Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 28 June 2018 [1]

Case C-147/17

Sindicatul Familia Constanța
Ustinia Cvas
Silvica Jianu
Dumitra Bocu
Cader Aziz
Georgeta Crângaşu
Sema Cutlacai
v
Direcția Generală de Asistență Socială și Protecția Copilului Constanța

(Request for a preliminary ruling from the Curtea de Apel Constanța (Court of Appeal, Constanța, Romania))

(Request for a preliminary ruling — Directive 2003/88/EC — Working time — Scope — Concept of worker — Foster parents — Exclusion)

1. Foster care takes many shapes and forms. In general temporary in nature, it can range from short-term respite or emergency care of children to long-term full-time care from a young age until the child in question reaches adulthood. Depending on the circumstances foster care can take place at the foster parent's home or in a more institutionalised setting in a group home or an institution.

2. The present case concerns foster parents who, in their own home, take care of children full-time. Care giving constitutes their principal activity, an activity for which they receive compensation from the competent authority with which they have signed an employment contract. Given the needs of the children, the foster parents are not, as a matter of principle, allowed to go on holiday without the children. Nor do they receive additional compensation for the fact that they must continuously attend to the children's needs without having the right to pre-determined rest periods or holiday without the children placed in their care.

3. The crux of this case is whether such foster parents fall under the purview of Directive 2003/88/EC, which lays down rules pertaining to working time. [2] If so, further questions arise regarding the application of specific provisions of that directive, bearing in mind, in particular, that the time the foster parents use to care for the children placed in their care cannot be determined exactly. That is because, like parents, foster parents are to ensure that the children concerned can grow up with continuous parental supervision and age-appropriate care.

1 Original language: English.

2 Directive of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

4. In what follows, I shall explain why the foster parents in question fall outside the scope of Directive 2003/88.

I. Legal framework

A. EU law

1. Directive 89/391

5. Directive 89/391/EEC[3] concerns the introduction of measures to encourage improvements in the safety and health of workers at work.

6. The scope of Directive 89/391 is defined in Article 2. It provides:

'1. This [directive] shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This [directive] shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this directive.'

2. Directive 2003/88

7. Directive 2003/88 lays down rules regarding the organisation of working time. Those rules relate, inter alia, to minimum rest periods and breaks (Articles 3 to 5), maximum weekly working time (Article 6) and paid annual leave (Article 7).

8. It can be seen from recitals 3 and 4 that the directive is designed to improve workers' safety, hygiene and health at work.

9. Article 1 defines the purpose and scope of the directive. It reads:

'1. This [directive] lays down minimum safety and health requirements for the organisation of working time.

2. This [directive] applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This [directive] shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive [89/391], without prejudice to Articles 14, 17, 18 and 19 of this [directive].

3 Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

This [directive] shall not apply to seafarers, as defined in Directive 1999/63/EC without prejudice to Article 2(8) of this Directive.

4. The provisions of [Directive 89/391] are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this [directive].'

10. Article 3 of Directive 2003/88 provides for daily rest. It states:

'Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period.'

11. Article 4 of the directive deals with breaks. It provides:

'Member States shall take the measures necessary to ensure that, where the working day is longer than six hours, every worker is entitled to a rest break, the details of which, including duration and the terms on which it is granted, shall be laid down in collective agreements or agreements between the two sides of industry or, failing that, by national legislation.'

12. Article 5 of the directive deals with weekly rest periods. It reads:

'Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.

If objective, technical or work organisation conditions so justify, a minimum rest period of 24 hours may be applied.'

13. Article 6 of Directive 2003/88 sets out the rules pertaining to maximum weekly working time. It states:

'Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

(a) the period of weekly working time is limited by means of laws, regulations or administrative provisions or by collective agreements or agreements between the two sides of industry;

(b) the average working time for each seven-day period, including overtime, does not exceed 48 hours.'

14. Article 7 of Directive 2003/88 provides:

'1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

15. Article 17 of the directive allows Member States to derogate from certain provisions of the directive. It states:

'1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Articles 3 to 6, 8 and 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

...

(b) family workers; or

…

2. Derogations provided for in paragraphs 3, 4 and 5 may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection.

3. In accordance with paragraph 2 of this [provision,] derogations may be made from Articles 3, 4, 5, 8 and 16:

…

(b) in the case of security and surveillance activities requiring a permanent presence in order to protect property and persons, particularly security guards and caretakers or security firms;

(c) in the case of activities involving the need for continuity of service or production …

...

4. In accordance with paragraph 2 of this [provision,] derogations may be made from Articles 3 and 5:

...

(b) in the case of activities involving periods of work split up over the day, particularly those of cleaning staff.

…'

B. Romanian law

1. Law No 272/2004

16. Legea nr. 272/2004 privind protecția si promovarea drepturilor copilului[4] (Law No 272/2004) concerns the protection and promotion of the rights of minors.

4 Republished in the *Monitorul Oficial*, Part I, No 159 of 5 March 2014, amended and supplemented by Ordonanța de Urgență a Guvernului (Decree Law of the Government) No 65 of 15 October 2014, Law No 131 of 8 October 2014, Law No 52 of 30 March 2016 and Law No 57 of 11 April 2016.

