Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 11 April 2013 [1]

Case C-5/12

Marc Betriu Montull
v
Instituto Nacional de la Seguridad Social (INSS)

(Request for a preliminary ruling from the Juzgado de lo Social nº 1 de Lleida (Spain))

(Social policy — Equal treatment for male and female workers — Directive 76/207/EEC — Articles 2 and 5 — Directive 92/85/EEC — Article 8 — Right to maternity leave for employed mothers — Possible use by an employed mother or an employed father — Non-employed mother — No right to leave for an employed father — Directive 96/34/EC — Framework Agreement on parental leave — Rights of the mother and the father — Biological fathers and adoptive fathers)

I – Introduction

1. The present request for a preliminary ruling, lodged at the Court's Registry on 3 January 2012, concerns the interpretation of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2] and Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC. [3]

1 — Original language: French.

2 — OJ 1976 L 39, p. 40. Directive 76/207 was amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15). Since Article 2 of Directive 2002/73 provides that the directive must be transposed by the Member States by 5 October 2005 at the latest, it does not apply *ratione temporis* to the facts of the main proceedings, which date from 2004. Directive 76/207 was repealed, with effect from 15 August 2009, by Article 34 of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23). Notwithstanding these amendments, I consider that this Opinion is still relevant to the interpretation of Directive 2006/54. More specifically, Article 28 of Directive 2006/54 provides that the directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, and that it applies without prejudice to the provisions of Directives 96/34 and 92/85. In addition, under Article 3 of Directive 2006/54, entitled '[p]ositive action', 'Member States may maintain or adopt measures within the meaning of [Article 157(4) TFEU] with a view to ensuring full equality in practice between men and women in working life'. Consequently, I consider that Directive 2006/54 did not modify the substance of the provisions of Directive 76/207 which are applicable to the facts in the main proceedings.

3 — OJ 1996 L 145, p. 4. Directive 96/34 was repealed, with effect from 8 March 2012, by Article 4 of Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC (OJ 2010 L 68, p. 13). Notwithstanding the amendments made by Directive 2010/18 to the legal arrangements applicable to parental leave, I consider that it did not modify the substance of the provisions of Directive 96/34 invoked in the observations submitted to the Court in the present case.

2. The questions asked by the Juzgado de lo Social nº 1 de Lleida (Social Court No 1, Lleida) (Spain) have arisen in a dispute between Mr Betriu Montull and the Instituto Nacional de la Seguridad Social ('the INSS') (National Social Security Agency) concerning the combined application of Article 48(4) of the Workers' Statute [4] and Article 133a of the General Law on social security. [5] Article 48(4) of the Workers' Statute [6] provides for maternity leave of 16 weeks, the first 6 weeks of which following the birth must be taken by the child's mother. The mother may then elect for the father to take all or part of the remainder of the maternity leave. Article 133a of the General Law on social security provides for a maternity benefit for periods of maternity leave pursuant to Article 48(4) of the Workers' Statute.

3. Mr Betriu Montull is employed and covered by the Spanish general social security scheme. Ms Macarena Ollé, a Procuradora de los Tribunales (a lawyer), is a member of the Mutualidad General de los Procuradores, which is a system separate from the Spanish social security scheme. [7]

4. Following the birth of their son in Lleida on 20 April 2004 and, I presume, with the consent of the child's mother, as is provided for in the Spanish legislation, Mr Betriu Montull applied for maternity benefit for the period following the six weeks of compulsory leave which the mother must take immediately following the birth. By decisions dated 28 July and 8 August 2004, that application was rejected by the INSS on the grounds that the mother was not a member of a State social security scheme and, therefore, had no primary right to the leave and therefore to the social security cover for the situation and that, in the case of biological parenthood, the father does not have his own individual, autonomous and independent right to leave, but only a right necessarily derived from that of the mother.

5. On 13 September 2004, Mr Betriu Montull brought an action before the referring court contesting the decision of the INSS and seeking a ruling to the effect that he is entitled to the benefit in question, arguing, inter alia, that his right to equal treatment had been infringed.

6. The referring court asks whether the national legislation under consideration, which frames the father's right to the benefit as one which derives from that of the mother, breaches the principle of equal treatment of men and women.

4 — The consolidated text of the Law on the Workers' Statute (Texto refundido de la Ley del Estatuto de los Trabajadores), adopted by Royal Legislative Decree 1/1995 of 24 March 1995 (BOE No 75, 29 March 1995, p. 9654), as amended by Law 39/1999 of 5 November 1999 (BOE No 266, 6 November 1999) to reconcile work and family life for employees (Ley 39/1999 para promover la conciliación de la vida familiar y laboral de las personas trabajadoras) (BOE No 266, 6 November 1999, p. 38934; 'the Workers' Statute'), is applicable in the main proceedings.

