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Press and Information

Advocate General's Opinion in Case C-363/12
Z v A Government Department and the Board of Management of a Community School

According to Advocate General Wahl, a right to paid leave of absence from employment to parents of a child born through a surrogacy arrangement cannot be inferred from EU law

As EU law stands at present, their situation falls outside its scope

The case before the referring court concerns Ms Z, who is a teacher 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. In order to have a child, Ms Z and her husband arranged for a surrogate mother to give birth to a child in California. The child born under the surrogacy arrangement is the genetic child of the couple and no mention of the surrogate mother is made on the child's American birth certificate.

While paid maternity leave and adoption leave are regulated under Irish law, 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. After her request for paid leave of absence had been refused, 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.

In those circumstances, the Equality Tribunal asked the Court of Justice whether the fact that a woman whose genetic child has been born through a surrogacy arrangement is refused paid leave of absence from employment constitutes a breach of EU law.

In his Opinion today, Advocate General Nils Wahl distinguishes the case at hand from the situation of a pregnant worker falling under the scope of the Pregnant Workers Directive[1], which provides for maternity leave of at least 14 weeks. In that regard, he emphasises that the protection afforded by the Directive applies to women who have given birth to a child and that it aims at protecting those workers in their fragile physical state.

Concerning the question at hand, the Advocate General considers, first, that **Ms Z has not been subject to any prohibited discrimination on grounds of sex**[2]. According to the Advocate General, the differential treatment of which Ms Z complains was not based on sex, but on the refusal of national authorities to equate her situation with that of either a woman who has given birth, or an adoptive mother. However, the special protection in terms of discrimination based on sex afforded to pregnant women cannot apply in this case and therefore a comparator of the opposite sex is necessary. Finding that the male parent of a child born through surrogacy would be treated in exactly the same manner, the Advocate General dismisses the argument based on sex discrimination.

While the Advocate General states that the situation of a woman such as Ms Z could be compared to that of an adoptive mother, he emphasises that the Member States have not yet passed

[1] 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).
[2] Prohibited discrimination on grounds of sex is governed by 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) (OJ 2006 L 204, p. 23).

legislation harmonising the right to paid leave of absence for adoptive parents. Accordingly, where national law foresees the possibility of paid adoption leave, the national court ought to assess whether the application of differing rules to adoptive parents and to parents who have had a child through a surrogacy arrangement constitutes prohibited discrimination contrary to that national law.

As regards the second ground of discrimination brought forward, Advocate General Wahl concludes that **Ms Z also has not been subject to discrimination on grounds of disability** under EU law. According to the Advocate General, the provisions prohibiting discrimination based on disability in the context of employment and occupation[3] are limited in scope and seek to ensure full and effective participation in professional life by all. Seeing as her inability to carry a pregnancy to term did not prevent Ms Z from such participation, the EU legislation in question could not apply.

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.

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[3] The EU has passed specific legislation in this field, notably, Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).