17. Pursuant to Article 4 of Law No 272/2004, foster parents [5] who care for minors placed in care in accordance with that law are regarded as falling under the concept of a 'foster family' and as pursuing an activity analogous to that of parents.

18. Article 117 provides that the competent authority, in order to protect and promote the rights of minors, must coordinate the activities of social assistance and protection of the family and the rights of minors at the level of provinces and districts of the municipality of Bucharest.

19. In Article 121 family services are defined as services provided, within the home of a natural person or family, for the upbringing and care of a minor separated temporarily or permanently from his or her parents. Such services are provided following the adoption of a foster care measure in accordance with Law No 272/2004.

20. Article 122 of the law states:

'(1) Minors may be fostered by families and persons who are at least 18 years of age, have full capacity, are resident in Romania and have the moral qualities and material conditions necessary for the upbringing and care of a minor separated temporarily or permanently from his or her parents.

...

(3) The activity of the person appointed as [foster parent], in accordance with the law, shall be performed on the basis of a special contract for the protection of the minor, concluded with the Directorate-General or with an accredited private body, which includes the following stipulations:

(a) activities for the upbringing, care and education of minors in care shall be performed at home;

(b) the programme of work shall be determined on the basis of the needs of the minors;

(c) free time shall be arranged in accordance with the programme of the family and of the minors in foster care;

(d) the continuity of the work performed shall be guaranteed during the statutory leave period, unless during that period separation from the minor fostered with the family is authorised by the Directorate-General.

(4) The individual employment contract shall be drawn up as of the date of issue of [the fostering measure].

...'

2. Government Decree No 679/2003

21. Hotărârea Guvernului nr. 679/2003 privind condițiile de obținere a atestatului, procedurile de atestare și statutul asistentului maternal profesionist [6] (Government Decree No 679/2003 on the conditions for obtaining authorisation, the certification procedures and the regulations for persons whose occupation is the fostering of minors ('professional foster parents')) provides, in Article 1, that

5 In the relevant national legislation, the foster parents are referred to as 'maternal assistants' ('asistent maternal').

6 Published in the *Monitorul Oficial*, Part I, No 443 of 23 June 2003.

a professional foster parent is a natural person authorised in accordance with Decree No 679/2003. The foster parent must provide, by means of activities performed in his or her own home, for the upbringing, care and education necessary for the harmonious development of the minor in his or her foster or other care.

22. Article 8 of the decree states that the activities of persons authorised as professional foster parents are to be performed on the basis of a special individual employment contract, specifically intended for the protection of the minor, which is to be concluded with a public service specialising in the protection of minors or with an authorised private body that is under a duty to supervise and support the work performed by professional foster parents.

23. In accordance with Article 9 of the decree, for every minor received into foster or other care the professional foster parent must conclude an agreement annexed to the individual employment contract with the employer. That provision also specifies that the agreement is to be concluded with the written consent of the husband or wife of the professional foster parent and is to be notified to the board for the protection of minors that ordered the fostering or other care of the minor.

24. Article 10 sets out the obligations of the professional foster parent. Specifically, the foster parent is to provide for the upbringing, care and education of the minors in order to ensure their harmonious physical, mental, intellectual and emotional development; provide for the integration of the minors into their own family, guaranteeing them equal treatment with the other family members; provide for the social integration of the minors; contribute to preparations for the minors' return to their natural family or their integration into an adoptive family; permit public-service specialists in the protection of minors, or the authorised private body, to supervise their professional activity and assess the minors' development; and ensure the continuity of their activity during statutory leave, unless separation from the minors in foster or other care is authorised for that period by the employer.

C. Facts, procedure and the questions referred

25. The applicants in the main proceedings, represented by Sindicatul Familia Constanța, are employed by the Direcția Generală de Asistență Socială și Protecția Copilului Constanța (Directorate-General for Social Assistance and the Protection of Minors of Constanța) as foster parents. They take care of children placed in foster care at their respective homes 24 hours a day, without specific weekly rest periods or holidays.

26. The foster parents are to continuously supervise and care for the children in their care, except when the children are at school. Specifically, the foster parents are to guarantee that the children are continuously taken care of, even while taking statutory leave, unless separation from the child for that period has been authorised by the competent authority.

27. The foster parents seek, on the one hand, supplementary payments equal to an increase of 100% of the base salary on account of work performed on weekly rest days, public holidays and other days considered not to be working days under the relevant national legislation. On the other hand, they claim monetary compensation for untaken leave. During the foster parents' annual leave, the children also remained in their care because separation from the children is, as indicated, subject to prior authorisation of the competent authority.

28. At first instance, the Tribunalul Constanța (Regional Court, Constanta, Romania) dismissed the application as unfounded.

29. An appeal was brought against that decision before the Curtea de Apel Constanța (Court of Appeal, Constanta). Entertaining doubts regarding the proper construction of the relevant provisions of EU law, that court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 1(3) of Directive [2003/88] in conjunction with Article 2 of Directive [89/391] be interpreted as excluding from the ambit of the directive activity such as that of [foster parents], performed by the applicants?