5 — Ley General de la Seguridad Social, adopted by Royal Legislative Decree 1/1994 of 20 June 1994 (BOE No 154, 29 June 1994, p. 20658), in the version introduced by Law 39/1999 ('the General Law on social security').

6 — In the version applicable at the time of the facts at issue in the main proceedings.

7 — According to the documents before the Court, the Spanish social security system is composed of a general scheme and special schemes. A Procurador de los Tribunales in Spain may choose to be affiliated either to the special scheme for self-employed workers, which forms an integral part of the Spanish social security system, or to the Mutualidad General de los Procuradores, a private occupational social security scheme for Procuradores de los Tribunales. Membership of the Mutualidad General de los Procuradores may also be supplementary to the Spanish social security scheme.

II – Legal framework

A – *European Union law*

1. Directive 76/207

7. Article 1(1) of Directive 76/207 reads as follows:

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

8. Article 2 of that directive provides:

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

...

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

(4) This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in Article 1(1).’

9. Under Article 5 of the directive:

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

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

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

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

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

2. Directive 92/85/EEC

10. The purpose of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC),[8] according to Article 1(1) thereof, is 'to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding'.

11. Article 8 of Directive 92/85, entitled 'Maternity leave', provides:

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

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

3. Directive 96/34

12. Under Article 1, the purpose of Directive 96/34 is to put into effect the annexed framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations (UNICE, CEEP and the ETUC).

13. Under paragraph 2 of Clause 1 of the framework agreement annexed to Directive 96/34, 'this agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State'.

14. Clause 2 of Directive 96/34, entitled 'Parental leave', provides:

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

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

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

B – *Spanish law*

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

8 — OJ 1992 L 348, p. 1.

16. Under Article 1(3) of the Workers' Statute:

'The following shall be excluded from the scope of the present law:

...

(g) in general, any activity performed outside the scope of paragraph 1 of this article ...'

17. Article 48(4) of the Workers' Statute, in the version applicable at the time of the facts in the main proceedings, which date from 2004,[9] provides:

'In the case of childbirth, the contract shall be suspended for a continuous period of 16 weeks ... The period of suspension shall be allocated in accordance with the wishes of the person concerned on condition that at least six weeks are taken immediately following childbirth. ...

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

...

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

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

...'

9 — Points 3 to 5 above.

18. Article 48(4) of the Workers' Statute was subsequently amended by Organic Law 3/2007 of 22 March 2007 on effective equality between women and men (Ley orgánica 3/2007 para la igualdad efectiva de mujeres y hombres) (BOE No 71 of 23 March 2007, p. 12611). In so far as is relevant here, Article 48(4) of the Workers' Statute was amended by adding the following subparagraph:

'Where, by virtue of the legislation governing the mother's work, she is not entitled to suspend her employment and take paid leave, the other parent shall be entitled to suspend his contract of employment for the period which would have been applicable to the mother, and this shall be consistent with exercising the right provided for in the following article [suspension of the contract of employment in connection with paternity]. ...' [10]

19. Article 133a of the General Law on social security provides:

'Childbirth, adoption and fostering (whether preliminary to an adoption or permanent) shall, for the purposes of maternity benefit, be deemed situations which are covered, for the duration of the periods of leave which may be taken in these circumstances by virtue of Article 48(4) of the recast text of the Workers' Statute, approved by Royal Legislative Decree 1/1995 of 24 March 1995, and Article 30(3) of Law 30/1984 on measures to reform the civil service of 2 August 1984'.

III – The main proceedings and the questions referred for a preliminary ruling

20. In addition to the facts described in points 3 to 5 above, it should be noted that on 20 April 2005 the referring court referred to the Tribunal Constitucional (Constitutional Court) a question concerning the conformity of Article 48(4) of the Workers' Statute with the Spanish Constitution. By judgment of 19 May 2011, the Tribunal Constitutional ruled that the provision in question was not contrary to Articles 14 (principle of non-discrimination), 39 (social, economic and legal protection of the family) or 41 (social security scheme) of the Constitution.

21. However, the referring court has doubts about the compatibility of that provision with European Union law and, more specifically, with the general principle of equal treatment.

