Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 26 September 2013[1]

Case C-363/12

Z.v
A Government Departmentand
the Board of Management of a Community School

(Request for a preliminary ruling from the Equality Tribunal (Ireland))

(Social policy — Surrogacy — Right to leave of absence equivalent to maternity leave or adoption leave — Directive 2006/54/EC — Equal treatment of men and women — Scope — United Nations Convention on the Rights of Persons with Disabilities — Directive 2000/78/EC — Equal treatment in employment and occupation — Scope — Concept of disability — Participation in professional life — Article 5 — Obligation of reasonable accommodation)

1. Surrogacy, an increasingly common form of medically assisted reproduction, constitutes a sensitive political and social issue in a number of Member States. The present request for a preliminary ruling from the Equality Tribunal (Ireland), together with the *CD* case,[2] attests to the topicality of surrogacy, despite its still relatively marginal role, and the complexity of the legal (and ethical) issues involved in regulating it. Indeed, the legislative landscape is varied in the Member States: surrogacy ranges from being legal and specifically regulated, to illegal or – as in the case of Ireland – unregulated, and there is considerable disparity between Member States as to how surrogacy arrangements and, in particular, the processes involved therein ought to be regulated.

2. In the case before the referring court, a woman who is unable to support a pregnancy has had her genetic child through a surrogacy arrangement. As a matter of EU law, is she entitled to paid leave of absence from employment equivalent to maternity leave or adoption leave? That is the crux of the questions put to the Court in this case.

1 — Original language: English.

2 — Case C-167/12 *CD*, pending before the Court.

I – Legal framework

A – *International law*

3. Paragraph (e) in the preamble to the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities [3] ('the UN Convention') recognises that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.

4. Article 1 of the UN Convention states that persons 'with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

B – *EU law*

1. Directive 92/85/EEC

5. The eighth recital in the preamble to Directive 92/85 [4] emphasises that pregnant workers and workers who have recently given birth or who are breastfeeding constitute a specific risk group and that there is a need to take measures to ensure their safety and health.

6. According to the 14th recital, the vulnerability of pregnant workers and of workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave.

7. In accordance with Article 1 of Directive 92/85, the purpose of that directive 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'.

8. Under Article 8, Member States are required to take measures to ensure that workers within the meaning of Article 2 [5] 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.

9. Article 11(2) provides, in relation to the period of maternity leave governed by Article 8, that a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2 must be ensured during the period of maternity leave.

3 — Ratified by the European Union on 23 December 2010. See Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (OJ 2010 L 23, p. 35) ('Council Decision 2010/48').

4 — Council Directive of 19 October 1992 (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ 1992 L 348, p. 1).

5 — Article 2 defines (a) 'pregnant worker' as 'a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice' and (b) 'worker who has recently given birth' as 'a worker who has recently given birth within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice'.

2. Directive 2006/54/EC

10. Recital 23 in the preamble to Directive 2006/54[6] refers to the case-law of the Court confirming that unfavourable treatment of a woman in relation to pregnancy or maternity amounts to direct discrimination on grounds of sex and states that, accordingly, such treatment is covered by the directive. Recital 24, also referring to the Court's case-law, adds that it is legitimate to protect a woman's biological condition during pregnancy and maternity and to introduce maternity protection measures as a means to achieve substantive equality.

11. According to recital 27, the competence 'to determine whether or not to grant [a right] to paternity and/or adoption leave' lies with the Member States. Furthermore, it is up to the Member States to 'determine any conditions, other than dismissal and return to work, which are outside the scope of [the] Directive'.

12. Article 2 of Directive 2006/54 lays down definitions that are to apply for the purposes of that directive.

13. In accordance with Article 2(1)(a) of Directive 2006/54, there is 'direct discrimination' where 'one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'. Under Article 2(1)(b) there is 'indirect discrimination' where 'an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary'. Moreover, Article 2(2)(c) states that discrimination under that directive is to include 'any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85 ...'.

14. Article 4 prohibits all discrimination on grounds of sex 'with regard to all aspects and conditions of remuneration'.

15. Article 14 prohibits all discrimination on grounds of sex in relation to access to employment, access to training, employment and working conditions, as well as membership of, and involvement in, an organisation of workers.

16. Article 16 of Directive 2006/54 concerns paternity and adoption leave. It provides:

'This Directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Those Member States which recognise such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they are entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.'

6 — Directive of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ 2006 L 204, p. 23).

3. Directive 2000/78/EC

17. According to recital 20 in the preamble to Directive 2000/78,[7] appropriate measures should be provided to adapt the workplace to disability. Effective and practical measures should be understood as including 'adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources'.

18. Recital 21 specifies that to 'determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance'.

19. Article 3 defines the scope of Directive 2000/78. It states:

'1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation …

...

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

20. The concept of 'reasonable accommodation' for disabled persons is defined in Article 5 of the directive. That provision states that 'employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment …, unless such measures would impose a disproportionate burden on the employer'.

C – *Irish law*

21. Irish law does not regulate surrogacy. No provision is therefore made for paid leave of absence from employment equivalent to maternity leave or adoption leave for parents whose children are born under a surrogacy arrangement.

22. With regard to maternity leave, Section 8 of the Maternity Protection Act 1994[8] (as amended) provides that '*pregnant* employees' (emphasis added) are to be entitled to leave from employment, to be known as 'maternity leave'. The statutory minimum period of maternity leave is 26 weeks. The grant of maternity leave requires that the employer be notified of the employee's intention to take maternity leave and that a medical certificate or equivalent confirming the pregnancy and the expected week of confinement be presented to the employer.

7 — Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

8 — Irish Statute Book, No 34, 1994.

23. Adoption leave is regulated by the Adoptive Leave Act 1995[9] (as amended). Under Section 6 thereof, an employed adopting mother or sole male adopter is entitled to adoption leave from the date of placement of the child. The minimum period of statutory adoption leave is 24 weeks from the date of placement. The grant of adoption leave requires that the employer be notified in advance of the adoption taking place and that relevant documents certifying the adoption be presented to the employer.[10]

II – Facts, procedure and the questions referred

24. Ms Z is a teacher in a school managed by a public body in Ireland. She suffers from a rare condition which has the effect that, although she has healthy ovaries and is otherwise fertile, she has no uterus and cannot support a pregnancy.

25. In order to have a child, Ms Z and her husband arranged for a surrogate mother to give birth to a child in California, United States of America. In April 2010 a child was born under that surrogacy arrangement. The child is the genetic child of the couple and no mention of the surrogate mother is made on the child's American birth certificate.

26. The terms and conditions of Ms Z's employment include a right to paid adoption leave and maternity leave. There is no express provision in Irish legislation or in Ms Z's contract of employment for leave arising from the birth of a child through a surrogacy arrangement.

27. However, during the surrogate's pregnancy, Ms Z made an application for adoption leave. After having been refused paid leave of absence and offered only unpaid parental leave,[11] Ms Z brought a complaint before the Equality Tribunal. She argued that she had been subject to discrimination on grounds of sex, family status and disability.