(2) If the answer to the first question is in the negative, must Article 17 of Directive [2003/88] be interpreted to the effect that an activity such as that of [foster parents], performed by the applicants, may be the object of a derogation from the provisions of Article 5 of the directive in accordance with paragraphs 1, 3(b) and (c) or 4(b) [of Article 17]?

(3) If the answer to the preceding question is in the affirmative, is Article 17(1) or, if applicable, Article 17(3) or (4) of Directive [2003/88] to be interpreted to the effect that such a derogation must be explicit, or may it also be implicit as a result of the adoption of special legislation laying down other rules for organising working hours for a particular professional activity? If such a derogation need not be explicit, what are the minimum conditions for it to be considered that national legislation introduces a derogation and may such a derogation be expressed in the terms deriving from Law No 272/2004?

(4) If the answer to questions 1, 2 or 3 is in the negative, must Article 2(1) of Directive [2003/88] be interpreted to the effect that the period spent by a [foster parent] with the assisted minor, in his own home or in another place of his choice, constitutes working time even if none of the activities described in the individual employment contract is performed?

(5) If the answer to questions 1, 2 or 3 is in the negative, is Article 5 of Directive [2003/88] to be interpreted as precluding national provisions such as those in Article 122 of Law No 272/2004? And if the answer should confirm that paragraph (3)(b) and (c) or paragraph 4(b) of Article 17 of the directive is applicable, must that article be interpreted as precluding that national legislation?

(6) If the answer to question 1 is in the negative and the answer to question 4 is in the affirmative, may Article 7(2) of Directive [2003/88] be interpreted to the effect that it does not, however, preclude the award of compensation equal to the allowance that the worker would have received during annual leave, because the nature of the activity performed by [foster parents] prevents them taking such leave or, even though leave is formally granted, the worker continues in practice to perform that activity if, in the period in question, he is not permitted to leave the assisted minor? If the answer is in the affirmative, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?

(7) If the answer to question 1 is in the negative, the answer to question 4 is in the affirmative and the answer to question 6 is in the negative, does Article 7(1) of Directive 2003/88 preclude a provision such as that contained in Article 122(3)(d) of Law No 272/2004 in a situation in which that law gives the employer discretion to decide whether to authorise separation from the minor during leave and, if so, is the inability de facto to take leave as a result of the application of that provision of the law an infringement of EU law that meets the conditions for the worker to be entitled to compensation? If so, must such compensation be paid by the State for infringement of Article 7 of that directive or by the public body, as employer, which has not provided for separation from the assisted minor during the period of leave? In that situation, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?'

30. Written observations have been submitted by the Romanian and German Governments and the European Commission. Those parties also presented oral argument at the hearing held on 7 May 2018.

II. Analysis

31. The referring court has put several questions to the Court regarding the proper construction of Directive 2003/88. More specifically, at the heart of the case is the question whether the activity of foster parenting as set out in Law No 272/2004 falls within the scope of that directive. If so, the referring court has put a set of further questions to the Court regarding, in particular, the possibility of a Member State of derogating from the provisions of the directive in the specific circumstances of the present case.

32. Before dealing with the questions referred, I shall briefly examine a procedural issue raised by the German Government.

A. Jurisdiction of the Court

33. The German Government argues that the referring court has not explained sufficiently why the questions referred are of relevance in deciding the case pending before it. Rather than the health and safety of workers at work, an issue covered by Directive 2003/88, the claims in the main proceedings concern different aspects of the right to remuneration.

34. Yet as the German Government itself observes, questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance. Accordingly, the Court may refuse to rule on a question referred by a national court only where it is *quite obvious* that the interpretation of EU law sought is unrelated to the facts underlying the case pending before the referring court, or the object of those proceedings, 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.[7]

35. It is true that the link between the questions and the case pending before the referring court is not entirely clear. Indeed, the circumstance that workers are not granted the rest periods and leave prescribed by Directive 2003/88 cannot be remedied by affording them additional payments.[8] Nonetheless, the jurisdictional test applied by the Court is rather generous and requires that the absence of a connection between the questions and the facts of the case be quite obvious.

36. That is not the case here.

37. The case pending before the referring court concerns claims regarding additional compensation for work undertaken during weekly rest periods, statutory holidays and paid annual leave.

7 See, inter alia, judgment of 6 September 2016, *Petruhhin*, C-182/15, EU:C:2016:630, paragraph 20 and the case-law cited.

8 See point 53 et seq. below.

38. It is true that questions pertaining to the level of remuneration and the way that remuneration is calculated are issues that are not regulated by Directive 2003/88.[9] Barring Article 7 of the directive, which concerns the right to paid annual leave, the directive does not deal with how workers are to be remunerated for specific types of work such as shift work, night work and on-call time or, indeed, how they are to be compensated for overtime.[10] On the basis of Article 153 TFEU, those questions are a matter of national law. The Court has therefore consistently refused to answer questions pertaining to the level of remuneration.[11]

39. However, the questions referred do not concern specific aspects of the right to compensation for the services performed, such as the appropriate level of compensation. They concern the compatibility with Directive 2003/88 of the regime set out in Law No 272/2004 as far as foster parents are concerned.

