

JUDGMENT OF THE COURT (Grand Chamber)

18 March 2014 (*)

(Reference for a preliminary ruling – Social policy – Directive 2006/54/EC – Equal treatment of male and female workers – Commissioning mother who has had a baby through a surrogacy arrangement – Refusal to grant her paid leave equivalent to maternity leave or adoptive leave – United Nations Convention on the Rights of Persons with Disabilities – Directive 2000/78/EC – Equal treatment in employment and occupation – Prohibition of any discrimination on the ground of disability – Commissioning mother unable to bear a child – Existence of a disability – Validity of Directives 2006/54 and 2000/78)

In Case C-363/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Equality Tribunal (Ireland), made by decision of 26 July 2012, received at the Court on 30 July 2012, in the proceedings

Z.

v

A Government department,

The Board of management of a community school,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, M. Ilešič, E. Juhász, A. Borg Barthet, M. Safjan (Rapporteur) and J.L. da Cruz Vilaça, Presidents of Chambers, G. Arestis, J. Malenovský, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: N. Wahl,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 May 2013,

after considering the observations submitted on behalf of:

- Ms Z., by N. Butler SC, P. Dillon Malone BL, and A. Beirne BL,
- the Government department and the Board of management of a community school, by E. Creedon, acting as Agent, and by G. Durcan SC and C. Smith BL,
- Ireland, by E. Creedon, acting as Agent, and by G. Durcan SC and C. Smith BL,
- the Portuguese Government, by L. Inez Fernandes and S. Ribeiro, acting as Agents,
- the European Parliament, by K. Zejdová and A. Pospíšilová Padowska, acting as Agents,
- the Council of the European Union, by H. Grahn, R. LiudvinavičiuteCordeiro and S. Thomas, acting as Agents,
- the European Commission, by J. Enegren and C. Gheorghiu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2013,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), and also the validity of those two directives.
- 2 The request has been made in proceedings between Ms Z., a commissioning mother who has had a baby through a surrogacy arrangement, and an Irish Government department and the Board of management of a community school ('the Board of Management') concerning the refusal to grant Ms Z. paid leave equivalent to maternity leave or adoptive leave following the birth of that child.

Legal context

International law

- 3 The United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Community by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35) ('the UN Convention'), states in recital (e) in the preamble thereto:

'Recognising 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 Under Article 1 of the UN Convention:

'The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

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.'

- 5 Article 4 of the UN Convention, headed 'General obligations', is worded as follows:

'1. States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

- (a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention;
- (b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
- (c) To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
- (d) To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;

- (e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organisation or private enterprise;

...

3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.

...’

6 Under Article 5 of the UN Convention, headed ‘Equality and non-discrimination’:

‘1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

2. States 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.

3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

4. Specific measures which are necessary to accelerate or achieve *de facto* equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.’

7 Article 6 of the UN Convention, headed ‘Women with disabilities’, states:

‘1. States Parties recognise that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.’

8 Article 27 of the UN Convention, headed ‘Work and employment’, states in paragraph 1:

‘States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. 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*:

...

- (b) 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, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

...’

9 Article 28 of the UN Convention, headed ‘Adequate standard of living and social protection’, provides in paragraph 2:

‘States Parties recognise the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realisation of this right, including measures:

...

- (b) To ensure 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;

...’

10 Article 42 of the UN Convention states:

‘The present Convention shall be open for signature by all States and by regional integration organisations at United Nations Headquarters in New York as of 30 March 2007.’

11 Article 43 of the UN Convention provides:

‘The present Convention shall be subject to ratification by signatory States and to formal confirmation by signatory regional integration organisations. It shall be open for accession by any State or regional integration organisation which has not signed the Convention.’

12 The UN Convention entered into force on 3 May 2008.

European Union legislation

Directive 92/85/EEC

13 Article 2 of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (OJ 1992 L 348, p. 1) contains the following definitions:

‘For the purposes of this Directive:

- (a) *pregnant worker* shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and/or national practice;
- (b) *worker who has recently given birth* shall mean 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;
- (c) *worker who is breastfeeding* shall mean a worker who is breastfeeding 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.’

