

Case C-129/20**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

9 March 2020

Referring court:

Cour de cassation du Grand-Duché de Luxembourg (Luxembourg)

Date of the decision to refer:

27 February 2020

Appellant in the appeal on a point of law, original applicant:

XI

Respondent in the appeal on a point of law, original defendant:

Caisse pour l'avenir des enfants

1 Subject matter and facts of the dispute:

- 1 On 4 March 2012, at a time when she was unemployed, the applicant gave birth to twins.
- 2 After having concluded two fixed-term contracts for the provision of services in school education on 15 September 2012 and 1 August 2013, on 15 September 2014 she signed a contract of indefinite duration, still within school education.
- 3 On 11 March 2015, she applied to take parental leave starting on 15 September 2015.
- 4 By decision of 19 May 2015, the Caisse nationale des prestations familiales (National Family Benefits Fund) (now the 'Caisse pour l'avenir des enfants' (Children's Future Fund)) rejected her application for a 'full-time parental leave allowance' on the ground, in essence, that she did not have the status of a worker at the time of the birth and throughout the 12 months immediately preceding the start of the parental leave.

- 5 By judgment of 27 October 2017, the Conseil arbitral de la sécurité sociale (Social Security Arbitration Board) varied that decision, holding that, under clause 1 and clause 2.3(b) of the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC on 14 December 1995 and implemented by Council Directive 96/34/EC of 3 June 1996, the legislation of a Member State can provide only for more favourable, and not more restrictive, provisions and therefore the provision of national law laying down the requirement of employment on the date of birth should not be applied to the present case.
- 6 It took the view that the condition requiring employment at the time of the birth is not compatible with the requirement of a period of work or a length of service of up to one year one year since, in the present case, the condition is met in respect of that limit immediately before the start of the parental leave and the additional condition requiring employment at the time of the birth would have the effect of prolonging that required twelve-month period of work and would therefore make access to the right to parental leave more restrictive than that provided for by the directive.
- 7 Hearing the case on appeal, the Conseil supérieur de la sécurité sociale (Higher Social Security Board) set aside that decision by judgment of 17 December 2018.
- 8 It held that, since XI did not have an employment contract at the time when the twins were born, an entitlement to parental leave did not arise for her, irrespective of any subsequent employment at the same public establishment for at least one year prior to the desired start date of the leave applied for.
- 9 According to the Higher Social Security Board, entitlement to parental leave cannot ‘be revived’ merely because the parent, who did not have the status of a worker at the time of the birth, has been employed for one year during the five-year period in which parental leave may be requested.
- 10 The Higher Social Security Board added that there was no need to review whether the condition of employment for one year is compatible with EU law since entitlement to parental leave did not arise in the case of XI.
- 11 XI brought an appeal on a point of law against that judgment.

2. Provisions at issue:

EU law

Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC

- 12 Clause 1, entitled ‘Purpose and scope’, reads as follows:

‘1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.

2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreements or practices in force in each Member State.’

13 Clause 2, entitled ‘Parental leave’, provides:

‘1. This agreement grants, subject to clause 2.2, men and women workers an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour.

...

3. The conditions of access and detailed rules for applying parental leave shall be defined by law and/or collective agreement in the Member States, as long as the minimum requirements of this agreement are respected. Member States and/or social partners may, in particular:

...

(b) make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year;

...’.

National law

Loi du 16 avril 1979 fixant le statut général des fonctionnaires de l’État (Law of 16 April 1979 laying down the general regulations applicable to State officials) as amended by the loi du 12 février 1999 portant création d’un congé parental et d’un congé pour raisons familiales (Law of 12 February 1999 introducing parental leave and leave for family reasons), in the latest version resulting from the Law of 22 December 2006

14 Article 29 bis provides:

‘ ...

Any person (“the parent”) may claim parental leave so long as that person:

...