40. In that regard, it can be understood that the merit of the claim brought forward by the foster parents regarding additional compensation may depend on the lawfulness of the special regime applicable to foster parents as set out in Law No 272/2004. Under that regime, the working time and free time of foster parents are determined by the individual needs of the children in their care. The foster parents are to continuously mind the children without a right to specifically defined rest periods, holidays and leave without those children. In other words, due to the needs of the children, the working time and free time of foster parents are invariably intertwined.

41. Considering those elements, it seems to me that a sufficient nexus may be discerned between the questions referred and the facts underlying the case pending before the referring court: for that court, a preliminary issue is whether the foster parents could enjoy, as a matter of EU law, a right to the rest periods, holidays and leave on which they base their claim for additional compensation.[12]

42. For those reasons, the Court should not refuse to answer the questions referred.

B. The questions referred

43. The doubts entertained by the referring court as to the interpretation of Directive 2003/88 — and in particular whether foster parents such as those referred to in Law No 272/2004 fall within the scope of Directive 2003/88 — are explained by three interrelated factors.

44. First, the material scope of Directive 2003/88 is defined broadly in Article 1(3) of the directive. In accordance with that provision, the directive is to apply to *all sectors of activity*, both public and private, within the meaning of Article 2 of Directive 89/391.

9 See, among others, judgments of 1 December 2005, *Dellas and Others*, C-14/04, EU:C:2005:728, paragraph 38; of 10 September 2015, *Federación de Servicios Privados del sindicato Comisiones obreras*, C-266/14, EU:C:2015:578, paragraph 48; and of 26 July 2017, *Hälvä and Others*, C-175/16, EU:C:2017:617, paragraph 25, as well as orders of 11 January 2007, *Vorel*, C-437/05, EU:C:2007:23, paragraph 35; and of 4 March 2011, *Grigore*, C-258/10, not published, EU:C:2011:122, paragraphs 81 to 84. See also the Commission Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (OJ 2017 C 165, p. 1), p. 14.

10 The Commission Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (OJ 2017 C 165, p. 1), p. 15.

11 See, for example, order of 11 January 2007, *Vorel*, C-437/05, EU:C:2007:23, paragraph 32 and the case-law cited. See also The Commission Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects of the organisation of working time (OJ 2017 C 165, p. 1), p. 15.

12 See also judgment of 26 July 2017, *Hälvä and Others*, C-175/16, EU:C:2017:617, in particular paragraph 26. In that case, the Court accepted that an interpretation of Article 17(1) of Directive 2003/88 could be given even though the case pending before the referring court turned on the applicants' right to additional payments for overtime.

45. In that regard, on the one hand, Article 2(1) of Directive 89/391 refers to 'all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.)'. On the other hand, in Article 2(2) of the directive certain activities are specifically excluded from the scope of Directive 89/391 (and by extension, Directive 2003/88): the directive does not apply where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

46. Second, the Court has given full effect to the broad scope of Directive 2003/88, and explained that the exceptions to the application of the directive ought to be construed narrowly.[13] As a matter of principle, therefore, the directive applies to a worker who, in the context of an employment relationship, performs services for and under the direction of another person in return for which he receives remuneration.[14]

47. Third, and as a corollary to the broad scope of Directive 2003/88, and the Court's case-law in the field, the referring court's doubts are explained by the particular circumstances of the case pending before it. On the one hand, the referring court explains that the foster parents have an employment contract with the competent authority and they perform a service (foster care) under a special employment contract concluded with the competent authority in exchange for compensation. On the other hand, the foster parents in question are to continuously care for the children in their own home on the basis of the individual needs of those children. Indeed, it is only with some difficulty that that requirement for continuous care and supervision can be reconciled with the requirements laid down in Directive 2003/88 regarding, in particular, weekly rest periods (Article 5) and paid annual leave (Article 7). That is so because, according to this Court, the concept of 'working time' is the opposite of 'rest periods', the two being mutually exclusive.[15]

48. To address the questions put to the Court, I shall begin by exploring the rationale underlying Directive 2003/88.

1. The rationale of Directive 2003/88: the protection of the health and safety of workers

49. Directive 2003/88[16] is intended, first and foremost, to ensure better protection of the safety and health of workers.[17] As a minimum harmonisation measure, it sets the minimum standard of protection that Member States must ensure for workers regarding, among other things, daily and weekly limits to working hours and paid annual leave. It also contains specific rules regarding the organisation of shift and night work (Articles 8 to 13 of the directive).

50. Despite the clear emphasis on the protection of workers, it can nevertheless be seen from the directive that the legislature was not entirely oblivious either to the need to ensure flexibility in certain sectors of activity or to the gradual the gradual emergence of new forms of work.[18]

13 For example, judgments of 3 October 2000, *Simap*, C-303/98, EU:C:2000:528, paragraphs 35 and 36; of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 52 to 55; of 3 May 2012, *Neidel*, C-337/10, EU:C:2012:263, paragraphs 21 and 22; and of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 24 and the case-law cited.

14 Judgments of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 28 and the case-law cited; of 3 May 2012, *Neidel*, C-337/10, EU:C:2012:263, paragraphs 23 to 25; and of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82, paragraph 66.