14 Article 8 of that directive, headed ‘Maternity leave’, provides:

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

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

Directive 2006/54

15 According to recital 27 in the preamble to Directive 2006/54:

‘Similar considerations apply to the granting by Member States to men and women of an individual and nontransferable right to leave subsequent to the adoption of a child. It is for the Member States to

determine whether or not to grant such a right to paternity and/or adoption leave and also to determine any conditions, other than dismissal and return to work, which are outside the scope of this Directive.’

16 Article 1 of Directive 2006/54 states:

‘The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

...

(b) working conditions, including pay;

...’

17 Article 2 of that directive provides:

‘1. For the purposes of this Directive, the following definitions shall apply:

(a) “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;

(b) “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;

...

2. For the purposes of this Directive, discrimination includes:

...

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85 ...’

18 Article 4 of that directive, relating to equal pay, provides:

‘For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

...’

19 Article 14 of Directive 2006/54, relating to equal treatment as regards access to employment, vocational training and promotion and working conditions, states in paragraph 1:

‘There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

...

(c) employment and working conditions, including dismissals, as well as pay as provided for in Article [157 TFEU];

...’

20 Article 16 of that directive, headed ‘Paternity and adoption leave’, states:

‘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.’

Directive 2000/78

21 Article 1 of Directive 2000/78 states:

‘The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.’

22 Article 2 of that directive, headed ‘Concept of discrimination’, provides:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

...’

23 Article 3 defines the scope of Directive 2000/78 as follows:

‘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:

...

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

...’

24 Article 5 of Directive 2000/78, headed ‘Reasonable accommodation for disabled persons’, reads as follows:

‘In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means 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, or to undergo training, unless such measures would

impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.'

Irish legislation

- 25 Surrogacy is unregulated in Ireland.
- 26 Section 8 of the Maternity Protection Act 1994, in the version applicable at the material time, provides that a pregnant employee is to be entitled to maternity leave from her employment for a period of not less than 26 weeks.
- 27 Section 9 of that Act sets out the conditions for the granting of maternity leave, including that the employee should have given to her employer a medical or other appropriate certificate confirming the pregnancy and specifying the expected week of confinement.
- 28 Section 6 of the Adoptive Leave Act 1995, in the version applicable at the material time, gives an employed adopting mother or sole male adopter the right to a minimum period of adoptive leave of 24 weeks from the date of placement of the adopted child.
- 29 Section 7 of that Act provides, inter alia, for notification to the employer in advance of the adoption taking place and for the provision to the employer of a certificate of placement or, in the case of a foreign adoption, a certificate of eligibility and suitability.
- 30 Chapters 9 and 11 of the Social Welfare Consolidation Act 2005 lay down the rules relating to the grant of maternity benefit and adoptive benefit respectively.
- 31 Section 2 of the Employment Equality Acts 1998 to 2011 defines disability as being inter alia the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body, and defines family status as being responsibility, inter alia, as a parent or as a person *in loco parentis* in relation to a person who has not attained the age of 18 years.
- 32 Section 6(1) and (2) of those Acts defines discrimination as being taken to occur, inter alia, where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the specified grounds. Those grounds, as between two persons, include the fact that one is a woman and the other is a man, referred to as 'the gender ground', and that one is a person with a disability and the other either is not or is a person with a different disability, referred to as 'the disability ground'.
- 33 Section 6(2A) of those Acts provides that, without prejudice to the generality of subsections (1) and (2), discrimination on the gender ground is to be taken to occur where, on a ground related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less favourably than another employee is, has been or would be treated.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 34 It is apparent from the order for reference that Ms Z. is employed as a postprimary school teacher in a school managed by the Board of Management, pursuant to terms and conditions of employment determined by the Government department, which is responsible for her pay.
- 35 Ms Z. has a rare condition which has the effect that, although she has healthy ovaries and is fertile, she has no uterus and cannot support a pregnancy. In 2008 and 2009, Ms Z. and her husband opted for surrogacy and turned to a specialist agency in California (United States), a State in which the law provides for detailed regulation of surrogate pregnancies and births.
- 36 *In vitro* fertilisation treatment took place in Ireland, with egg transfer to the surrogate mother occurring in California in August 2009.