28. Entertaining doubts as to the scope and interpretation of the relevant provisions of EU law, the Equality Tribunal decided to stay the proceedings and to refer the following questions to the Court:

'(1) Having regard to the following provisions of the primary law of the European Union:

(i) Article 3 of the Treaty on European Union,

(ii) Articles 8 and 157 of the Treaty on the Functioning of the European Union, and/or

(iii) Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union

Is [Directive 2006/54], and in particular Articles 4 and 14 thereof, to be interpreted as meaning that there is discrimination on the ground of sex where a woman – whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoption leave?

9 — Irish Statute Book, No 2, 1995.

10 — As regards these two types of leave, the entitlement to pay depends on the terms of the contract of employment. However, the person concerned may be entitled to maternity or adoptive benefit. The Social Welfare (Consolidation) Act 2005 makes provision for the payment of maternity benefit (Chapter 9) and of adoptive benefit (Chapter 11), provided that certain conditions are met.

11 — The Department of State responsible for education within the State agreed to Ms Z being granted unpaid leave of absence for the time she was in California prior to the birth of her child. Once the child was born, it was also open to Ms Z to take statutory parental leave for the period from the birth of her child until the end of the 2010 school year, and again from the beginning of the next school year. The maximum number of weeks of parental leave to which she was entitled was 14 weeks. Ms Z was also entitled to her ordinary pay during the summer months.

(2) If the answer to the first question is in the negative, is [Directive 2006/54] compatible with the above provisions of the primary law of the European Union?

(3) Having regard to the following provisions of the primary law of the European Union:

(i) Article 10 of the Treaty on the Functioning of the European Union, and/or

(ii) Articles 21, 26 and 34 of the Charter of Fundamental Rights of the European Union

Is [Directive 2000/78], and in particular Articles 3(1) and 5 thereof, to be interpreted as meaning that there is discrimination on the ground of disability where a woman – who suffers from a disability which prevents her from giving birth, whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoption leave?

(4) If the answer to the third question is in the negative, is [Directive 2000/78] compatible with the above provisions of the primary law of the European Union?

(5) Is [the UN Convention] capable of being relied on for the purposes of interpreting, and/or of challenging the validity, of [Directive 2000/78]?

(6) If the answer to the fifth question is in the affirmative, is [Directive 2000/78], and in particular Articles 3 and 5 thereof, compatible with Articles 5, 6, 27(1)(b) and 28(2)(b) of [the UN Convention]?'

29. Written observations have been submitted by Ms Z and A Government Department and the Board of Management of a Community School in Ireland, as well as by the Irish and the Portuguese Governments, and by the Parliament, the Council and the Commission. At the hearing on 28 May 2013, oral argument was presented by Ms Z, the Irish Government, the Parliament, the Council and the Commission.

III – Analysis

A – *Preliminary issues*

30. For a better understanding of the societal context of the present case, I consider it necessary to outline briefly the key (legal and factual) aspects of surrogacy. [12]

31. Surrogacy takes different forms. In 'traditional surrogacy', surrogates (women who help commissioning parents [13] to become parents by carrying a child for them) become pregnant using the commissioning father's sperm and their own ova. By contrast, host or gestational surrogacy involves in vitro fertilisation treatment (IVF) whereby either the commissioning mother or a donor provides the ova employed in the fertilisation process. Under gestational surrogacy arrangements, the surrogate mother is not genetically related to the child she carries.

12 — For an overview of surrogacy arrangements and the legal issues involved, see, for example, Trimmings, K. and Beaumont, P., 'General Report on Surrogacy', in Trimmings, K. and Beaumont, P. (eds), *International Surrogacy Arrangements. Legal Regulation at the International Level*, Hart Publishing, Oxford: 2013, pp. 439 to 549.

13 — 'Commissioning parents' are couples who use surrogacy as a way to have a child. In some instances, also the term 'intended parents' is used.

32. The reasons for resorting to surrogacy may vary significantly. At one end of the spectrum, there are persons who decide to undertake surrogacy for reasons of personal convenience. At the other end, there are couples who, for various reasons related to infertility, illness or disability, are unable to have a child by conventional means. Surrogacy also provides a means for same-sex couples to fulfil their desire to have a child who is genetically related to one of the commissioning parents.

33. Surrogacy does not only give rise to complicated legal issues concerning the contractual aspects of such arrangements (such as whether or not entering into such contracts is to be regarded as legal and, further, to what extent surrogate mothers may receive financial compensation for the service they provide). Other problematic issues arise once the child is born.

34. Depending on the Member State concerned, the birth of a child through surrogacy raises a string of complex legal questions, including: who are to be regarded as the legal parents of the child? [14] More specifically: how are the parental rights of commissioning parents established? A separate, albeit intimately linked, issue is to what extent entitlements, such as paid maternity or adoption leave, ought to be granted to parents who undertake surrogacy. Save for some exceptions, it seems that these and many other questions, which are linked to this particular form of medically assisted reproduction, have yet to be satisfactorily regulated in many Member States.

35. A further layer of complexity is added in cases of cross-border surrogacy: the cross-border element gives rise to a number of difficult questions relating, in particular, to the family and immigration status of children born through such arrangements. Evidently, the commercial nature of such arrangements is not without problems in most Member States. [15]

36. In jurisdictions with permissive legislation on surrogacy, such as Ukraine or the state of California in the United States, the commissioning parents are treated as the legal parents of the child. By contrast, it is not uncommon that national law in EU Member States primarily protects the woman who gives birth (and her spouse or partner). Needless to say, in such cases the strict application of conflict of laws rules and, in particular, considerations related to public policy in taking decisions on the status of the commissioning parents and the children born through surrogacy arrangements may result in a regrettable 'legal limbo' whereby children may be denied parents and legal status. [16]

37. Undoubtedly, therefore, the present case – like any case linked to surrogacy in the current legal landscape – involves fundamental questions concerning the demarcation of socially and culturally accepted forms of medically assisted reproduction. In this sense, separating the legal issues charted above from the political, ethical and cultural considerations which underpin surrogacy may prove to be difficult.

14 — This is a particularly problematic issue in relation to the rights of the commissioning mother, as a recent case decided by the High Court in Ireland illustrates. See *M.R & Anor* v *An tArd Chlaraitheoir & Ors* [2013] IEHC 91, in which an appeal was brought before the Supreme Court. In fact, it seems that, in a number of Member States, the woman who gives birth to the child is, in accordance with the maxim *mater semper certa est*, regarded as the legal mother notwithstanding the fact that the child is not necessarily her genetic child. However, the status of the genetic father may be less complicated to the extent that in most jurisdictions the presumption of fatherhood is open to rebuttal. For legal solutions adopted in different jurisdictions, see Monéger, F. (ed.), *Surrogate motherhood: XVIIIth Congress, Washington, D.C. 25–30 July 2010*, Société de legislation comparée, Paris: 2011.