15 Judgment of 3 October 2000, *Simap*, C-303/98, EU:C:2000:528, paragraph 47.

16 The original directive laying down rules on working time was enacted in 1993. In contrast to earlier measures in the field, which were mainly concerned with the creation of employment by reducing working time, Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) placed emphasis on the health and safety of workers. Directive 93/104 — together with several sectoral directives — was subsequently repealed and replaced by Directive 2003/88. See in more detail Barnard, C., *EU Employment Law*, 4th edition, Oxford University Press, Oxford, 2012, p. 534.

17 It was enacted on the basis of Article 137 EC (now Article 153 TFEU). See also judgments of 26 June 2001, *BECTU*, C-173/99, EU:C:2001:356, paragraph 59, and of 12 October 2004, *Wippel*, C-313/02, EU:C:2004:607, paragraphs 46 and 47 on the rationale of the directive.

18 This can be seen from recital 15 of the directive.

51. More concretely, perhaps the most obvious example of the willingness of the legislature to accommodate the need for flexibility can be found in Article 1(3) of Directive 2003/88 which, by reference to Article 2(2) of Directive 89/391, expressly excludes from the scope of Directive 2003/88 certain public service activities. Those activities are excluded because of their peculiar characteristics that inevitably conflict with regular patterns of work and rest. Indeed, the express exclusion of certain activities from the scope of the directive supports the view that the legislature was indeed aware that certain activities simply cannot be organised in a manner required by the directive. While the wording of Article 2(2) is open-ended, the examples specifically mentioned therein tend to suggest that in devising that exclusion, the legislature had particularly in mind activities related to public safety that obey a higher loyalty. [19]

52. In addition to that exclusion, Directive 2003/88 contains various derogations. Under Articles 17, 18, 20 and 21 Member States may, in certain specific circumstances, derogate from the provisions of the directive concerning, in particular, daily and weekly rest, breaks and night work. On the basis of Article 22 moreover, individual opt-outs are also possible under certain conditions as concerns the weekly limit of working hours (48) laid down in Article 6 of the directive. [20]

53. Despite a certain leeway being left to the Member States, the language and overall structure of Directive 2003/88 clearly indicate that the well-being of the worker in the form of a healthy work-life balance lies at the heart of the considerations that led to the enactment of the directive. That is attested to in particular by the fact that insufficient rest periods and statutory leave cannot, following the logic of the directive, be remedied with additional compensation. [21]

54. The Court has also clearly endorsed the view that the overriding objective of Directive 2003/88 is to protect workers. In fact, the objective of protecting the well-being of workers permeates the Court's case-law in the field: by reference to that objective, both the exclusions set out in Article 2(2) of Directive 89/391 and the set of derogations laid down in Directive 2003/88 have been interpreted narrowly. [22] To ensure comprehensive protection for workers, the Court has not only interpreted the scope of the directive, but also the concept of 'working time', broadly. [23] Accordingly, 'working time' includes, for example, time spent asleep at the employer's premises, [24] and stand-by time spent at home with a duty to respond to calls from the employer within 8 minutes. [25]

55. Nonetheless, a point that should not be overlooked is that in order for an activity to fall within the (material) scope of Directive 2003/88 in the first place (or indeed, under the exceptions laid down in Article 2(2) of Directive 89/391), that activity must be performed by a worker. Indeed, it must be emphasised that Directive 2003/88 affords certain minimum rights only to persons who perform an (economic) activity in a specific contractual context: that is to say, it affords rights to persons who perform such an activity for the benefit of and under the direction of someone else, and therefore without enjoying freedom in choosing the time, place and content of their activity. It demarcates the

19 See to that effect also judgment of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 52 to 55.

20 Notwithstanding the leeway left to Member States, it seems that the directive fails to address adequately many issues pertaining to the reality of work today. See to that effect Commission Communication Reviewing the Working Time Directive (Second-phase consultation of the social partners at European level under Article 154 TFEU) (COM(2010) 801 final). For example, the logic of '9 to 5' is clearly present in many provisions of the directive, despite the increase in new types of flexible working arrangements that do not obey that logic. See Barnard, C., *EU Employment Law*, 4th edition, Oxford University Press, Oxford, 2012, p. 558.

21 Cf. Article 7(2) of the directive regarding an allowance in lieu of untaken annual leave where the employment relationship is terminated.

22 Judgments of 3 October 2000, *Simap*, C-303/98, EU:C:2000:528, paragraph 35; of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 52; of 9 September 2003, *Jaeger*, C-151/02, EU:C:2003:437, paragraph 89; of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraphs 24, 40 and 41; and of 26 July 2017, *Hälvä and Others*, C-175/16, EU:C:2017:617, paragraph 31.

23 See, among many, judgments of 3 October 2000, *Simap*, C-303/98, EU:C:2000:528, paragraph 49; of 9 September 2003, *Jaeger*, C-151/02, EU:C:2003:437, paragraph 65; and of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82, paragraphs 44 and 45 and the case-law cited.

24 Judgment of 9 September 2003, *Jaeger*, C-151/02, EU:C:2003:437, in particular paragraphs 60 and 68.

25 Judgment of 21 February 2018, *Matzak*, C-518/15, EU:C:2018:82, paragraph 66.

limits regarding the time such persons can be required to invest in an activity performed for and under the direction of another person. Contrariwise, the directive *does not* seek to protect, or organise the working time of, persons who perform an activity in return for compensation on the basis of some other contractual arrangement that does not entail such an element of subordination.