- 37 On 7 April 2010, Ms Z. travelled to California in order to be present at the birth of the child, a girl, on 28 April 2010. The child is the genetic child of Ms Z. and her husband, having been created from their gametes. As a matter of Californian law, Ms Z. and her husband are considered the baby's parents and the surrogate mother is not identified on the child's birth certificate. Ms Z., with the help of her husband, has been taking care of the child since the birth. On 18 May 2010, Ms Z. and her husband returned with their baby to Ireland, a Member State in which surrogacy arrangements are unregulated.
- 38 The terms and conditions of Ms Z.'s employment include a right to paid maternity leave and adoptive leave. When either kind of leave is taken by a teacher employed subject to those terms and conditions, the payment in respect of such leave is, in the majority of cases, disbursed in part by the Government department, and the balance paid by the Department of Social Protection in the form of maternity benefit.
- 39 Since she had not been pregnant and could not give birth to a child, Ms Z. was unable to satisfy the requirements under the Maternity Protection Act 1994 for taking maternity leave. Nor was she in a position to qualify for adoptive leave, as provided by the Adoptive Leave Act 1995, since she was not adopting a child born through surrogacy.
- 40 Furthermore, there is no express provision in statute or in Ms Z.'s contract of employment for leave to be granted following the birth of a child under surrogacy arrangements.
- 41 On 10 February 2010, Ms Z. made an application to the Government department for leave equivalent to adoptive leave. On 5 March 2010, the Government department refused that application on the ground that she did not satisfy the requirements laid down by the existing maternity or adoptive leave schemes.
- 42 The Government department indicated, however, that it was prepared to grant Ms Z. unpaid leave for the time she was in California prior to the birth of the child. It added that, once the child was born, Ms Z. could avail of statutory parental leave for the period from the birth until the end of May 2010 and again from the beginning of the next school year. It stated that Ms Z. had a right to parental leave of a maximum duration of 14 weeks and that she would be paid for the summer months in the normal way.
- 43 Through a combination of school closures and certified paid sick leave, for reasons not based on her disability but arising from stress, Ms Z. worked approximately nine days in the period from 12 April 2010 until early January 2011. The Government department paid Ms Z. in full for this entire period.
- 44 In November 2010, Ms Z. brought an action against the Government department before the Equality Tribunal. She claimed that she had been the subject of discriminatory treatment on the grounds of gender, family status and disability, that the Government department had failed to reasonably accommodate her as a person with a disability, and that the Government department had refused to provide her with paid leave equivalent to maternity or adoptive leave, although she had undergone *in vitro* fertilisation treatment.
- 45 In those circumstances, the Equality Tribunal decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

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

- Article 3 [TEU],
- Articles 8 [TFEU] and 157 [TFEU], and/or
- Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union [(‘the Charter’)]

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 adoptive leave?

- (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:
- Article 10 [TFEU], and/or
 - Articles 21, 26 and 34 of the [Charter]
- 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 adoptive 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]?’

Consideration of the questions referred

The first and second questions

- 46 By its first and second questions, which it is appropriate to consider together, the referring tribunal asks, in essence, whether Directive 2006/54, in particular Articles 4 and 14 thereof, are to be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement constitutes discrimination on grounds of sex and, if not, whether that directive is valid in the light of Article 3 TEU, Articles 8 TFEU and 157 TFEU and Articles 21, 23, 33 and 34 of the Charter.
- 47 It is appropriate to consider, first of all, the question whether the refusal to provide maternity leave to a commissioning mother such as Ms Z. constitutes discrimination on grounds of sex, within the meaning of Directive 2006/54.
- 48 Article 4 of that directive states that, for the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration is to be eliminated.
- 49 Under Article 14 of that directive, there is to be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation inter alia to employment and working conditions, including dismissals, as well as pay.
- 50 In the context of the present case, those two articles of Directive 2006/54 must be read in conjunction with the provisions of Article 2(1)(a) and (b) and (2)(c) of that directive.
- 51 As regards discrimination as referred to in Article 2(1)(a) and (b) of Directive 2006/54, the refusal to provide maternity leave in the situation outlined by the referring tribunal constitutes direct discrimination on grounds of sex within the meaning of Article 2(1)(a) if the fundamental reason for that refusal applies exclusively to workers of one sex (see, to that effect, Case C-177/88 *Dekker* [1990] ECR I-3941, paragraph 10; Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657, paragraph 14; and Case C-506/06 *Mayr* [2008] ECR I-1017, paragraph 50).