22. The referring court states that there is no dispute over the six-week period of compulsory leave which the mother must take immediately following the birth. However, in respect of the subsequent period of 10 weeks, it states that in so far as the father's right is framed as a right which derives from that of the mother, the national legislation does not treat working fathers and working mothers in the same way even though their respective situations are comparable.

23. According to the referring court, the period during which the contract of employment is suspended and the person is entitled to return to the same job which is established in Article 48(4) of the Workers' Statute, should, with the exception of the six weeks following the birth, be regarded as parental leave and as a measure intended to reconcile work and family life, since the biological fact of the pregnancy and birth, which affect only the woman, is relevant only for the compulsory leave for the mother.

24. That court considers that the leave at issue in the main proceedings must therefore be able to be taken by the mother or the father without distinction, where both are employed and in their capacity as parents of the child.

10 — It is clear from the documents before the Court and from the wording of Article 48(4) of the Workers' Statute as amended by Organic Law 3/2007 that, if that amended version had been in force at the time of the facts of the present case, the main proceedings would not have existed, as the father could have suspended his contract and received a benefit irrespective of whether or not the mother was a member of the social security scheme. The INSS and the Spanish Government confirmed this interpretation at the hearing.

25. According to the referring court, the Spanish legislation in question also treats biological fathers and adoptive fathers differently. In the case of adoption, where both the mother and the father work, Article 48(4) of the Workers' Statute allows them to allocate the leave between them as they wish. In those circumstances the right to leave is not therefore framed as primarily that of the mother, which she can transfer to the father, but as a period of leave allocated by common agreement between the father and the mother. Thus, in the case of adoption, an employed father covered by a social security scheme can take the whole of the leave and be paid the corresponding benefit even in cases where the mother is not an employee covered by a social security scheme, while in the same situation, in the case of biological maternity and childbirth, the father cannot take the last 10 weeks of the leave, as it is regarded as primarily the right of the mother.

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

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

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

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

IV – The procedure before the Court

27. Written observations were submitted by the INSS, the Spanish and Polish Governments and the European Commission. They presented oral argument at the hearing which was held on 21 February 2013.

V – Analysis

A – *The admissibility of the questions referred for a preliminary ruling*

28. The Spanish Government considers the questions referred for a preliminary ruling to be inadmissible. It takes the view that the order for reference does not set out specific reasons which would justify the relevance of those questions, which highlights their purely hypothetical character. The referring court has thus requested an advisory opinion from the Court on the interpretation of certain provisions of European Union law in conjunction with Article 48(4) of the Workers' Statute.

29. At the hearing, the INSS also claimed that the questions referred for a preliminary ruling were inadmissible. In its view, since Article 48(4) of the Workers' Statute provides for leave for a continuous period of 16 weeks, the questions asked nine years after the birth are necessarily hypothetical since they are posed at a time when it is not possible to take that leave.

30. It has consistently been held that the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of European Union law which they need in order to decide the disputes before them. In the context of that cooperation, questions relating to European Union law enjoy a presumption of relevance. The Court may thus refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. The Court's function in preliminary rulings is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions. [11]

31. In the present case, it is clear from the decision by the referring court and the questions referred for a preliminary ruling that that court is seeking to ascertain whether provisions of European Union law, namely Directives 76/207 and 96/34, preclude a rule such as Article 48(4) of the Workers' Statute. Whilst it is true that, in the main proceedings, Mr Betriu Montull applied for the 'maternity benefit' provided for in Article 133a of the General Law on social security and that that law does not define the conditions governing entitlement to the benefit in question, it nevertheless refers, in that same Article 133a, to Article 48(4) of the Workers' Statute, which does define the conditions.

32. In view of the direct link expressly provided by the Spanish legislature between those two provisions, I cannot see how the questions asked by the referring court could be general or hypothetical or how the Court's answers to those questions could have no bearing on the decision in the main proceedings.

33. In addition, as regards the observations made by the INSS, referred to in point 29 above, I consider that, even accepting the alleged impossibility for Mr Betriu Montull to take the leave in question retrospectively, not only did he apply for a benefit, but he can in any case claim his rights to compensation against the INSS, as the INSS mentioned at the hearing.

34. I therefore consider the questions referred for a preliminary ruling to be admissible.

35. However, it should be noted that, in so far as the referring court has not set out, in the order for reference, the national legislative framework on parental leave, I will not examine the question whether Directive 96/34 precludes a measure such as that provided for in Article 48(4) of the Workers' Statute. [12]

11 — Case C-197/10 *Unió de Pagesos de Catalunya* [2011] ECR I-8495, paragraphs 16 to 18 and cited case-law.