56. Therefore, to establish whether foster parenting such as that at issue in the main proceedings falls under Directive 2003/88, it has to be determined as a preliminary point whether the foster parents concerned are to be considered 'workers' for the purposes of that directive.

2. The scope of Directive 2003/88: the proper construction of the concept of 'worker'

57. As in the case of the material scope of Directive 2003/88 (encompassing in principle all imaginable labour activities), the Court has also interpreted the personal scope of the directive broadly. As will be explained in the next section, in interpreting the concept of worker in this context, the Court has drawn inspiration from its case-law on free movement under Article 45 TFEU.

(a) The Court's case-law: inspiration from Article 45 TFEU

58. In *Union syndicale Solidaires Isère*,[26] a case concerning seasonal workers at children's holiday camps employed under special contracts, the Court emphasised that 'worker' must be interpreted autonomously in EU law. Consequently, that concept, as a matter of EU law, must be defined in accordance with objective criteria that distinguish the employment relationship by reference to the rights and duties of the persons concerned. By reference to its case-law under Article 45 TFEU, the Court held that the essential feature of an employment relationship, for the purposes of the application of Directive 2003/88, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[27]

59. In other words, a 'worker' within the meaning of Directive 2003/88 is a person that performs services in an employment relationship. That in turn, implies a relationship of subordination.[28] According to the Court, an indicator in that regard may be the circumstance that a person acts under the direction of another person as regards, in particular, his freedom to choose the time, place and content of his work.[29]

60. For the present purposes, it is of crucial importance that the Court has emphasised that the special nature of a contractual relationship under national law does not have a direct bearing on the classification of a person as a worker for the purposes of EU law.[30] Indeed, it seems that just as in other areas of EU social and employment law, the protective umbrella of the concept of worker may in certain cases cover persons who are not regarded as such under national law.[31]

26 Judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612.

27 Idem, paragraph 28 with reference to judgments of 3 July 1986, *Lawrie-Blum*, 66/85, EU:C:1986:284, paragraphs 16 and 17, and of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172, paragraph 26. See also judgments of 3 May 2012, *Neidel*, C-337/10, EU:C:2012:263, paragraph 23, and of 7 September 2004, *Trojani*, C-456/02, EU:C:2004:488, paragraphs 15 and 16.

28 See, among others, judgments of 8 June 1999, *Meeusen*, C-337/97, EU:C:1999:284, paragraph 15, and of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, paragraph 26 and the case-law cited.

29 Judgment of 13 January 2004, *Allonby*, C-256/01, EU:C:2004:18, paragraph 72.

30 Judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 30, with reference to judgment of 20 September 2007, *Kiiski*, C-116/06, EU:C:2007:536, paragraph 26 and the case-law cited. See also judgments of 11 November 2010, *Danosa*, C-232/09, EU:C:2010:674, paragraph 56, and of 1 March 2012, *O'Brien*, C-393/10, EU:C:2012:110, paragraphs 42 to 51.

31 See, in that regard, for an analysis of the implications of the Court's tendency to interpret the concept of worker broadly and to interpret that concept in the same way for the purposes of Article 45 TFEU and secondary legislation without due regard to the choices made by national legislatures, Paanetoja, J., 'Euroopan unionin oikeuden työntekijäkäsitteen laajeneva tulkinta', Lakimies 3-4/2015, pp. 367-385.

61. More precisely, to determine as a matter of EU law whether a person is a worker and thus within the scope of Directive 2003/88, it may be necessary to look behind the nature of the arrangement under national law. The overall assessment made to that end of the (factual and contractual) framework within which the service is carried out must therefore be self-standing, and it is not to be coloured by the name given to the contractual relationship in national law.

62. In that regard, the conceptual cross-fertilisation that can be observed in the Court's case-law regarding the concept of worker for the purposes of Directive 2003/88 confirms that that concept must, like in other areas of EU law, be interpreted broadly. In any event, in the light of the Court's case-law, it seems clear that all workers under Directive 2003/88 are also workers under Article 45 TFEU.

63. Yet, the opposite might not always hold true.

64. Indeed, it is commonplace that one and the same term may refer to different concepts depending on the field of law considered. As the Court has itself observed, there is no single definition of worker in EU law: that definition varies according to the context in which it is to be applied.[32] In construing the concept of worker in a particular context, it is important to take account of the underlying rationale of the legal instrument and the interest that that instrument seeks to protect.

65. As is well known, the Court has held that persons may retain the status of 'worker' and enjoy protection under Article 45 TFEU during periods of economic inactivity too. That is for example the case of job seekers[33] and women that, because of the physical constraints of pregnancy and childbirth, give up work for a reasonable period of time.[34]

66. Despite their status as 'workers' under the law on freedom of movement, it is difficult to see why such persons should (or how they could) benefit from the protection afforded by Directive 2003/88 as workers. That is because they are not in an employment relationship. As suggested above, Directive 2003/88 is intended to protect the health and safety, but also more broadly, the well-being of persons while they perform work for and under the direction of an employer and this, in essence, in a relationship of subordination.

67. Mindful of those considerations I now turn to the question whether the foster parents at issue in the main proceedings are workers for the purposes of Directive 2003/88.