- 52 Yet, as the Advocate General noted in point 63 of his Opinion, under the national legislation applicable in a situation such as that at issue in the main proceedings, a commissioning father who has had a baby through a surrogacy arrangement is treated in the same way as a commissioning mother in a comparable situation, in that he is not entitled to paid leave equivalent to maternity leave either. It follows from this that the refusal of Ms Z.'s request is not based on a reason that applies exclusively to workers of one sex.
- 53 The Court has consistently held that indirect discrimination on grounds of sex arises where a national measure, albeit formulated in neutral terms, puts considerably more workers of one sex at a disadvantage than the other (see, to that effect, Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 30; Case C-123/10 *Brachner* [2011] ECR I-10003, paragraph 56; and Case C-7/12 *Riežniece* [2013] ECR, paragraph 39).
- 54 As regards the indirect discrimination referred to in Article 2(1)(b) of Directive 2006/54, it must be noted that there is nothing in the file in the case to establish that the refusal to grant the leave at issue puts female workers at a particular disadvantage compared with male workers.
- 55 Consequently, the refusal to grant maternity leave to a commissioning mother such as Ms Z. does not constitute direct or indirect discrimination on grounds of sex within the meaning of Article 2(1)(a) and (b) of Directive 2006/54. The fact that the commissioning mother has been responsible for the care of the child from birth, as mentioned in the first question, is not such as to call that finding into question.
- 56 Further, under Article 2(2)(c) of Directive 2006/54, any less favourable treatment of a woman that is related to pregnancy or maternity leave within the meaning of Directive 92/85 constitutes discrimination within the meaning of Directive 2006/54.
- 57 A commissioning mother who has had a baby through a surrogacy arrangement cannot, by definition, be subject to less favourable treatment related to her pregnancy, given that she has not been pregnant with that baby.
- 58 Moreover, in point 1 of the operative part of the judgment in Case C-167/12 *C.D.* [2014] ECR, the Court ruled that Directive 92/85 must be interpreted as meaning that Member States are not required to provide maternity leave pursuant to Article 8 of that directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.
- 59 Therefore, such a commissioning mother is not subject to less favourable treatment related to the taking of maternity leave within the meaning of Directive 92/85, and, consequently, she cannot be regarded as having been subject to discrimination on grounds of sex, within the meaning of Article 2(2)(c) of Directive 2006/54.
- 60 In the light of the foregoing, it must be held that a refusal to provide paid leave equivalent to maternity leave to a woman who has had a baby through a surrogacy arrangement does not constitute discrimination within the meaning of Directive 2006/54 and, in particular, Articles 4 and 14 thereof.
- 61 Next, the Court must ascertain whether the refusal to provide paid leave equivalent to adoptive leave to a commissioning mother such as Ms Z. constitutes discrimination on grounds of sex, within the meaning of Directive 2006/54.
- 62 According to Article 16 of Directive 2006/54, that directive is without prejudice to the right of Member States to recognise distinct rights to paternity and/or adoption leave. Article 16 provides only that those Member States which recognise such rights are to 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.
- 63 It is clear from that article, read in conjunction with recital 27 in the preamble to Directive 2006/54, that the directive preserves the freedom of the Member States to grant or not to grant adoption leave,

and that the conditions for the implementation of such leave, other than dismissal and return to work, are outside the scope of that directive.