12 — Points 78 and 86 below.

B – *The substance of the questions referred for a preliminary ruling*

1. Arguments

36. With regard to the first question, the INSS considers that it is not contrary to Directive 92/85 not to permit the transfer to the father of the entitlement to maternity benefit where the mother has no right to it herself because she a voluntary member of a mutual scheme which does not provide such cover, since no one can transfer a right which they do not hold.

37. The INSS points out that the parental leave covered by Directive 96/34 is different from that at issue in the main proceedings. According to the INSS, the right to parental leave is transposed into Spanish law by Article 46(3) of the Workers' Statute, which provides that 'workers shall be entitled to an extended period of leave not exceeding three years to enable them to take care of the child, whether by birth or by adoption, or in cases of foster care, whether permanent or preliminary to an adoption, including temporary foster care, as from the date of birth of the child, or, as the case may be, of judicial or administrative decision'. The aim of that parental leave is to reconcile the work and family responsibilities of working parents (whether men or women), whilst the purpose of the leave at issue in the main proceedings is to protect the mother's health and the special relationship between the mother and the newborn after the birth.

38. With regard to the second question, the INSS notes that Mr Betriu Montull was not entitled to take the leave in question because Ms Macarena Ollé, their child's mother, was a voluntary member of the Mutualidad General de los Procuradores and not of the general social security scheme. According to the INSS, the right to leave from work in connection with maternity, together with entitlement to a benefit during leave and the possibility of sharing that paid leave with the child's father, is not contingent on the mother's status as an employed person, but on her choice whether or not to become a member of the social security scheme covered by the national legislation in question.

39. With regard to the third question, the INSS considers that the difference in treatment among employed fathers, depending on whether they are adoptive fathers or biological fathers, is perfectly justified since, in the case of a biological relationship, it is reasonable that the right is envisaged exclusively for the mother, who must be able to recuperate from the pregnancy and the birth, whereas the purpose of suspending a contract on account of adoption or fostering is to facilitate the harmonious integration of the new child into the family unit, which affects the father and the mother without distinction.

40. The Spanish Government points out that the Spanish legislature introduced the legislation having due regard to the wording of Article 8 of Directive 92/85 and the margin of discretion accorded to the Member States therein. According to the Spanish Government, the fact that the mother can not only forgo completely the period after the six weeks of leave which she is required to take after the birth, but also share it or transfer it to the father, respects the wording and the purpose of Directive 92/85 by allowing the father to be involved in family duties.

41. The Spanish Government considers that the possibility of suspending the contract of employment whilst keeping the job open in the case of adoption is consistent with the provisions of Directives 96/34 and 76/207. In its view, Directive 96/34 recognises that the birth and the adoption of a child are not equivalent in so far as Clause 2.3(c) of the annexed framework agreement states that Member States may, in particular, adjust conditions of access and detailed rules for applying parental leave to the special circumstances of adoption. It therefore takes the view that the European legislature accords Member States a margin of discretion in adapting parental leave to the special circumstances of adoption.

42. According to the Polish Government, whilst the national legislature permits employed fathers to take part of the maternity leave, it is legitimate for this right to be derived from that of the employed mother. It observes that European Union law grants maternity leave to the child's mother and not to the father. Having acquired it, the mother can, of course, forgo part of that leave and transfer it to the father, but the father cannot claim to take care of the child and to take maternity leave in place of the mother. Such a solution is contrary to the objectives of maternity leave, which seek to protect the mother and her relationship with her child. The Polish Government considers that if a woman who does not have the status of a worker has not acquired a right to leave, she cannot *a fortiori* transfer it to the child's father. It notes that only an analysis presupposing that the right of the child's father to take maternity leave is a derived right makes it possible to preserve the fundamental function of that leave and to distinguish it from parental leave.

43. According to the Polish Government, the right to adoption leave and the conditions for its exercise are not laid down in EU law and remain within the exclusive competence of the national legislature, such that they cannot be assessed from point of view of the general principle of equal treatment.

44. The Commission points out that the Spanish legislation falls outside the scope of Directive 92/85, since a (male) worker cannot, in any case, take maternity leave under that directive. According to the Commission, Article 48(4) of the Workers' Statute introduces a difference in treatment on grounds of sex within the meaning of Article 2(1) of Directive 76/207 between mothers having the status of employed persons and fathers having that same status. That difference in treatment cannot be justified by reasons connected with the protection of pregnancy and maternity within the meaning of Article 2(3) of Directive 76/207.