- is lawfully employed in a workplace situated in the territory of the Grand Duchy of Luxembourg at the time of the birth or of the reception of the child or children

to be adopted and is so employed without interruption for a continuous period of at least 12 months immediately preceding the start of the parental leave, ...

...?.

3. Arguments of the parties:

XI

- 15 First of all, XI criticises the Higher Social Security Board for having inferred from clause 1 and clause 2.1 of the framework agreement that the benefit of parental leave is reserved for workers who held that status at the time when the child in respect of whom the parental leave is sought was born. By contrast, XI submits that clause 1 of the framework agreement does not require that the parent has worker status at the time of the birth or the adoption of the child.
- 16 XI then alleges that the Higher Social Security Board has refused to review whether Article 29 bis of the Law laying down the general regulations applicable to State officials is compatible with clause 2.3(b) of the framework agreement on parental leave which prescribes a condition of employment for a maximum period of one year and that it has therefore refused to apply that clause. XI takes the view, on the contrary, that Article 29 bis makes the grant of parental leave subject to the twofold condition of being employed at the time when the child was born and of a period of service of twelve months at the time of the application, in disregard of clause 2.3(b) of the framework agreement which provides that the national legislature may require only a maximum period of service of one year.
- 17 She notes that the twofold condition stipulated in Article 29 bis entails a period of work which will necessarily exceed one year where, as in the present case, the uninterrupted period of 12 months' continuous legal employment (first condition) does not coincide with the time when the children were born (second condition). Article 29 bis therefore contains cumulative conditions with regard to length of service or period of work which go beyond the condition of a maximum length of service or period of work of 12 months laid down in clause 2.3(b) of the framework agreement on parental leave of 14 December 1995 implemented by Directive 96/34/EC.
- 18 XI requests that a question be referred to the Court of Justice for a preliminary ruling as to whether Article 29 bis of the Law of 16 April 1979 laying down the general regulations applicable to State officials, as amended, is compatible with the framework agreement.

Children's Future Fund

- 19 The Children's Future Fund maintains that the law at issue is consistent with EU law. The right to parental leave arises for a parent worker as a result of the birth or

adoption of a child and that leave is granted if a period of work of one year is recorded before the start of the parental leave.

- 20 It contends that the grounds of the appeal on a point of law should be dismissed and the question referred for a preliminary ruling should be rejected on the ground that the framework agreement is not open to interpretation.

4. Findings of the Cour de cassation (Court of Cassation):

- 21 The question arises whether the clauses in the directive, referred to in the appeal, preclude the application of Article 29 bis of the Law laying down the general regulations applicable to State officials.
- 22 The grounds of appeal raise a question as to the interpretation of EU law which is decisive for the outcome of the dispute and the correct application of that law is not so obvious as to leave no scope for any reasonable doubt as to the manner in which the question is to be resolved. That question has not already been the subject of a preliminary ruling in a similar case.
- 23 It is therefore necessary to refer the question set out below to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU.

5. Question referred for a preliminary ruling:

- 24 The Court of Cassation refers the following question:

Must clauses 1.1, 1.2, 2.1 and 2.3(b) of the framework agreement on parental leave concluded on 14 December 1995 between the general cross-industry organisations UNICE, CEEP and the ETUC, which was implemented by Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave (OJ 1996 L 145, p. 4), be interpreted as precluding the application of a provision of national law, such as Article 29 bis of the amended Law of 16 April 1979 laying down the general regulations applicable to State officials in the version resulting from the Law of 22 December 2006 (Mémorial, A, 2006, No 242, p. 4838), which makes the grant of parental leave subject to the twofold condition that the worker is lawfully employed in a workplace and affiliated in that regard to the social security scheme, first, without interruption for a continuous period of at least 12 months immediately preceding the start of the parental leave and, secondly, at the time of the birth or of the reception of the child or children to be adopted, compliance with that second condition being required even if the birth or reception occurred more than 12 months before the start of the parental leave?