64 With regard, lastly, to the validity of Directive 2006/54 in the light of Article 3 TEU, Articles 8 TFEU and 157 TFEU, and Articles 21, 23, 33 and 34 of the Charter, it must be noted that it has been held consistently that the Court may decide not to give a preliminary ruling where the provision whose validity is the subject-matter of the reference manifestly has no bearing on the outcome of the main proceedings (see Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraph 75).

65 As is apparent from the foregoing, the situation of a commissioning mother as regards the grant of maternity leave or adoptive leave is not within the scope of Directive 2006/54.

66 Consequently, it is not necessary to examine the validity of that directive in the light of Article 3 TEU, Articles 8 TFEU and 157 TFEU and Articles 21, 23, 33 and 34 of the Charter.

67 In view of the foregoing considerations, the answer to the first and second questions is that:

- Directive 2006/54, in particular Articles 4 and 14 thereof, must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex;
- the situation of such a commissioning mother as regards the grant of adoptive leave is not within the scope of that directive.

The third, fourth, fifth and sixth questions

68 By its third, fourth, fifth and sixth questions, which it is appropriate to consider together, the referring tribunal asks, in essence, whether Directive 2000/78, interpreted if necessary in the light of the UN Convention, must be understood as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement constitutes discrimination on the ground of disability, and, if the answer is in the negative, whether that directive is valid in the light of Article 10 TFEU, Articles 21, 26 and 34 of the Charter, and the UN Convention.

69 As a preliminary point it should be noted that the purpose of Directive 2000/78, as stated in Article 1, is to lay down a general framework for combating discrimination, as regards employment and occupation, on any of the grounds referred to in that article, which include disability (see Case C-13/05 *Chacón Navas* [2006] ECR I-6467, paragraph 41). In accordance with Article 3(1)(c) of the directive, it applies, within the limits of the areas of competence conferred on the European Union, to all persons, in relation inter alia to employment and working conditions, including dismissals and pay.

70 The concept of ‘disability’ is not defined by Directive 2000/78 itself.

71 It must be borne in mind that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions and, consequently, they prevail over acts of the European Union (Case C-366/10 *Air Transport Association of America and Others* [2011] ECR I-13755, paragraph 50, and Joined Cases C-335/11 and C-337/11 *HK Danmark* [2013] ECR, paragraph 28).

72 The primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements (Joined Cases C-320/11, C-330/11, C-382/11 and C-383/11 *Digitalnet and Others* [2012] ECR, paragraph 39, and *HK Danmark*, paragraph 29).

73 It is apparent from Decision 2010/48 that the European Union has approved the UN Convention. The provisions of that Convention are thus, from the time of its entry into force, an integral part of the

European Union legal order (see Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5, and *HK Danmark*, paragraph 30).