45. The Commission takes the view that the 10-week period at issue in the main proceedings during which the contract of employment is suspended is distinct in this regard from periods of compulsory leave for the mother, in particular the 6 weeks immediately following the birth. It points out that the six weeks immediately following the birth constitute a period of compulsory leave for the mother, as that period is linked to the protection of the mother and of the special relationship between the mother and her child during the period following the birth.

46. The Commission considers, on the other hand, that where the Spanish legislation permits the father to benefit from a further period of 10 weeks, it detaches that period from the biological fact of maternity. In the Spanish legislation that period is construed as a period for giving care and attention to the child to which both employed mothers and fathers are entitled.

47. The Commission considers that the findings made by the Court in Case C-104/09 *Roca Álvarez*[13] are applicable in the present case. In the view of the Commission, Articles 2 and 5 of Directive 76/207 must be interpreted, in the present case too, as precluding a national measure such as that at issue in the main proceedings which recognises that employed mothers have the right to suspend their contract of employment in the event of a birth after the first six weeks of compulsory leave for the mother, whilst employed fathers can benefit from such suspension only if the mother is also an employed person.

48. The Commission considers that it does not have sufficient information to be able to conclude that the leave provided for in Article 48(4) of the Workers' Statute, except for the six weeks of compulsory leave for the mother, constitutes parental leave within the meaning of Directive 96/34.

13 — [2010] ECR I-8661.

2. Analysis

(a) The first and second questions

49. By its first and second questions, which should be examined together, the referring court asks, essentially, whether Directives 76/207 and 96/34 and the principle of equal treatment, which prohibits any discrimination on grounds of sex, must be interpreted as precluding national legislation such as that at issue in the main proceedings which establishes a difference in treatment on grounds of sex in so far as it recognises that employed mothers have the right to suspend their contract of employment in the event of a birth, beyond the six weeks of compulsory leave for the mother after the birth, and except in cases where the mother's health is at risk, whereas employed fathers can benefit from such suspension only if the mother is also an employed person and elects for the father to take a designated part of that leave (as permitted by the legislation in question).

50. It is common ground that Article 48(4) of the Workers' Statute provides, in the case of childbirth, for leave for a continuous period of 16 weeks, the first 6 weeks of which following the birth must be taken by the mother. In addition, it is clear from the wording of that provision and from the documents before the Court that the mother may elect for the father to take all or part of the remainder of the leave up to a maximum of 10 weeks. It should be stressed in this regard that this choice made by the mother in the main proceedings is not called into question.

51. Furthermore, the referring court does not ask any questions concerning the six weeks of compulsory leave for the mother following the birth [14] and there is no question here of a risk to the mother's health, in which case the mother cannot elect for the father to take the remainder of the leave. [15]

52. First of all, Article 48(4) of the Workers' Statute should be compared with Article 8 of Directive 92/85.

53. Article 8 of Directive 92/85 provides that workers are entitled to a continuous period of maternity leave of at least 14 weeks. Article 8 makes no provision for leave for the child's father. Unlike that article, whose scope *ratione personae* covers only pregnant workers and workers who have recently given birth or who are breastfeeding, [16] male workers do, under certain conditions, fall within the scope of Article 48(4) of the Workers' Statute.

54. However, I believe that the very wording of Article 8 of Directive 92/85 allows the Member States to adopt additional measures or measures which go beyond the minimum requirements laid down by that provision, as long as, of course, those minimum requirements are respected. [17] In this regard, I concur with the observations made by the Spanish Government, mentioned in point 40 above, to the effect that by permitting the mother to elect for the child's father to take all or part of the maternity leave, Article 48(4) of the Workers' Statute goes beyond the minimum requirements laid down in Article 8 of Directive 92/85, while respecting the binding regime which it imposes on the Member States.

14 — The order for reference explains that '[t]here is no dispute regarding that period of leave'.

15 — Article 48(4) of the Workers' Statute.

16 — Article 1(1) and (2) of Directive 92/85.

17 — See, in this regard, the use in two instances of the words 'of at least' in the provision in question. In my view, this interpretation is confirmed by the first recital in the preamble to Directive 92/85, which makes reference to its legal basis, Article 118a of the EEC Treaty, which provided that the Council must adopt, by means of directives, 'minimum requirements' for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers. See also Article 153 TFEU.