15 — See, on international commercial surrogacy, Brugger, K., 'International law in the gestational surrogacy debate', *Fordham International Law Journal*, 3(35) 2012, pp. 665 to 697. By using powerful language, she refers to this phenomenon, inter alia, as the 'global trade in wombs' and the surrogacy 'industry'.

16 — See, for example, Trimmings, K. and Beaumont, P., op. cit., at pp. 503 to 528. See also Gamble, N., 'International surrogacy law conference in Las Vegas 2011', *Family Law*, February 2012, pp. 198 to 201, especially for examples cited.

38. That said, I would emphasise that, in the present case, the Court is solely called on to decide whether the right of a woman who has had her genetic child through surrogacy to paid leave of absence equivalent to maternity or adoption leave is protected *as a matter of EU law*. While the referring court is uncertain as to the validity of the secondary legislation at issue, I consider this request for a preliminary ruling to be first and foremost a request for interpretation, turning on the proper construction of the relevant EU secondary legislation.

39. In essence, the referring court seeks guidance on two issues. First: does Directive 2006/54 preclude as discriminatory on grounds of sex a refusal to grant paid leave of absence equivalent to maternity or adoption leave to a mother who has had a child through a surrogacy arrangement? Second: does such a refusal constitute discrimination on grounds of disability under Directive 2000/78, given that the commissioning mother suffers from a condition which prevents her from giving birth?

40. An affirmative answer to these questions necessarily requires that those directives be applicable in circumstances such as those of the case before the referring court. That being so, the heart of the issue lies in determining the scope of those legal instruments.

41. For reasons I will set out in detail below, I do not consider that a right to paid leave of absence for a woman such as Ms Z can be inferred from either Directive 2006/54 or Directive 2000/78. I will first deal with Directive 2006/54 (and Directive 92/85, which specifically governs the issue of maternity leave under EU law). I will then move on to consider Directive 2000/78.

B – *Discrimination on grounds of sex*

1. The rationale underlying Directive 92/85 with regard to maternity leave

42. By its first question, the referring court wishes to establish whether a refusal to grant paid leave of absence equivalent to maternity or adoption leave constitutes, in circumstances such as those of the case before it, discrimination prohibited under Directive 2006/54. Even though the order for reference contains no explicit reference to Directive 92/85, I consider it necessary to begin by clarifying the scope of protection afforded by EU law in relation to maternity leave. This is because the present case raises the issue of whether a woman who has her genetic child through a surrogacy arrangement ought to benefit from protection comparable to that afforded by Directive 92/85, in the same way as a woman who gives birth to a child.

43. Directive 92/85 governs solely and exclusively the right to maternity leave under EU law.

44. As Ms Z herself admits, she has not been pregnant, nor has she given birth for the purposes of Directive 92/85. As regards the protection afforded by that directive, which was adopted on the basis of Article 118a of the EEC Treaty (now Article 153 TFEU), it is quite clear that the purpose of the protection which it offers is to encourage improvements in the safety and health at work of pregnant workers.[17] Put simply, it aims to protect their physical and mental condition. Illustrating this point, the eighth recital in the preamble to the directive identifies pregnant workers and workers who have recently given birth or who are breastfeeding as a specific risk group and states that measures must be taken with regard to their safety and health.[18]

17 — See, in particular, Case C-506/06 *Mayr* [2008] ECR I-1017, paragraph 31.

18 — See also the Opinion of Advocate General Ruiz-Jarabo Cólomer in *Mayr*, points 41 and 42.

45. What is more, it is clear from the 14th recital in the preamble to Directive 92/85, which emphasises the vulnerability of workers who have given birth, read in conjunction with Article 8 of that directive, which concerns maternity leave, that the health and safety protection provided under the directive is intended for women who give birth to a child. Indeed, the right to maternity leave is defined as a period of 'at least 14 weeks, allocated before and/or after *confinement*' (emphasis added). Therefore, the aim of Article 8 is to protect the woman during a period when she is particularly vulnerable both before and after confinement. In the same vein, the Court has highlighted this aspect of maternity leave in observing that maternity leave, as opposed to parental leave, is intended to protect a woman's biological condition and the special relationship between a woman and her child over the period which follows pregnancy and childbirth.[19]

46. On a more general level, Directive 92/85 aims, inter alia, by means of maternity leave, at helping female workers to recover from the physical and mental constraints of enduring pregnancy and the aftermath of childbirth, as well as at facilitating their return to the labour market at the end of their leave. The directive therefore operates as an instrument to bolster substantive equality between the sexes.

47. Admittedly, as alluded to above, in construing the rationale of maternity leave under Directive 92/85, the Court also attaches importance to the special relationship that develops after birth between the woman and her child. However, I believe that that objective can only be understood in context; as a logical corollary of childbirth (and breastfeeding). Otherwise, if that objective were given independent significance, the scope of protection afforded by Article 8 of Directive 92/85 could not, in my view, be meaningfully limited only to women who have given birth, but would necessarily also cover adoptive mothers or indeed, any other parent who takes full care of his or her new-born child.

48. Precisely because of the clearly enunciated objective of protecting the health and safety of workers in a vulnerable condition, I cannot read Directive 92/85 as protecting a right to paid leave of absence equivalent to maternity leave in the case of a mother who has had her genetic child through a surrogacy arrangement. Indeed, although Ms Z is the genetic mother of the child born through surrogacy, I am not convinced that that circumstance alone may be construed as enabling the ambit of Directive 92/85 to be widened to protect, in general terms, motherhood, or indeed parenthood, in defiance of its very wording and its clearly enunciated objectives.

49. I would add, however, that because the standard of protection guaranteed by Directive 92/85 is only by way of an accepted minimum, Member States may of course provide more extensive protection, both for biological mothers and for surrogate and adoptive mothers (and fathers). It seems to me that Member States have considerable leeway for offering, in addition to the type of leave governed by Article 2(b) of Directive 92/85, a right to paid leave of absence which extends – if deemed appropriate – even to workers who have not given birth to a child.

50. However, in so far as the national legislation at issue in the main proceedings does not extend the right to maternity leave to commissioning mothers, this cannot be interpreted as being contrary to Directive 92/85. That is so quite simply because Ms Z does not fall within the scope, *ratione personae*, of Directive 92/85.

19 — Case C-116/06 *Kiiski* [2007] ECR I-7643, paragraph 46 and case-law cited.

51. On that point, I must stress that broadening the scope of Directive 92/85 – and, consequently, extending a right of paid leave of absence from employment to a female worker whose genetic child is born to a surrogate – would result in a contradictory situation, whereby Directive 92/85 would extend a right of paid leave of absence to a female worker undertaking surrogacy, but would not extend such a right, by the same token, to a working adoptive mother – or indeed to a father, whether through surrogacy or otherwise. As matters stand at present, there is no obligation stemming from EU law for Member States to provide for paid adoption and/or parental leave.

52. As is clear from Article 1 of Directive 92/85, read in conjunction with the eighth recital thereto, that directive only covers a specific category of workers whom the EU legislature has deemed to be in need of special protection. In this respect, I do not believe that a woman undertaking surrogacy can be compared to a woman who, after being pregnant and having endured the physical and mental constraints of pregnancy, gives birth to a child.

