards pregnancy and maternity. To forbid a State to limit the provisions at issue to mothers alone would discourage it from adopting protective measures of that nature.

Directive 76/207 does not, according to the Government of the United Kingdom, confer on individuals any Community rights which they may assert before a court of law, because it fails to satisfy the prerequisites that it should be immediate, unconditional and precise. Furthermore, whilst a directive may, in some circumstances, have a direct effect in relations between an individual and a Member State, that can never be the case in relations between individuals.

The Commission was wrong in contending that a judgment declaring that a State has failed to fulfil its Treaty obligations compels either the State or an individual to make good the damage caused to the persons allegedly injured. Rights accruing to individuals do not derive from the judgment but from the Community rules which have direct effect. The supposed failure of a State to fulfil its Treaty obligations cannot entail the infringement by one individual of the rights of another.

The Advocate General delivered his Opinion at the sitting on 27 June 1984.

Decision

1 By an order of 9 August 1983, received at the Court Registry on 29 August 1983, the Landessozialgericht [Higher Social Court] Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning 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 (Official Journal 1976, L 39, p. 40), in order to determine whether Paragraph 8a of the Mutterschutzgesetz [Law for the Protection of Working Mothers] of 18 April 1968, as amended by the

Laws of 25 June 1979 and 22 December 1981 (Bundesgesetzblatt I, 1968, p. 315, 1979, p. 797, and 1981, p. 1523), is compatible with Community law.

2 The order making the reference to the Court discloses that Mr Hofmann, the plaintiff in the main proceedings, is the father of an illegitimate child, of which he has acknowledged paternity. He obtained unpaid leave from his employer for the period between the expiry of the statutory protective period of eight weeks which was available to the mother and the day on which the child reached the age of six months; during that time he took care of the child while the mother continued her employment.

3 At the same time the plaintiff submitted to the Barmer Ersatzkasse, the defendant in the main proceedings, a claim for payment, during the period of maternity leave provided for by Paragraph 8a of the Mutterschutzgesetz, of an allowance pursuant to the combined provisions of Paragraph 13 thereof and Paragraph 200 (4) of the Reichsversicherungsordnung [German Insurance Regulation].

4 The defendant refused the plaintiff's request, and his appeal against that refusal was also unsuccessful. An action brought before the Sozialgericht [Social Court] Hamburg was dismissed by a judgment of 19 October 1982, on the ground that the wording of Paragraph 8 (a) of the Mutterschutzgesetz and the intention of the legislature indicated that only mothers could claim maternity leave. According to the Sozialgericht, it was the deliberate intent of the legislature not to create "parental leave".

5 The plaintiff appealed against that decision to the Landessozialgericht Hamburg, arguing that the maternity leave introduced by the Mutterschutzgesetz was not in fact designed to protect the mother's health but was concerned exclusively with the mother's care of the child. In the course of the proceedings before the Landessozialgericht, he requested primarily that the proceedings should be stayed and that certain questions on the interpretation of Directive 76/207 should be referred to the Court of Justice.

6 In view of the doubts which had arisen as to the compatibility of the national legislation on maternity leave with the aforesaid directive, the Landessozialgericht granted Mr Hofmann's request, particularly since it had learned that the Commission had brought proceedings on the same issue against the Federal Republic of Germany claiming that the latter had failed to fulfil its

Treaty obligations (Case 248/83). It therefore referred two questions to the Court, worded as follows:

"1. Are Articles 1, 2 and 5 (1) of Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal of the European Communities, L 39, pp. 40 to 42) infringed if, on the expiry of the eight-week protective period for working mothers following childbirth, a period of leave which the State encourages by payment of the net remuneration of the person concerned, subject to a maximum of DM 25 per calendar day, and which lasts until the day on which the child reaches the age of six months can be claimed solely by working mothers and not, by way of alternative, if the parents so decide, by working fathers?

2. If the answer to Question 1 is in the affirmative, are Articles 1, 2 and 5 (1) of Council Directive 76/207/EEC directly applicable in the Member states?"

7 In its order, the Landessozialgericht points out that the plaintiff, at the same time, lodged a Verfassungsbeschwerde [an objection on a point of constitutional law] with the Bundesverfassungsgericht [Federal Constitutional Court], pleading that some of the provisions of the Law instituting the maternity leave were unconstitutional, on the ground that they infringed the rule of the equality of men and women before the law, enshrined in Article 3 (2) and (3) of the Grundgesetz [Basic Law].

First question (scope and limits of the principle of equal treatment)

8 It is appropriate first of all to set out the legislative provisions on maternity leave which form the subject-matter of the proceedings pending before the Landessozialgericht.