55. First of all, the maternity leave which must be taken by the mother is six weeks following the birth, whereas Directive 92/85 requires only two weeks (allocated before and/or after confinement), and, second, the possibility for the mother to elect for the father to take the remainder of the leave disappears if, 'at the time she is about to do so, the mother's return to work would endanger her health', [18] which comes under the objective of Directive 92/85, which is to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. [19]

56. It should be stated, for purposes of clarification, that, even though Article 8(2) of Directive 92/85 provides that only the first two weeks (before or after confinement) constitute compulsory maternity leave, the entitlement of the child's mother to 14 weeks' maternity leave under Article 8(1) of Directive 92/85 could not, in any case, be withdrawn against her will in favour of the child's father. [20]

57. I therefore take the view that the possibility for the child's father, under certain conditions and exclusively on the initiative of the mother, to take 10 weeks' leave, as in the main proceedings, complies with Article 8 of Directive 92/85.

58. That possibility must still be examined in the light of Directive 76/207. [21] Article 1(1) of Directive 76/207 states that the purpose of that directive is to put into effect in the Member States the principle of equal treatment for men and women as regards, inter alia, access to employment, including promotion, and to vocational training and as regards working conditions. That principle is defined in Articles 2 to 5 of the directive. Article 2(1) states that the principle of equal treatment means that there is to be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference in particular to marital or family status. Article 5(1) of the directive provides that the application of that principle, with regard to working conditions, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex. [22]

59. It is clear from the order for reference that, after the 6 weeks of leave following the birth, an employed mother is, in principle, entitled to an additional 10 weeks of leave, whilst an employed father is entitled to those 10 weeks only with the mother's agreement (which is not at issue in the main proceedings) and if the two parents are employed persons.

60. In fact, this measure is similar to the one at issue in *Roca Álvarez*, which concerned the interpretation of Article 2(1), (3) and (4) and Article 5 of Directive 76/207 in proceedings between Mr Roca Álvarez and his employer concerning the company's refusal to accord him so-called 'breastfeeding' leave.

61. In principle, the Spanish legislation in question in that case restricted the right to 'breastfeeding' leave to mothers, the child's father being entitled to that leave only on the condition that both parents were employed persons. Thus, for men whose status was that of an employed person the fact of being a parent was not sufficient to gain entitlement to leave, whereas it was for women with an identical status. [23]

18 — Article 48(4) of the Workers' Statute.

19 — Case C-460/06 *Paquay* [2007] ECR I-8511, paragraph 27.

20 — In paragraph 58 of the judgment in Case C-411/96 *Boyle and Others* [1998] ECR I-6401, the Court ruled that 'although the Member States are required, pursuant to Article 8 of [Directive 92/85], to take the necessary measures to ensure that workers are entitled to a period of maternity leave of at least 14 weeks, those workers may waive that right, with the exception of the two weeks' compulsory maternity leave provided for in paragraph 2'.

21 — By providing for a period during which the contract of employment is suspended, Article 48(4) of the Workers' Statute affects working conditions within the meaning of Article 5 of Directive 76/207.

22 — See, to this effect, *Roca Álvarez*, paragraphs 19 and 20.

23 — Ibid., paragraphs 22 and 23.

62. Having recalled its case-law to the effect that 'the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child',[24] the Court ruled that the legislation in question established 'a difference on grounds of sex, within the meaning of Article 2(1) of Directive 76/207, as between mothers whose status is that of an employed person and fathers with the same status'.[25]

63. The Court then examined whether such a difference in treatment was justified under Article 2(3) and (4) of Directive 76/207, which states that its application is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity, and to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women's opportunities in respect of working conditions.

64. According to the Court, the fact that, under the national legislation, the 'breastfeeding' leave at issue could be taken by the employed father or the employed mother without distinction meant that feeding and devoting time to the child could be carried out just as well by the father as by the mother.

65. That legislation could not therefore be regarded as ensuring the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child in accordance with Article 2(3) of Directive 76/207. The national legislation detached the granting of 'breastfeeding' leave from the biological fact of breastfeeding with the result that it was not covered by the exception provided for in Article 2(3) of Directive 76/207.

66. The Court also ruled in that judgment that to hold that only a mother whose status was that of an employed person was the holder of the right to qualify for the 'breastfeeding' leave, whereas a father with the same status could only enjoy that right but not be the holder of it, was liable to perpetuate a traditional allocation 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. The Court then held that to refuse entitlement to the leave to fathers whose status was that of an employed person, on the sole ground that the child's mother did not have that status, could have as its effect that a woman who was self-employed would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden. According to the Court, the national legislation in question did not eliminate or reduce existing inequalities in society within the meaning of Article 2(4) of Directive 76/207 and was not 'a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons'.[26]

67. Taking up the Court's reasoning in *Roca Álvarez*, it is evident that the measure at issue in the main proceedings establishes, with regard to the periods of leave at issue in the main proceedings, a difference in treatment on grounds of sex within the meaning of Article 2(1) of Directive 76/207 as between mothers whose status is that of an employed person and fathers with the same status.