53. However, as the referring court contemplates, that does not rule out *per se* protection under Directive 2006/54. This is confirmed by the Court's judgment in *Mayr*,[20] a case concerning the temporal aspect of the notion of pregnancy in the context of IVF treatment.

2. Is Ms Z's situation covered by Directive 2006/54?

54. For Directive 2006/54 to apply, it must be established that the differential treatment complained of is based on sex. To illustrate why I do not believe that to be the case here, I will begin by explaining why the present case ought to be distinguished from *Mayr*. I will then address the issue of identifying the correct comparator.

55. As a preliminary point, I observe that the Court's extensive body of case-law maintains a distinction between, on the one hand, discrimination on grounds of pregnancy and maternity under Article 2(2)(c) of Directive 2006/54 and other forms of prohibited sex discrimination under Articles 2(1)(a) or 2(1)(b) of that directive, on the other.[21] Indeed, according to the maxim, 'treat like cases alike' or conversely, 'do not treat unlike cases alike', it is accepted that whereas a finding of discrimination on grounds of pregnancy or maternity does not presuppose the existence of a comparator because of the (sex) specific condition of pregnancy or maternity,[22] other types of sex discrimination do.

56. More specifically with regard to *Mayr*, I recall that the Court concluded that a worker who undergoes IVF treatment cannot rely on the protection afforded by Directive 92/85 in relation to dismissal, if the fertilised ova have not yet been transferred into her uterus.[23] However, the Court went on to consider whether such a worker, who is not pregnant within the meaning of Directive 92/85, could nonetheless rely on the protection against discrimination on grounds of sex granted by Directive 76/207/EEC,[24] which has now been replaced by Directive 2006/54.[25]

20 — *Mayr*, paragraph 44.

21 — See, inter alia, Case C-342/93 *Gillespie and Others* [1996] ECR I-475, paragraph 17; Case C-411/96 *Boyle and Others* [1998] ECR I-6401, paragraph 40; Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 46; Case C-191/03 *McKenna* [2005] ECR I-7631, paragraph 50; and Case C-471/08 *Parviainen* [2010] ECR I-6533, paragraph 40. Indeed, the Court has emphasised repeatedly that women taking maternity leave under Directive 92/85 are in a special position, which requires them to be afforded special protection but which is not comparable either with that of a man or with that of a woman actually at work or on sick leave. See also the Opinion of Advocate General Kokott in Joined Cases C-512/11 and C-513/11 *Terveys- ja sosiaalialan neuvottelujärjestö TSN*, pending before the Court, points 47 and 48.

22 — See also recitals 23 and 24 in the preamble to Directive 2006/54.

23 — *Mayr*, paragraph 53.

24 — Council Directive 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 (OJ 1976 L 39, p. 40).

25 — *Mayr*, paragraph 54.

57. According to the Court, the dismissal of a female worker because she is undergoing a specific kind of treatment [26] which forms a crucial stage of the IVF process and which directly affects only women constitutes direct discrimination on grounds of sex. [27] This line of reasoning may be traced back to *Dekker* [28] in which the Court found that only women can be subject to less favourable treatment as a result of pregnancy. Extending that line of authority, it seems that the Court in *Mayr* distinguished between sex-specific medical treatment (related to pregnancy) and sex-specific illness (related to pregnancy, but occurring after the end of maternity leave). [29]

58. The approach taken in *Mayr* appears to be closely related to the goal pursued by IVF treatment, which is to induce pregnancy in the woman concerned through medical intervention. The reference to the objective of Article 2(3) [30] of Directive 76/207 being to protect women and, in particular, pregnant workers, seems to confirm that the prohibited discrimination in that case stemmed from the intimate link that exists between, on the one hand, the (sex) specific features of the treatment in question, which can only affect women, and pregnancy, on the other, which is afforded special protection under EU law. [31]

59. Given that the less favourable treatment of which Ms Z complains does not relate to her being – or indeed becoming – pregnant as a result of the IVF treatment that she has undergone, but to her being a female parent of a child, I consider it necessary to identify a male comparator.

60. Moreover, I would emphasise that, unlike *Mayr*, the case before the referring court does not concern dismissal. It turns on the entitlement to a specific form of remuneration and relates therefore more specifically to Article 4 of Directive 2006/54 (although the referring court also refers to Article 14 thereof), which prohibits all discrimination on grounds of sex 'with regard to all aspects and conditions of remuneration'.

61. In this respect, I have difficulties in accepting that Ms Z has been subject to prohibited discrimination *on grounds of sex*.

62. In the present case, the differential treatment of which Ms Z complains is not based on sex, but on the refusal of national authorities to equate the situation of a commissioning mother with that of either a woman who has given birth or an adoptive mother. It thus follows that Directive 2006/54 does not apply to the less favourable treatment of which Ms Z complains.

63. In fact, it appears that a male parent of a child born through surrogacy (or indeed, otherwise) would be treated in exactly the same manner as Ms Z in a comparable situation: it must be assumed that, in common with a female commissioning parent, he would not be entitled to paid leave of absence equivalent to maternity or adoption leave. In my view, to construe Directive 2006/54 as precluding the refusal to grant paid leave of absence to a woman undertaking surrogacy would itself be contrary to the principle of equal treatment. Such a construction would have the contradictory

26 — Namely a follicular puncture and the transfer to the woman's uterus of the ova removed by way of that follicular puncture immediately after their fertilisation.

27 — *Mayr*, paragraph 50.

28 — Case C-177/88 [1990] ECR I-3941, paragraph 12. According to the Court, a decision not to appoint a woman because she is pregnant constitutes unlawful discrimination because only women can be refused employment owing to pregnancy.

29 — See, in particular, *McKenna*, paragraphs 45 to 54 and case-law cited. In fact, because of the special condition of pregnancy, pregnant workers are protected against dismissal throughout the pregnancy until the end of maternity leave. However, after maternity leave has ended, the question is whether a female worker is treated in the same way as a male worker as regards absences caused by illness. If she is, there is no discrimination on grounds of sex.

30 — The then Article 2(3) stated that the directive 'shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.

31 — *Mayr*, paragraph 51.

effect of discriminating against men who become parents and who take full care of a child. In my view, a distinction between sexes which does not relate to the specific physical and mental constraints of carrying and giving birth to a child would additionally entail a value judgment as to the qualitative difference between motherhood as opposed to parenthood in general.

64. On that point, I am inclined to argue that for a woman who becomes a mother through a surrogacy arrangement, an appropriate point of comparison seems to be found – as Ms Z herself admits – in an adoptive mother (or, as the case may be, a parent, male or female) who has *not* given birth to a child. Similarly to an adoptive mother, she has become a mother without enduring the physical and mental effects of pregnancy and childbirth – although I do not wish in any way to understate the difficulties involved in undertaking surrogacy (or adoption).