9 Under Paragraph 6 (1) of the Mutterschutzgesetz, women may not be employed during the eight weeks which follow childbirth. According to Paragraph 8a of that Law, mothers are entitled to maternity leave from the end of the protective period provided for by Paragraph 6 (1) until the day on which the child attains the age of six months. The leave must be claimed by

the mother at least four weeks prior to the expiry of the protective period and is subject to the condition that the mother must have held employment for a period of, generally speaking, nine months before the birth. If the child dies during the period of leave, the leave is, as a general rule, terminated three weeks after the death. Under Paragraph 9a, the employer is forbidden to terminate the employment contract during the maternity leave and for a period of two months thereafter. Under Paragraph 13 of the Law, the mother receives an allowance from the State which is equal to her earnings, but subject to an upper limit of DM 25 per day, according to the provisions in force at the material time.

10 The plaintiff claims, essentially, that the main object of the disputed legislative provisions, in contrast with the protective period provided for by Paragraph 6, is not to give social protection to the mother on biological and medical grounds but rather to protect the child. The plaintiff draws that conclusion, on the one hand, from the *travaux préparatoires* relating to the Law introducing maternity leave and, on the other hand, from certain objective characteristics of the Law. He draws particular attention to three characteristics:

(i) The fact that the leave is withdrawn in the event of the child's death, which demonstrates that the leave was created in the interests of the child and not of the mother;

(ii) The optional nature of the leave, which means that it cannot be said to have been introduced to meet imperative biological or medical needs;

(iii) Lastly, the requirement that the woman should have been employed for a minimum period prior to childbirth; this indicates that it was not considered necessary to grant the leave in the interests of the mother, otherwise it ought to have been extended to all women in employment irrespective of the date on which their employment commenced.

11 According to the plaintiff, the protection of the mother against the multiplicity of burdens imposed by motherhood and her employment could be achieved by non-discriminatory measures, such as enabling the father to enjoy the leave or creating a period of parental leave, so as to release the mother from the responsibility of caring for the child and thereby allow her to resume employment as soon as the statutory protective period had expired. The plaintiff further claims that the choice between the options

thereby created should, in conformity with the principle on non-discrimination between the sexes, be left completely at the discretion of the parents of the child.

12 The plaintiff's viewpoint is supported by the Commission, which takes the view that the proviso in Article 2 (3) of Directive 76/207, which permits Member States to maintain provisions concerning the protection of women, particularly as regards pregnancy and maternity, calls for a restrictive interpretation inasmuch as it derogates from the principle of equal treatment. Since that principle constitutes a "fundamental right", its application cannot be limited except by provisions which are objectively necessary for the protection of the mother. If national legislation, such as that in this instance, serves the interests of the child as well, its purpose should preferably be achieved by non-discriminatory means. In the present instance, however, the protection provided for by Article 2 (3) of the directive may equally well be attained by a reduction of the mother's domestic duties, achieved by granting the leave to the father.

13 The Commission draws attention to the fact that, in a number of Member States, social legislation is moving towards the grant of "parental leave" or of "child-care leave", which is to be preferred to leave which is available to the mother alone. It stated that it was considering whether to bring actions for failure to fulfil a Treaty obligation against a number of Member States which, in various forms, retained measures which were comparable to the maternity leave provided for by the German legislation.

14 The Government of the Federal Republic of Germany, supporting the viewpoint of the Barmer Ersatzkasse, argues that legal protection afforded to the mother by the disputed legislation aims to reduce the conflict between a woman's role as a mother and her role as a wage-earner, in order to preserve her health and that of the child. It admits that there are differing views on the length of time for which a woman should enjoy special treatment following pregnancy and childbirth, but it argues that the period in question, although varying from woman to woman, extends considerably beyond the end of the statutory eight-week period of protection laid down by the Law. Hence the creation of maternity leave is justified for reasons which are connected with a woman's biological characteristics, since its aim is to avoid placing the mother, on expiry of the statutory protective period, under an

obligation to decide whether or not to resume her employment. Indeed, experience and statistics demonstrate that a considerable number of working women were compelled, under earlier legislation, to give up their employment as a result of motherhood.

15 In reply to the arguments put forward in particular by the plaintiff in the main proceedings, the Government of the Federal Republic of Germany maintains that maternity leave under German legislation constitutes an uninterrupted continuation of the protection given to a mother beyond the end of the protective period provided for by Paragraph 6 (1) of the Mutterschutzgesetz. The withdrawal of the leave in the event of the child's death is justified by the fact that its death puts an end to the multiplicity of burdens borne by the woman as a result of motherhood and her employment. The fact that the leave is optional and may be claimed by the mother is consistent with its objective, namely to enable the woman to choose freely, in the light of her physical condition and of other family and social factors, the solution which is better suited to her personal circumstances; by virtue of that provision the purpose of the leave, namely to protect the mother, may be better achieved than by the adoption of other sulutions, such as the grant of leave to the father or the assumption by other members of the family of responsibility for looking after the child. Finally, the provision which makes the grant of leave subject to the prerequisite that the mother shall have been in employment for a minimum period prior to giving birth is explained by the concern to avoid abuses whereby expectant mothers take up employment during pregnancy for the purpose of enjoying leave and the pecuniary benefits attaching to it.