68. As the Court ruled in paragraph 24 of *Roca Álvarez*, the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child.

24 — *Roca Álvarez*, paragraph 24; Case C-366/99 *Griesmar* [2001] ECR I-9383, paragraph 56; and Case C-476/99 *Lommers* [2002] ECR I-2891, paragraph 30.

25 — Ibid., paragraph 25.

26 — Ibid., paragraphs 36 to 38.

69. It should then be examined whether that discrimination which is contrary to Article 2(1) of Directive 76/207 could be justified with reference to paragraphs 3 and 4 of that article, which permit derogations from the principle of equal treatment.

70. First of all, as regards the protection of women in connection with pregnancy and maternity, it is settled case-law that, by reserving to Member States the right to retain or introduce provisions which are intended to ensure that protection, Article 2(3) of Directive 76/207 recognises the legitimacy, in terms of the principle of equal treatment of the sexes, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows childbirth. [27]

71. However, unlike the 6 weeks of leave immediately following the birth which, with a view to protecting her biological condition, the mother is required to take, the 10 weeks' leave at issue in the main proceedings cannot fall within the scope of Article 2(3) of Directive 76/207. By providing that the mother may, at the beginning of the maternity leave, elect, after the first 6 weeks, for the father to take a designated and continuous part of the subsequent 10-week period of leave, the Spanish legislature detached those 10 weeks of leave from the mother's biological condition and, consequently, from the purpose of Article 2(3) of Directive 76/207. It follows that that leave cannot fall within the scope of that provision. [28]

72. Furthermore, the facts of the case in the main proceedings must be distinguished from those at issue in *Hofmann*. According to that judgment, the maternity leave at issue in that case was reserved entirely to the mother, to the exclusion of any other person, and strictly linked to the protection of the mother's biological condition. [29]

73. Accordingly, like the 'breastfeeding' leave at issue in *Roca Álvarez*, the 10 weeks' leave in the present case is accorded to workers solely in their capacity as parents of the child and is not linked to the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child. [30]

74. Second, as regards the exception laid down in Article 2(4) of Directive 76/207, which permits a derogation from the principle of non-discrimination under Article 2(1) of that directive in order to promote equal opportunity for men and women and to reduce existing inequalities which affect women's opportunities in the area of working conditions, 'the Court has consistently held [that] Article 2(4) of Directive 76/207 is specifically and exclusively designed to authorise measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society. That provision thus authorises national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men … The aim of Article 2(4) is to achieve substantive, rather than formal, equality by reducing *de facto* inequalities which may arise in society and, thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional career of the relevant persons …' [31]

75. The Spanish Government points out that, by permitting the transfer to the father of the voluntary period, rather than losing entitlement to it if it is not taken, the legislation in question seeks to rectify the traditional allocation of the roles of men and women which keeps men in a subsidiary role in relation to the exercise of their parental duties.

27 — *Roca Álvarez*, paragraph 27; Case 184/83 *Hofmann* [1984] ECR 3047, paragraph 25; Case C-32/93 *Webb* [1994] ECR I-3567, paragraph 20; Case C-394/96 *Brown* [1998] ECR I-4185, paragraph 17; and Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 43.

28 — Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraphs 54 to 56.

29 — *Hofmann*, paragraphs 25 and 26.

30 — See, by analogy, *Roca Álvarez*, paragraph 31.

31 — Ibid., paragraphs 33 and 34.

76. In my view, whilst such an objective of promoting the rectification of the effects which could help to perpetuate a traditional allocation of the roles of men and women is laudable and should be encouraged, it is sufficient to note that the Court ruled in paragraph 36 of *Roca Álvarez*, that the fact that only a mother whose status was that of an employed person was the holder of the right to qualify for the leave at issue in that case, whereas a father with the same status could only enjoy that right but not be the holder of it, was liable to perpetuate a traditional allocation 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. The Court added that the exclusion of employed fathers from the right to leave, on the sole ground that the child's mother does not have that status, could have as its effect that a woman would have to limit her self-employed activity and bear the burden resulting from the birth of her child alone, without the child's father being able to ease that burden.[32] That reasoning is applicable *mutatis mutandis* to a measure such as that at issue in the main proceedings. Accordingly, the difference in treatment established by a measure such as that at issue cannot be justified under Article 2(4) of Directive 76/207.