(b) The assessment of the case at hand

68. At the outset, it must be recalled that it follows from the division of labour laid down in Article 267 TFEU between the Court and its interlocutors in the Member States that it is ultimately for the referring court to apply the concept of worker to the facts of the case at hand. It is nevertheless for this Court to define the concept of worker for the purposes of Directive 2003/88 and to provide the referring court with the necessary guidance that will assist it in its task of applying that concept.

32 Judgments of 12 May 1998, *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 31; of 13 January 2004, *Allonby*, C-256/01, EU:C:2004:18, paragraph 63; and of 1 March 2012, *O'Brien*, C-393/10, EU:C:2012:110, paragraph 30.

33 See, for example, judgments of 12 May 1998, *Martínez Sala*, C-85/96, EU:C:1998:217, paragraph 32 and the case-law cited; of 23 March 2004, *Collins*, C-138/02, EU:C:2004:172, paragraph 70; of 4 June 2009, *Vatsouras and Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, paragraphs 36 and 40 and the case-law cited; and of 25 October 2012, *Prete*, C-367/11, EU:C:2012:668, paragraph 46.

34 Judgment of 19 June 2014, *Saint Prix*, C-507/12, EU:C:2014:2007, paragraph 47.

69. According to the Court, the application of the concept of worker in a particular case must be based on objective criteria: the referring court should take account of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved. [35]

70. In that regard, as already indicated, the nature of a contractual relationship in national law should not be determinative for establishing that a person is a worker for the purposes of Directive 2003/88. Indeed, if the opposite were true, the concept of worker would receive (contrary to the Court's case-law) a plethora of (diverging) interpretations depending on the definition of a particular contractual relationship in national law.

71. Therefore, in deciding whether the foster parents in question are to be considered as workers for the purposes of Directive 2003/88, the nature of the relationship between those foster parents and the competent authority should be of only peripheral significance for the assessment of that contractual relationship as a matter of EU law. Simply because the foster parents carry out their tasks under 'an employment contract', it does not follow that the contractual relationship between the foster parents and the competent authority should be conceptualised as one of employment *for the purposes of Directive 2003/88*.

72. In fact, several factors lend support to the view that the foster parents referred to in Law No 272/2004 should not be regarded as workers for the purposes of Directive 2003/88. Those factors relate both to the relationship of the parties involved and to the nature of the activities performed by the foster parents in question.

(1) The relationship between the parties involved

73. As mentioned above, in order for a person to be regarded as a worker, the service should be performed in a relationship of subordination: in an employment relationship the worker is performing an economic activity under the direction of his employer. Such a relationship appears to be absent in the present case.

74. The parallel might admittedly be somewhat imprecise. Nevertheless, the relationship between the competent authority and the foster parents could (for the specific purpose of assessing whether those foster parents fall under the scope of Directive 2003/88) be compared to a mandate to fulfil a particular obligation. Indeed, as can be seen from the order for reference, rather than performing work in a relationship of subordination and thus for and under the direction of the competent authority, the foster parents are *mandated* by the competent authority to care for the children in question like any other parent.

75. In that regard, it can be seen from the order for reference that the activity of foster parenting is performed on the basis of a special (framework) contract. On the other hand, 'the employment contract' between the competent authority (or an accredited private body) and the foster parents enters into force once the child has been placed in their care. Once in their care, the foster parents are to ensure that the children in question integrate in the new family environment and that the children can grow up with continuous parental supervision and age-appropriate care.

76. In that sense, rather than being subordinate to the competent authority and subject to that authority's orders or decisions in performing the tasks agreed to, the foster parents care for the children concerned independently, acting on the basis of the individual needs of those children and the programme determined by the foster family.

35 Judgment of 14 October 2010, *Union syndicale Solidaires Isère*, C-428/09, EU:C:2010:612, paragraph 29.

77. True, the foster parents are not allowed to take leave from their duties without express authorisation from the competent authority. It is also true that the foster parents are under an obligation to allow specialists in child protection to supervise their professional activity. However, those requirements do not suffice to conclude that foster parents perform their day-to-day activities in a relationship of subordination as required by the case-law.

78. More specifically: it is clear that due to those requirements foster parents cannot arrange their time and care for the children concerned entirely as they see fit. But the requirements do not relate to the actual (day-to-day) performance of the tasks carried out by the foster parents, or the organisation of work according to the needs of an employer. If anything, the requirements constitute a part of the general framework in which the mandate is to be carried out.

79. Moreover, it should not be forgotten that children placed in foster care are particularly vulnerable. The requirements mentioned regarding annual leave and input from specialists in the upbringing of those children are arguably put in place to protect the children concerned. Indeed, it would be clearly contrary to the best interests of the children concerned to allow foster parents to take time off regularly from the children they are expected to care for as if they were their own or, for that matter, to refuse help from specialists in the field.

(2) The nature of the activities performed

80. As the referring court observes, placing a child in foster care constitutes a measure aimed at ensuring that the child grows up in an environment similar to that of its family. It entails living continuously with the foster family. In that sense, the service provided by foster parents is comparable to that of any other parent. To ensure that the best interests of the child remains the priority in foster care, the parental tasks performed by foster parents should not be organised on the basis of a set programme of work or with compulsory rest periods, including compulsory periods of annual leave.