16 The Gorvernment of the United Kingdom, after setting out the arrangements for protecting mothers under the social legislation of the United Kingdom, supports the viewpoint of the German Government. It reacts critically to the contentions put forward by the Commission, which in its view places too restrictive an interpretation on Article 2 (3) of the directive, thereby discouraging Member States from availing themselves of the possibilities offered by that provision.

17 For the purpose of answering the question raised by the Landessozialgericht, it is appropriate in the first instance to set out the provisions of Directive 76/207 to which reference has been made.

18 The directive is designed to implement the principle of equal treatment for men and women as regards *inter alia* "working conditions", with a view to attaining the social policy aims of the EEC Treaty to which the third recital in the preamble to the directive refers.

19 To that end, Article 1 defines "the principle of equal treatment" as meaning that the directive seeks to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, promotion, vocational training and working conditions. According to Article 2 (1), the principle of equal treatment means "that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status." Under Article 5 (1), application of the principle of equal treatment with regard to working conditions "means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex"; paragraph (2) of the article requires Member States to abolish any laws, regulations and administrative provisions contrary to the principle of equal treatment and to amend those which conflict with the principle "when the concern for protection which originally inspired them is no longer well founded".

20 Paragraphs (2), (3) and (4) of Article 2 indicate, in various respects, the limits of the principle of equal treatment laid down by the directive.

21 Under paragraph (2), which is of no relevance to the present case, the directive is expressed to be without prejudice to the right of Member States to exclude from its field of application those occupational activities for which, "by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor."

22 Paragraph (3) makes the following provision: "This directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."

23 Reference should also be made in the present context to paragraph (4), according to which the directive is to be without prejudice to measures to

promote equal opportunity for men and women, "by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1)", that is to say, as regards access to employment, promotion and other working conditions.

24 It is apparent from the above analysis that the directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents.

25 It should further be added, with particular reference to paragraph (3), that, by reserving to Member States the right to retain, or introduce provisions which are intended to protect women in connection with "pregnancy and maternity", the directive recognizes the legitimacy, in terms of the principle of equal treatment, of protecting a woman's needs in two respects. First, it is legitimate to ensure the protection of a woman's biological condition during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate 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.

26 In principle, therefore, a measure such as maternity leave granted to a woman on expiry of the statutory protective period falls within the scope of Article 2 (3) of Directive 76/207, inasmuch as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. That being so, such leave may legitimately be reserved to the mother to the exclusion of any other person, in view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely.

27 Furthermore, it should be pointed out that the directive leaves Member States with a discretion as to the social measures which they adopt in — order to guarantee, within the framework laid down by the directive, the protection of women in connection with pregnancy and maternity and to offset the disadvantages which women, by comparison with men, suffer with regard to the retention of employment. Such measures are, as the

Government of the United Kingdom has rightly observed, closely linked to the general system of social protection in the various Member States. It must therefore be concluded that the Member States enjoy a reasonable margin of discretion as regards both the nature of the protective measures and the detailed arrangements for their implementation.

28 It follows from the foregoing that the reply to be given to the question submitted by the Landessozialgericht Hamburg is that Articles 1, 2 and 5 (1) of Council Directive 76/207 must be interpreted as meaning that a Member State may, after the statutory protective period has expired, grant to mothers a period of maternity leave which the State encourages them to take by the payment of an allowance. The directive does not impose on Member States a requirement that they shall, as an alternative, allow such leave to be granted to fathers, even where the parents so decide.

29 Since the reply to the first question submitted by the Landessozialgericht is in the negative, the second question, concerning the effect of Directive 76/207 in the event of its provisions being disregarded by a Member State, is otiose.

Costs

30 The costs incurred by the Government of the Federal Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landessozialgericht Hamburg, by order dated 9 August 1983, hereby rules:

Articles 1, 2 and 5 (1) of Council Directive 76/207 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 meaning that a Member State may, after the protective period has expired, grant to mothers a period of maternity leave which the State encourages them to take by the payment of an allowance. The directive does not impose on Member States a requirement that they shall, as an alternative, allow such leave to be granted to fathers, even where the parents so decide.

	Mackenzie Stuart	Koopmans	Bahlmann
Galmot	Pescatore	O'Keeffe	Bosco
Due	Everling	Kakouris	Joliet

Delivered in open court in Luxembourg on 12 July 1984.

For the Registrat

H. A. Rühl
Principal Administrator

A. J. Mackenzie Stuart
President

OPINION OF MR ADVOCATE GENERAL DARMON DELIVERED ON 27 JUNE 1984 [1]

Mr President,
Members of the Court,

1. The Landessozialgericht [Higher Social Court] Hamburg has referred to this court two questions on the interpretation of Council Directive 76/207 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. In my view, the subject-

1 — Translated from the French.