77. In its first question, the referring court also makes reference to Directive 96/34 implementing the framework agreement on parental leave.

78. It should be noted that the referring court has not set out, in the order for reference, the national legislative framework for parental leave. More specifically, the referring court has not shown the relevance, in that regard, of Article 46(3) of the Workers' Statute and the link between that provision and Article 48(4) of that Statute. Consequently, I consider that, in the absence of a description in the documents before the Court of the content of the Spanish legislation relating to parental leave, there is no need to examine whether Directive 96/34 precludes a measure such as that provided for in Article 48(4) of the Workers' Statute.

79. In any case, since I consider that Article 2(1), (3) and (4) and Article 5 of Directive 76/207 preclude a national measure such as that provided for in Article 48(4) of the Workers' Statute, it is not necessary to examine the latter provision in the light of Directive 96/34.

80. In the light of the foregoing, I suggest that, in answer to the first and second questions referred for a preliminary ruling, the Court rule that Article 2(1), (3) and (4) and Article 5 of Directive 76/207 must be interpreted as precluding a national measure such as that at issue in the main proceedings which establishes a difference in treatment on grounds of sex in so far as it recognises that employed mothers have the right to suspend their contract of employment, beyond the six weeks of compulsory leave they enjoy after the birth, whereas employed fathers can benefit from such suspension only if the mother who elects for the father to take a designated part of that leave is also an employed person.

(b) The third question

81. My proposed answers to the first and second questions referred for a preliminary ruling may mean that there is no need to answer the third question, which asks the Court about the compatibility with the principle of equal treatment of a national provision such as Article 48(4) of the Workers' Statute, which recognises employed fathers as holders of a primary right to suspend their contract of employment and to be paid for by the social security system when they adopt a child but, by contrast, when they father their own child, the right conferred on them is only a right deriving from that of the mother.

32 — Ibid., paragraph 37.

82. I would note, however, that while it is apparent from the documents before the Court that Article 48(4) of the Workers' Statute establishes significant and manifest discrimination as between adoptive fathers and biological fathers to the detriment of the latter, European Union law does not contain any provision directly protecting biological fathers who suffer such discrimination. Such discrimination is not covered either by the FEU Treaty or by any directive, in particular Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,[33] which seeks to combat discrimination on the grounds of religion or belief, disability, age or sexual orientation.[34]

83. In addition, as was stated in point 53 above, (male) workers do not fall within the scope *ratione personae* of Directive 92/85, which covers only pregnant workers and workers who have recently given birth or who are breastfeeding. The European Union legislature would have to take action to extend its scope to (male) workers and to eliminate the inescapable link between the maternity leave provided for in that directive and the biological condition of pregnant workers and workers who have recently given birth or who are breastfeeding.

84. Lastly, the difference in treatment in question also does not fall within the scope of Directive 76/207, which concerns only discrimination between men and women. In the present case, the difference in treatment is between male workers.

85. The question could possibly be raised whether discrimination such as that at issue is consistent with Clause 2 of the framework agreement annexed to Directive 96/34 which, in paragraph 1, does not draw any distinction between the birth and adoption of a child as regards the grant of an individual right to parental leave and, in paragraph 3, permits the Member States to define the conditions of access and detailed rules for applying parental leave, as long as the minimum requirements of the directive are respected. I tend to think that such a significant difference in treatment between adoptive fathers and biological fathers, when paragraph 1 of Clause 2 of the framework agreement annexed to Directive 96/34 does not draw any distinction between birth and adoption, fails to comply with the minimum requirements stipulated by paragraph 3 of Clause 2 of that framework agreement.

86. Be that as it may, in view of my answer in point 78 above and the absence of a description of the content of the Spanish legislation relating to parental leave in the documents before the Court, it is not possible to take a proper view on the third question.

VI – Conclusion

87. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Juzgado de lo Social nº 1 de Lleida as follows:

Article 2(1), (3) and (4) and Article 5 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 must be interpreted as precluding a national measure such as that at issue in the main proceedings which establishes a difference in treatment on grounds of sex in so far as it recognises that employed mothers have the right to suspend their contract of employment, beyond the six weeks of compulsory leave they enjoy after the birth, whereas employed fathers can benefit from such suspension only if the mother who elects for the father to take a designated part of that leave is also an employed person.

33 — OJ 2000 L 303, p. 16.

34 — Article 1.