81. That is true no matter the length of the placement with a foster family (which can, as indicated above, range from a short stay to long-term care). It cannot be emphasised enough that foster parenting as defined in Law No 272/2004 constitutes a mandate to give the child the opportunity to grow up as part of a family, a family whose programme is determined by the family's and the children's needs, not by those of an employer.

82. That brings me to the Court's judgment in *Hälvä*.[36] That case concerned persons employed as 'relief parents' by a child protection association operating a children's village. More specifically, the issue was whether such relief parents, as workers employed by the association, fall within the scope of Article 17(1) of Directive 2003/88. In that case, the Court took as a starting point that such relief parents are workers, and thus fall within the scope of the directive, a starting point shared by the referring court.[37]

83. In contrast to the present case, in *Hälvä* the relief parents did not take care of children continuously in their own home. Rather, they were employed by a child protection association under contracts that indicated the number of 24-hour working periods they were to perform annually in an institution, albeit an institution closely resembling a family environment. Moreover, the relief parents were sent to work in village 'homes' on the basis of the schedule of work drawn up by the director of the children's village.[38]

36 Judgment of 26 July 2017, *Hälvä and Others*, C-175/16, EU:C:2017:617.

37 Idem, paragraph 24.

38 Idem, in particular paragraph 33.

84. While the children's protection association did not control work in the homes during the working periods, the broader framework in which the relief parents performed their tasks was determined by the association: in particular, they worked during pre-determined shifts in pre-determined homes for a pre-determined number of days a year. Despite the somewhat misleading job description (relief parent), they simply constituted temporary personnel at a children's village, personnel that did not bear the main responsibility for bringing up the children living in that village.

85. Those elements distinguish *Hälvä* from the present case. They also help explain why the preliminary issue of whether the persons concerned in *Hälvä* were workers for the purposes of Directive 2003/88 did not arise. Indeed, among other indicators regarding the existence of an employment relationship between the children's protection association and the persons concerned, the relationship of subordination required by the Court's case-law was clearly present in that case.

86. My next point also relates to the differences between *Hälvä* and the present case. It concerns the impossibility of reconciling the requirements of Directive 2003/88 with the best interests of the children placed in a foster family. As both the Romanian and German Governments emphasised at the hearing, the activity of foster parenting is fundamentally at odds with the provisions of Directive 2003/88 and should not be covered by that directive.

87. Let us assume that foster parents such as those at issue in the main proceedings were, nevertheless, regarded as workers for the purposes of Directive 2003/88, a position defended by the Commission.

88. Under that hypothesis, the organisation of the tasks performed by the foster parents in accordance with the requirements of Directive 2003/88 would require allocating several foster parents, and families, for the children concerned. That is because, as explained above, untaken rest periods and paid annual leave laid down in the directive cannot be replaced by additional payments. Therefore, holding that foster parents are workers for the purposes of the directive would mean that foster care would have to be organised around the rest periods and holidays of each foster parent. It would in practice mean that the children placed in foster care would need to move from one foster family to another in accordance with the 'shifts' of each foster parent, a situation considered by the Commission to be acceptable. From the perspective of the best interests of the children concerned however, the absurdity of such a solution is plain.[39]

89. Contrary to what was suggested by the Commission at the hearing, parallels cannot be drawn to *Hälvä*, which concerned an intrinsically different situation: *temporary staff* at a (privately owned) children's village that takes care of children in village homes, homes in which those children live, during the absence of the foster parents bearing the main responsibility for the children's upbringing.

90. In that regard, I would also point out that the tension between the activity of foster parenting and the requirements of Directive 2003/88 cannot be resolved by recourse to any of the paragraphs of Article 17 of the directive either. As indicated, that provision allows Member States to derogate from the requirements of the directive regarding (among other things) daily and weekly rest periods, but not from Article 7, which obliges Member States to ensure that every worker is entitled to paid annual leave of at least four weeks. Ensuring foster parents a minimum of four weeks of (paid) holiday without the children they are to care for would, in essence, require temporary care arrangements to be put in place. It is obvious that such a solution would not be in the best interests of the children concerned, and in particular, the objective of ensuring that foster children can live in a stable family environment as full members of the foster family.

39 It seems to me that such an unsatisfactory solution could not be avoided even if the Court were to hold that the activity of foster parents, although workers for the purposes of Directive 2003/88, falls under the exclusion in Article 2(2) of Directive 89/391. That is because, in that scenario too, a balance would need to be struck between the rights of the child referred to in Article 24 of the Charter of Fundamental Rights of the European Union, on the one hand, and the rights of workers laid down in Article 31(2) thereof, on the other.

91. For all those reasons, I take the view that on a proper construction of the concept of 'worker', foster parents such as those concerned in the main proceedings fall outside the scope of Directive 2003/88.

92. Consequently, there is no need to consider the other questions referred.

III. Conclusion

93. In the light of the above, I propose that the Court answer the questions referred by the Curtea de Apel Constanța (Court of Appeal, Constanța, Romania) as follows:

On a proper construction of the concept of 'worker', foster parents such as those concerned in the main proceedings fall outside the scope of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.