65. With regard to adoption, no provision is made under EU law which would entail an obligation for Member States to grant paid leave of absence for adoptive parents. In Article 16 of Directive 2006/54, provision is made only for protection against discrimination for men or women who make use of adoption or paternity leave, in Member States which recognise the right to such leave. Indeed, as is clear from Article 16 of Directive 2006/54, read in conjunction with recital 27 thereto, discrimination within the meaning of that directive can occur only in relation to the exercise of a right which is recognised as a matter of national law. By the same token, the directive leaves Member States free to make the arrangements they deem appropriate in relation to those types of leave.[32] In the case before the referring court, Ms Z did not suffer from any less favourable treatment because of taking adoption leave.

66. It seems to me, however, that unfavourable treatment vis-à-vis adoptive mothers cannot be ruled out.

67. In that respect, where provision is made under national law for paid adoption leave – or other form of leave, which is not contingent on the specific condition that the person concerned has undergone pregnancy – it ought to be left for the referring court to assess, in light of that national law, whether the application of differing rules to adoptive parents and to parents who have had a child through a surrogacy arrangement (and who are recognised as the legal parents of the child) constitutes discrimination.[33]

68. In sum, I believe that, because the different treatment of which Ms Z complains does not constitute discrimination on grounds of sex, Directive 2006/54 cannot be construed as precluding national legislation which does not provide for paid leave of absence from employment, equivalent to maternity or adoption leave, for a woman who is the genetic mother of a child born through a surrogacy arrangement.[34]

32 — In this respect, the discretion of Member States is limited by 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). In accordance with clause 2(1) of the Framework Agreement, the 'agreement entitles men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners'.

33 — Recently, the Court has also held that the application of the principle of equal treatment as enshrined in EU law does not extend to differential treatment of biological fathers vis-à-vis adoptive fathers in the context of national legislation that does not fall within the scope of EU law. See Case C-5/12 *Betriu Montull* [2013] ECR, paragraphs 71 to 73.

34 — That said, Directive 2006/54 may nonetheless fall to be applied in certain specific circumstances. This would be so where a woman who has become a mother through a surrogacy arrangement and who is granted paid leave of absence on the basis of national law is subject to discrimination because she has exercised that right to leave, or where such a woman is dismissed essentially because she has become a mother or indeed, taken such leave. That kind of treatment is not, however, at issue in the case before the referring court.

3. The impact of primary law

69. In the event that the reply to Question 1 is in the negative, the referring court further asks whether Directive 2006/54 is compatible with Article 3 TEU, Article 8 TFEU and Article 157 TFEU as well as Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union ('the Charter').

70. First, it is clear that, in tandem with the general principle of equal treatment, the provisions cited by the referring court may operate as a basis for the review of EU secondary legislation.[35] However, with regard to Article 3 TEU (which lays down general objectives for the European Union), and in particular paragraph 3 thereof, as well as Articles 8 and 157 TFEU, I would point out that those provisions concern, in their relevant parts, the equal treatment of men and women. Account taken of the conclusion drawn above that an entitlement to paid leave of absence equivalent to maternity leave or adoption leave for commissioning mothers falls outside the scope of Directives 92/85 and 2006/54, the question of compatibility of the latter directive with the Treaty provisions mentioned does not, in my view, arise.

71. Secondly, regarding the Charter provisions (Articles 21, 23, 33 and 34) mentioned by the referring court, it is necessary to call to mind that, in accordance with Article 51(1) of the Charter, the provisions thereof are only addressed to Member States when implementing EU law. In other words, to trigger the application of the Charter, a sufficiently close link to EU law must be established. In that sense, invoking a Charter provision will not suffice to transform a situation otherwise falling within the ambit of national law into a situation covered by EU law.[36] This is so because the Charter falls to be applied only in so far as a case concerns, not only a Charter provision, but also another rule of EU law which is directly relevant to the case.[37] As I have tried to illustrate above, no such connection seems to exist here.

72. I would also add that in accordance with the principle expressed in Article 51(2) thereof, the Charter does not extend the field of application of EU law beyond the powers conferred on the European Union. Nor does it 'establish any new power or task for the [European] Union, or modify powers and tasks as defined in the Treaties'.

73. While the Charter (and the primary law as a whole) must undoubtedly be observed in the interpretation of EU secondary legislation,[38] I cannot see how the Charter provisions cited by the referring court could be deployed in such a way as to extend the scope *ratione materiae* of Directive 2006/54. As illustrated above, the complaint of discrimination at issue relates to the fact that Ms Z was not treated in the same manner as a woman who has given birth or an adoptive mother, a situation which is not covered by that directive. Plainly, a specific legislative instrument reflecting a

35 — Indeed, under a general principle of interpretation, an EU measure ought to be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole. See, inter alia, Case C-149/10 *Chatzi* [2010] ECR I-8489, paragraph 43 and case-law cited.

36 — For recent cases in which, by reasoned order, the Court declined jurisdiction because no such link could be established, see, inter alia, Case C-466/11 *Currà and Others* [2012] ECR, and Case C-128/12 *Sindicato dos Bancários do Norte and Others* [2013] ECR. See also Case C-40/11 *Iida* [2012] ECR, paragraphs 78 to 81.

37 — Recently, a sufficiently close link to EU law was established, inter alia, in Case C-617/10 *Åkerberg Fransson* [2013] ECR (see, in particular, paragraph 27), and in Joined Cases C-411/10 and C-493/10 *N.S. and Others* [2011] ECR I-13905, paragraph 68. For an opposite conclusion, see *Betriu Montull*, paragraph 72.

38 — Case C-400/10 PPU *McB.* [2010] ECR I-8965, paragraphs 51 and 52, and Case C-256/11 *Dereci and Others* [2011] ECR I-11315, paragraph 71. To be clear, if an EU legislative provision cannot be interpreted in conformity with EU fundamental rights, that provision must be declared invalid. See Case C-236/09 *Association belge des Consommateurs Test-Achats and Others* [2011] ECR I-773, paragraphs 30 to 34.

fundamental legislative choice to enhance substantive equality between the sexes – in accordance with Articles 21 and 23 of the Charter – cannot be construed, simply by evoking fundamental rights, as covering other (possible) forms of discrimination.[39] Nor can such a choice affect the validity of Directive 2006/54.

74. Admittedly, where a specific situation (or a category of persons) falls within the scope of an EU legislative instrument, the Court may seek to redress the inconsistencies between secondary and primary law by means of a 'very teleological'[40] interpretation. This was the case in *Sturgeon*,[41] where the relevant provisions of Regulation (EC) No 261/2004[42] were interpreted in light of the general principle of equal treatment to extend the scope of protection afforded by that regulation in relation to passengers whose flights are delayed.[43] However, such an interpretation requires, to begin with, that the differential treatment complained of falls within the scope of the legislative instrument at issue.[44] That is not the case here.

75. As I have explained above, I cannot read the existing legislative provisions as entailing an obligation to grant paid leave of absence to a woman, such as Ms Z, who has had recourse to surrogacy to have a child. Under EU law, express provision is made for paid maternity leave for women who have given birth to a child. With regard to other types of leave (adoption or parental leave, in particular) Member States retain substantial discretion in making the arrangements they deem appropriate.