- 74 Moreover, according to the appendix to Annex II to that decision, which concerns independent living and social inclusion, work and employment, Directive 2000/78 is one of the European Union acts relating to matters governed by the UN Convention.
- 75 It follows that, in the present case, the UN Convention is capable of being relied on for the purposes of interpreting Directive 2000/78, which must, as far as possible, be interpreted in a manner that is consistent with that Convention (see *HK Danmark*, paragraph 32).
- 76 That is why, following the ratification by the European Union of the UN Convention, the Court held that the concept of ‘disability’ within the meaning of Directive 2000/78 had to be understood as referring to a limitation which results in particular from long-term 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 (see *HK Danmark*, paragraphs 37 to 39).
- 77 It must be added that the concept of ‘disability’ within the meaning of Directive 2000/78 must be understood as referring not only to the impossibility of exercising a professional activity, but also to a hindrance to the exercise of such an activity. Any other interpretation would be incompatible with the objective of that directive, which aims in particular to enable a person with a disability to have access to or participate in employment (see, to that effect, *HK Danmark*, paragraph 44).
- 78 In the present case, Ms Z. cannot give birth because she has a rare condition: she has no uterus.
- 79 Having regard to the concept of ‘disability’, as recalled in paragraph 76 of the present judgment, it is not disputed that such a condition constitutes a limitation which results in particular from physical, mental or psychological impairments, or that it is of a long-term nature. In particular, it cannot be disputed that a woman’s inability to bear her own child may be a source of great suffering for her.
- 80 However, the concept of ‘disability’ within the meaning of Directive 2000/78 presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person’s full and effective participation in professional life on an equal basis with other workers.
- 81 As the Advocate General stated in points 95 to 97 of his Opinion, the inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. In the present case, it is not apparent from the order for reference that Ms Z.’s condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity.
- 82 In those circumstances, it must be held that Ms Z.’s condition does not constitute a ‘disability’ within the meaning of Directive 2000/78, and that therefore that directive, in particular Article 5 thereof, is not applicable in a situation such as that at issue in the main proceedings. The fact that the commissioning mother has been responsible for the care of the child from birth, as mentioned in the third question, is not such as to call that finding into question.
- 83 Consequently, as is clear from the case-law cited in paragraph 64 of the present judgment, it is not necessary to examine the validity of Directive 2000/78 in the light of Article 10 TFEU and Articles 21, 26 and 34 of the Charter.
- 84 As regards examination of the validity of that directive in the light of the UN Convention, it follows from the case-law cited in paragraph 71 of the present judgment that the validity of an act of the European Union may be affected by the fact that it is incompatible with rules of international law. Where such invalidity is pleaded before a national court, the Court of Justice verifies whether certain conditions are satisfied in the case before it, in order to determine whether, pursuant to Article 267 TFEU, the validity of the act of European Union law concerned, in light of the rules of international law relied on, may be ascertained (see Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 43, and *Air Transport Association of America and Others*, paragraph 51).

85 So far as concerns the conditions referred to in the preceding paragraph, it is important to bear in mind that in a situation where the nature and the broad logic of an international treaty permit the validity of the act of European Union law to be reviewed in the light of the provisions of that treaty, it is still necessary that the provisions of that treaty which are relied on for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise (see *Intertanko and Others*, paragraph 45, and *Air Transport Association of America and Others*, paragraph 54).

86 Such a condition is fulfilled where the provision relied on contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see Case 12/86 *Demirel* [1987] ECR 3719, paragraph 14; Case C-213/03 *Pêcheurs de l'étang de Berre* [2004] ECR I-7357, paragraph 39; and *Air Transport Association of America and Others*, paragraph 55).

87 In the present case, however, it is apparent from Article 4(1) of the UN Convention that it is, in particular, for the States Parties to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in that Convention. In addition, under Article 4(3) of the UN Convention, in the development and implementation of legislation and policies to implement that Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties are to closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.

88 Therefore, as the Advocate General noted in point 114 of his Opinion, in so far as the obligations imposed by that Convention are addressed to Contracting Parties, that international agreement is 'programmatic'.

89 Consequently, the provisions of the UN Convention are subject, in their implementation or effects, to the adoption of subsequent measures which are the responsibility of the Contracting Parties. In that context, Annex II to Decision 2010/48 contains a declaration concerning the competence of the European Union with regard to matters governed by the UN Convention and the European Union acts which refer to matters governed by that Convention.

90 In those circumstances, without there being any need to examine the nature and broad logic of the UN Convention, it must be held that the provisions of that Convention are not, as regards their content, provisions that are unconditional and sufficiently precise within the meaning of the case-law cited in paragraphs 85 and 86 of the present judgment, and that they therefore do not have direct effect in European Union law. It follows from this that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention.

91 In the light of the foregoing considerations, the answer to the third, fourth, fifth and sixth questions is that:

- Directive 2000/78 must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement does not constitute discrimination on the ground of disability;
- the validity of that directive cannot be assessed in the light of the UN Convention, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

Costs

92 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **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, in particular Articles 4 and 14 thereof, must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex.**

The situation of such a commissioning mother as regards the grant of adoptive leave is not within the scope of that directive.

2. **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement does not constitute discrimination on the ground of disability.**

The validity of that directive cannot be assessed in the light of the United Nations Convention on the Rights of Persons with Disabilities, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

[Signatures]

* Language of the case: English.