



Press and Information

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Advocate General's Opinion in Case C-167/12
CD v ST

Advocate General Kokott considers that both mothers have the right to receive maternity leave in the case of legal surrogacy

Maternity leave of at least 14 weeks is not doubled but is to be divided between both mothers; the maternity leave must amount to at least two weeks for each of them

There are no uniform rules on the matter of surrogacy¹ in the EU. Whilst it is prohibited in many Member States, it is permitted in the United Kingdom under certain conditions. However, in the UK there are no specific rules on maternity leave for the woman who assumes responsibility for the child's care after it is born (intended mother).

With the assistance of a surrogate mother, C.D. and her partner, who live in the UK, fulfilled their wish to have a child. The sperm of the partner, but no ovum from C.D., was used to produce the child. C.D. began mothering and breastfeeding the child within an hour of the birth. A few months after the birth a British court gave C.D. and her partner full and permanent responsibility for the child with the approval of the surrogate mother in accordance with the British legislation on surrogacy.

Since her public employer was of the view that she was not entitled to paid maternity or adoption leave as she did not give birth to or adopt a child, C.D. brought legal proceedings before a British court. That court would like to know from the Court of Justice whether in accordance with EU law² a woman has the right to receive paid maternity leave where it is not she herself but a surrogate mother who has given birth to a child.

Advocate General Juliane Kokott considers that an intended mother who has a baby through a surrogacy arrangement has the right to receive maternity leave provided for under EU law after the birth of the child in any event where she takes the child into her care following birth, surrogacy is permitted in the Member State concerned, and its national requirements are satisfied. This also applies where the intended mother does not breastfeed the child following birth. **Maternity leave which the surrogate mother has taken must be deducted; the maternity leave of the intended mother must however amount to at least two weeks.**

On laying down the rules on maternity leave in 1992 the EU legislature only took biological motherhood as the norm and obviously did not consider the practice of surrogacy which was then not very widespread. The **objective of protection of maternity leave**, which is enshrined as a fundamental right, also however demands the protection of the intended mother, irrespective of whether or not she breastfeeds the child³. This paid leave not only serves to protect the worker

¹ In reproductive medicine surrogacy begins with the artificial fertilisation of the surrogate mother or the placing in her of an embryo. The surrogate mother then carries and delivers the child. The child can be genetically related either to the 'intended parents', who assume responsibility for the child's care after it is born, or to the father and the surrogate mother, or to him and a third woman.

² In particular in accordance with 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, OJ 1992 L 348, p. 1.

³ A breastfeeding mother is in a situation equivalent to that of a breastfeeding biological mother and as a 'breastfeeding worker' within the meaning of the directive must therefore enjoy its protection.

during pregnancy, in confinement, or during the lactation period, but should **also ensure the unhindered development of the mother-child relationship**.

In any event, if the Member State recognises the legal relationship of the intended mother to the child in the specific case, EU law on maternity leave must be applied to intended mothers who take the place of the surrogate mother immediately after the birth.

With regards to the length of maternity leave, Advocate General Kokott is of the view that the concept of surrogacy cannot result in a doubling of the minimum leave entitlement of 14 weeks. Rather, the division of roles chosen by the women concerned must be reflected in the maternity leave. Consequently, the leave already taken by the surrogate mother must be deducted from that of the intended mother, and vice versa. However the compulsory maternity leave of at least two weeks must be granted to both women in full. With regards to these two weeks the EU rules in the form of a directive are so precise that they are directly effective in Member States.

The division of the remaining ten weeks must duly take account of the protection of the pregnant woman and the woman who has recently given birth and the child's best interests. If the women cannot agree, it is reasonable to follow the approach of the national law. In the case of an agreement the right to the remaining leave can also be determined with sufficient precision with the result that it must be concluded that the EU rules are directly effective.

In other respects Advocate General Kokott is of the view that the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation⁴ is not relevant in the present case and is therefore not applicable.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Unofficial document for media use, not binding on the Court of Justice.

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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⁴ Confirmed in 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.