76. In light of the foregoing considerations, I take the view that Questions 1 and 2 should be answered to the effect that Directive 2006/54 does not apply in circumstances such as those of the case before the referring court where a woman, whose genetic child has been born through a surrogacy arrangement, is refused paid leave of absence from employment equivalent to maternity leave and/or adoption leave. That conclusion does not call into question the validity of that directive.

C – *Discrimination on grounds of disability*

1. Protection afforded by Directive 2000/78

77. Questions 3, 4, 5 and 6 turn on the issue of disability. More specifically, the referring court is unsure whether a refusal to grant paid leave of absence from employment equivalent to maternity or adoption leave constitutes discrimination on grounds of disability under Directive 2000/78 (in particular Question 3). This is because the mother concerned suffers from a condition which prevents her from supporting a pregnancy.

78. In this context, the Equality Tribunal also wishes to know what relevance should be attributed to the UN Convention in interpreting Directive 2000/78 and further, whether that convention may affect the validity of that directive (Questions 5 and 6). Question 4 in addition raises the issue of validity in relation to certain provisions of primary EU law.

39 — See, similarly, the Opinion of Advocate General Jääskinen, Case C-131/12 *Google Spain and Google*, pending before the Court, point 54.

40 — The Opinion of Advocate General Sharpston in Joined Cases C-402/07 and C-432/07 *Sturgeon and Others* [2009] ECR I-10923, point 91.

41 — Ibid.

42 — Regulation of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1).

43 — *Sturgeon and Others*; see paragraph 60, in particular.

44 — See, *mutatis mutandis*, Case 149/77 *Defrenne* [1978] ECR 1365, paragraph 24.

79. At the outset, I would observe that the Court has already given a partial reply to Question 5 in the recent judgment in *Ring*.[45] In that case, the Court confirmed that Directive 2000/78 must be interpreted, as far as possible, in conformity with the UN Convention.[46] Pursuant to Article 216(2) TFEU, international agreements concluded by the European Union are binding on its institutions. They consequently must prevail over EU acts.[47]

80. Indeed, to the extent that Directive 2000/78 constitutes one of the EU legislative acts which refer to matters governed by that instrument[48] – a point on which all the parties that submitted observations agree – it is clear that the UN Convention constitutes an imperative parameter for interpreting Directive 2000/78.

81. With regard to the second issue raised by Questions 5 and 6, namely the possibility of challenging the compatibility of Directive 2000/78 with the UN Convention, it is accepted case-law that the Court can only examine the validity of secondary EU legislation in the light of an international agreement where 'the nature and the broad logic' of such an agreement does not preclude this and where, in addition, the provisions of the international agreement appear, as regards their content, to be unconditional and sufficiently precise.[49] As I will explain in more detail below, I do not believe that the UN Convention and, more specifically, the provisions mentioned by the referring court can serve as a basis for challenging the validity of Directive 2000/78.

82. In order to determine whether Directive 2000/78 falls to be applied in Ms Z's situation, I will begin by briefly describing the evolution of the concept of disability in the context of Directive 2000/78. I will then address the scope of that directive.

a) Is Ms Z's situation covered by the concept of disability under Directive 2000/78?

83. It is commonly accepted that (at least) two contrasting concepts of disability can be identified: the medical (or individual) and the social concept of disability.[50]

84. The medical concept places particular emphasis on the individual, and on the impairment which makes it difficult for the person concerned to adapt to or to integrate into the surrounding societal environment. By contrast with the medical model, the social understanding of disability, which is based on a context-sensitive approach, emphasises the interplay between the impairment and the reaction of society or, indeed, the organisation of society to accommodate persons with impairments. Importantly, this model offers a more inclusive understanding of disability. Of particular significance is that disability is context-dependent and situational: for instance, a long-term illness such as diabetes or indeed an allergy may, depending on the surrounding environment, constitute a disability.

85. The UN Convention reflects the social model of disability. It recognises that disability 'results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.[51] According to that understanding, disability arises from a failure of the social environment to adapt to and accommodate

45 — Joined Cases C-335/11 and C-337/11 [2013] ECR.

46 — Ibid., paragraph 32.

47 — Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 50 and case-law cited. See also Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet* [2012] ECR, paragraph 39 and case-law cited.

48 — See also the Appendix to Council Decision 2010/48.

49 — Case C-59/11 *Association Kokopelli* [2012] ECR, paragraph 85 and case-law cited.

50 — See, for example, Oliver, M., *Understanding Disability: From Theory to Practice*, Palgrave Macmillan, Basingstoke: 2009 (2nd ed.); see, in particular, pp. 44 to 46.

51 — Recital (e) in the preamble to the UN Convention and Article 1 thereof.

the needs of people with impairments.[52] To the extent that the social model of disability extends beyond the limits of what in more traditional language may be understood as disability (including, inter alia, mental disability), the UN Convention arguably offers more robust and expansive protection against discrimination than a narrow, individual-centred definition. Indeed, it recognises that disability is 'as much a social construct as a medical fact'.[53]

86. Against that background, I would point out that the concept of disability has evolved considerably in the Court's case-law in the specific context of Directive 2000/78.

87. According to the Court's judgment in *Chacón Navas*,[54] the concept of disability is to be given an autonomous and uniform interpretation, not only to guarantee uniform application but also to ensure that the principle of equality is observed in the fullest sense.[55] In that case, the Court opted for a markedly narrow concept of disability: it defined it as a limitation which, as a result of physical, mental or psychological impairments, hinders the participation of the person in professional life.[56]

88. However, the judgment in *Ring* arguably marks a paradigm shift in the Court's case-law. In that case, the EU concept of disability was explicitly aligned with that of the UN Convention.

89. Drawing on the UN Convention, the Court acknowledged that disability must be understood as 'an evolving concept'. In the specific context of Directive 2000/78, that concept refers to 'a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers'.[57] While the cause of the disability (congenital, accident or illness) is irrelevant, the impairment must be 'long-term'.[58]

90. Nonetheless, a noteworthy difference seems to exist between the UN Convention definition and the one opted for in *Ring*. Whereas the UN Convention refers broadly to participation in society, the Court's definition covers only participation in *professional life*.

91. In my view, that difference is dictated by the scope of Directive 2000/78 which is determined by the policy choices made by the legislator in this particular field. Ultimately, therefore, it is inextricably linked to the issue of what falls within EU competence and what does not. The gist of the issue is accordingly the following: does the condition from which Ms Z suffers compromise her prospects of participating in professional life?

92. On that point, I would stress that the objective pursued by Directive 2000/78, as stated in Article 1, is to establish a general framework for combating discrimination, as regards employment and occupation, on any of the grounds referred to in that provision. Those grounds include disability. As mentioned above, that concept has been subsequently defined in the Court's case-law.[59]

52 — See, for example, Waddington, L., 'The European Union and the United Nations Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences', *Maastricht Journal of European and Comparative Law*, 4(18) 2011, pp. 431 to 453, at p. 436.

53 — Kelemen, R. D., *Eurolegalism: The Transformation of Law and Regulation in the European Union*, Harvard University Press, Cambridge Massachusetts: 2011, p. 202.

54 — Case C-13/05 [2006] ECR I-6467.

55 — Ibid., paragraphs 40 and 41.

56 — Ibid., paragraph 43.

57 — *Ring*, paragraph 38.

58 — Ibid., paragraph 39.

59 — *Chacón Navas*, paragraph 41, and *Ring*, paragraphs 38 and 39.

93. I have no doubt that a condition such as the one from which Ms Z suffers may constitute a long-term limitation, which 'results in particular from physical, mental or psychological impairments'. Given her desire to have a child of her own, the condition from which Ms Z suffers is certainly a source of great distress. Indeed, under the more expansive societal understanding of disability which follows from the UN Convention, it is conceivable that, in certain circumstances, that impairment may hinder a person's full and effective participation in society.

94. However, I am not persuaded that Directive 2000/78 applies to the specific circumstances of this case.

95. I do not think that the condition from which Ms Z suffers hinders, within the meaning of the Court's case-law, 'in interaction with various barriers … the full and effective participation of the person concerned *in professional life* on an equal basis with other workers' (emphasis added). Indeed, as the Court has observed, the concept of 'disability' within the meaning of Directive 2000/78 is to be understood in relation to the possibilities for that person to work, and to exercise a professional activity. [60] This approach appears to be consistent with the aims pursued by the directive, namely, to combat discrimination in the specific context of employment and, consequently, to enable a person with a disability to have access to and participate in employment.

96. In other words, because of the inherently contextual nature of disability, the issue of what constitutes a disability for the purposes of Directive 2000/78 ought to be examined on a case-by-case basis in light of the rationale underlying that legal instrument. In consequence, the issue is whether the impairment in question constitutes – in interaction with specific barriers, be they physical, attitudinal or organisational – a hindrance to exercising a professional activity.

97. As profoundly unjust as the inability to have a child by conventional means may be perceived to be by a person who wishes to have a child of his or her own, I cannot interpret the existing EU legislative framework as covering situations which are not linked to the capacity of the person concerned to work. [61] In that respect, it is necessary to highlight the inherently functional nature of the concept of disability under Directive 2000/78. In my view, in order for a limitation to fall within the scope of that directive, an interrelationship must be established between that limitation and the capacity of the person concerned to work. That link appears to be missing in circumstances such as those of the case before the referring court. [62] It does not appear from the case-file that the limitation from which Ms Z suffers would have prevented her from participating in professional life.

98. I therefore take the view that the less favourable treatment of which Ms Z complains cannot be construed as falling within the scope of Article 5 of Directive 2000/78.

99. However, in case the Court considers that Directive 2000/78 falls to be applied in the situation at issue before the referring court, I will add the following observations concerning the requirement of 'reasonable accommodation' within the meaning of Article 5 of that directive.

60 — *Ring*, paragraph 44.

61 — However, the possibility cannot be ruled out that that conclusion would be different if, for example, Ms Z had been dismissed on grounds relating to the condition from which she suffers or if she had not been employed solely because of her limitation.

62 — For such a link in the context of driving licences, see point 31 of the Opinion of Advocate General Bot in Case C-356/12 *Glatzel*, pending before the Court.

b) Reasonable accommodation: striking a balance between the interests of the person with a disability and that of the employer

100. Even supposing, for the sake of argument, that the discrimination of which Ms Z complains falls within the scope *ratione materiae* of the directive, I do not see how Article 5 of Directive 2000/78 could be construed as requiring an employer to grant *paid* leave of absence to an employee in her circumstances. In fact, under that provision, an employer is required, under certain conditions, to take appropriate measures to enable a person with a disability to have access to, participate in or advance in employment.

101. Admittedly, there is nothing in the wording of Article 5 of Directive 2000/78 or recital 20 in the preamble thereto that would rule out, from the outset, the possibility of construing Article 5 as requiring the grant of paid leave of absence in order to ensure reasonable accommodation.

102. Whereas Article 5 merely requires employers to take 'appropriate measures, where needed in a particular case', recital 20 sets out a non-exhaustive list of measures which may prove appropriate for adapting the workplace to disability: these measures include both organisational measures and measures intended to adapt premises to the needs of the person with a disability. It is also clear that the need and the appropriateness of measures must be assessed in each individual case.[63] Moreover, in light of the objective of Article 5 of Directive 2000/78 – to enable persons with disabilities to take up work and continue employment – that provision is to be interpreted broadly.[64]

103. Accordingly, reasonable accommodation for the purposes of Article 5 of Directive 2000/78 – and interpreted in light of Article 2 of the UN Convention – may entail costs for the employer (be it due to the adapting of premises or organisational measures). However, I would emphasise that Article 5 also states that such accommodation must not constitute a disproportionate burden on the employer. On the basis of recital 21 in the preamble to Directive 2000/78, particular importance ought to be placed on 'the financial and other costs entailed by such a measure, the scale and financial resources of the undertaking'.

104. On that point, I find it perfectly conceivable that, in certain circumstances, the grant of (unpaid) leave may be deemed appropriate to ensure that the disabled employee concerned may continue to work and participate in a professional activity in accordance with the objectives of Directive 2000/78. However, I have difficulty in accepting that an obligation for the employer to grant *paid* leave of absence could be inferred from Article 5 of Directive 2000/78.

105. In fact, the rationale behind the requirement of reasonable accommodation is to strike a just balance between the needs of persons with disabilities and those of the employer.[65]

106. In *Ring*, the Court held that the reduction of working time may constitute a measure of reasonable accommodation under Article 5 of Directive 2000/78. It is thus accepted that the obligation of reasonable accommodation may interfere with the liberty of the employer to conduct his business, and entail a financial burden.

63 — See also Article 2 of the UN Convention, under which 'reasonable accommodation' refers to 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure for persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.

64 — Most recently Case C-312/11 *Commission* v *Italy* [2013] ECR, paragraph 58. See also *Ring*, paragraph 56, and the Opinion of Advocate General Kokott in *Ring*, points 54 to 57.

65 — See also the Opinion of Advocate General Kokott in *Ring*, point 59 *in fine*: Directive 2000/78 'requires an appropriate balance to be struck between the interest of the disabled employee in benefiting from measures to support him and that of the employer in not being compelled to accept interferences with the organisation of his business and economic losses without further consideration'.

107. While the reduction of working time may arguably constitute a considerable financial burden on the employer, it nonetheless strikes a balance between the interests of the employee and those of the employer: indeed, as a *quid pro quo* for the accommodation provided, the employee continues to contribute to the performance of the establishment. Although the issue was not explicitly raised in *Ring*, it seems to me that in order to strike an appropriate balance between the interests involved, the reduction in working hours as a measure of accommodation necessarily entails a corresponding reduction in pay for the person concerned.

108. By contrast with the reduction of working time, the grant of paid leave of absence caters solely to the interests of the employee. Unlike the situation described above, the grant of paid leave of absence does not only place a considerable financial burden on the employer; it *also* fails to ensure that, in return for the adjustment made, the disabled employee continues to participate in the professional activity. In fact, if the grant of paid leave of absence were to be equated with the reduction of working hours, it would have to be assumed that the (disabled) employee would invariably return to work after the period of leave. Nor could it be excluded that further periods of absence would be necessary if the employee decided to have more children under a similar arrangement. In light of the various uncertainties surrounding the grant of paid leave of absence from the point of view of the employer, these measures cannot, in my opinion, be meaningfully compared.[66]

109. Moreover, the limitation from which a woman such as Ms Z suffers and her need to take a leave of absence do not seem to be directly linked. In fact, reasonable accommodation requires the employer to take measures which *facilitate* access to and participation in a professional activity.[67] This is confirmed by Article 5 of Directive 2000/78, read in conjunction with recital 20 thereto.

110. It is of course true that the accommodation provided ought to be adapted to each individual case. However, where the measures at issue possess no apparent link to ensuring that the disabled person concerned has access to or is able to participate in working life, Article 5 cannot in my view be interpreted as entailing an obligation for the employer to take such measures. That is the position in the case before the referring court. It emerges from the case-file that the need to take time off work is not a necessary corollary to enabling Ms Z to continue to participate in a professional activity, but rather, a consequence of her decision to undertake surrogacy.

2. The impact of primary and international law

111. Questions 4, 5 and 6 concern the validity of Directive 2000/78. More specifically, the referring court seeks to ascertain whether or not that directive is compatible, on the one hand, with Article 10 TFEU and Articles 21, 26 and 34 of the Charter and, on the other, with the UN Convention.

112. Article 10 TFEU contains a general clause which articulates a particular policy aim to which the European Union is committed. It sets out the aim of combating discrimination based on, among other reasons, disability: an aim furthered by Directive 2000/78 in the field of employment and occupation. It is my understanding that that provision of primary law does not lay down any precise rights or obligations which might call into question the validity of Directive 2000/78.

113. To the extent that Directive 2000/78 does not, in my view, fall to be applied in the circumstances of the present case, I refer – by analogy – to my remarks on the Charter in points 71 to 75 above.

66 — In my view, a more appropriate point of comparison can be found in the grant of unpaid leave of absence. Here, the difference is one of degree, and not of kind. Similarly to the reduction of working hours, the employee does not receive a salary for the period during which he ceases to perform his tasks. It transpires from the order for reference that Ms Z has had the possibility of taking time off work both before and after the birth of her child.

67 — Certainly, the accommodation in question takes different forms. In addition to the measures mentioned above (the adaptation of premises and organisational measures), it is perfectly conceivable that accommodation may also entail changing working patterns and distributing tasks in a specific way. For example, in the case of depression, employers may need to ensure that those suffering from depression are not exposed to stressful situations.

114. With regard to the issue of compatibility between Directive 2000/78 and the UN Convention, I would observe that the obligations laid down in the latter international instrument seem to be addressed to Contracting Parties. They are to take appropriate measures – if necessary, by adopting legislation – to give effect to the rights of disabled persons as laid down in the UN Convention.[68] Drafted in a programmatic form, I cannot read that Convention as containing any provisions which would fulfil the condition that the provision must be unconditional and sufficiently precise, as stated above. Consequently, I do not consider that the UN Convention may be relied on to challenge the validity of Directive 2000/78.[69]

115. I will nonetheless deal briefly with the provisions mentioned by the referring court.

116. First, Articles 5, 6 and 28 of the UN Convention[70] do not specifically relate to employment and occupation. They lay down general obligations addressed to the Contracting Parties to take steps to ensure that the aims of the UN Convention are achieved. Consequently, I cannot see how those provisions could serve as a basis for challenging the validity of Directive 2000/78.

117. Second, Article 27(l)(b) of the UN Convention provides that 'States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation to, inter alia … protect the rights of persons with disabilities on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value …'.

118. That provision thus leaves it to the discretion of Contracting Parties to determine the measures to be adopted. Therefore, the freedom of the European Union to take legislative measures to promote the realisation of rights enshrined in the UN Convention is not restricted by Article 27(l)(b) of the UN Convention.

119. In light of the foregoing considerations, I take the view that Questions 3, 4, 5 and 6 ought to be answered to the effect that Directive 2000/78 does not apply in circumstances, such as those of the case before the referring court, in which a woman who suffers from a condition that makes her unable to support a pregnancy and whose genetic child has been born through a surrogacy arrangement is refused paid leave of absence from employment equivalent to maternity and/or adoption leave. That conclusion does not call into question the validity of that directive.

D – *Final remarks*

120. Notwithstanding the conclusion I have reached above, I have considerable sympathy with the difficulties that commissioning parents undoubtedly face because of the legal uncertainty surrounding surrogacy arrangements in a number of Member States. However, I do not believe that it is for the Court to substitute itself for the legislature by engaging in constructive interpretation that would involve reading into Directives 2006/54 and 2000/78 (or, indeed Directive 92/85) something that is simply not there. That, in my view, would amount to encroaching upon the legislative prerogative.

68 — See, in particular, Article 4 of the UN Convention, which provides, under the heading 'General obligations' that 'States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'. That provision also lists a number of measures to be undertaken to achieve the aims pursued by the UN Convention.

69 — That being so, it is not necessary to determine whether 'the nature and broad logic' of the Convention allows the Court to examine the validity of Directive 2000/78.

70 — Article 5 provides inter alia that Contracting Parties 'shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds' and 'shall take all appropriate steps to ensure that reasonable accommodation is provided'. Article 6 specifically recognises that women and girls with disabilities are subject to different forms of discrimination and requires Contracting Parties to 'take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms'. Article 28(2)(b) recognises the right of persons with disabilities to social protection without discrimination and the duty of States to safeguard and promote that right, inter alia by ensuring 'access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes'.

121. Indeed, construing an entitlement to paid leave of absence from employment judicially would entail taking a stand on questions of an ethical nature, which have yet to be decided by legislative process. If extending the scope of protection of maternity or adoption leave (or indeed creating a separate form of leave for surrogacy arrangements) is considered to be socially desirable, it will be for the Member States and/or the EU legislature to put in place the necessary legislative measures to attain that objective.

IV – Conclusion

122. Accordingly, I propose that the Court answer the questions referred by the Equality Tribunal to the following effect:

— 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 (recast) does not apply in circumstances in which a woman whose genetic child has been born through a surrogacy arrangement is refused paid leave of absence from employment equivalent to maternity leave and/or adoption leave.

  Consideration of the questions raised has disclosed no factor capable of affecting the validity of Directive 2006/54.

— Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation does not apply in circumstances, such as those of the case before the referring court, in which a woman who suffers from a condition that makes her unable to support a pregnancy and whose genetic child has been born through a surrogacy arrangement is refused paid leave of absence from employment equivalent to maternity leave and/or adoption leave.

  Consideration of the questions raised has disclosed no factor capable of affecting the validity of Directive 2000/78.