becoming increasingly common for technical standards to be incorporated within the normative frameworks established by international instruments, especially in areas like environmental law and trade law, while states show a growing readiness to employ scientific assertions and evidence to advance their position in all manner of cases. For the time being, the ICJ can be expected to tread carefully but with growing confidence when called upon to resolve disputes involving disagreement on scientific matters.

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SHALL I BE MOTHER? THE PROHIBITION ON SEX DISCRIMINATION, THE UN DISABILITY CONVENTION, AND THE RIGHT TO SURROGACY LEAVE UNDER EU LAW

DOES EU law entitle a woman who had her genetic child through surrogacy to paid leave of absence from employment equivalent to maternity leave or adoption leave? That is, in essence, the issue the Court of Justice of the European Union (CJEU) was faced with in *Z*, C-363/12, EU:C:2014:159 ("*Z*"), a reference for a preliminary ruling from the Equality Tribunal (Ireland), and in *C.D.*, C-167/12, EU:C:2014:169 ("*C.D.*"), a reference from the Employment Tribunal, Newcastle upon Tyne (UK). The Opinions in the two cases (by A.G. Wahl, EU:C:2013:604 and A.G. Kokott, EU:C:2013:600, respectively), while reaching opposite conclusions, were both delivered on 26 September 2013, giving the Court the benefit of two well-reasoned analyses on which it could base its deliberations. The judgments of the Grand Chamber, which essentially followed the Opinion of A.G. Wahl, were delivered on 18 March 2014. This note focuses on *Z*, while referring to *C.D.* when appropriate.

Ms. Z, who suffers from a condition rendering her unable to support a pregnancy, and her husband, both Irish nationals, opted for surrogacy and turned to a specialist agency in California, US, where the law provides for detailed regulation. The child is the genetic child of Ms. Z and her husband, who are also legally the parents under Californian law. The surrogate (i.e. the woman who carried the child for Ms. Z and her husband, the commissioning parents) is not identified on the birth certificate. Ms. Z and her husband returned to Ireland, where surrogacy is unregulated. Ms. Z did not qualify for maternity or adoption leave under Irish law. She brought an action against her employer before the Equality Tribunal, which referred questions to the CJEU regarding sex discrimination and discrimination on grounds of disability in the light of the UN Convention on the Rights of Persons with Disabilities (2515 UNTS 3) ("UN Disability Convention" or UNCRPD), to which the Union is a party.

The CJEU addressed potential discrimination with respect to maternity leave and adoptive leave in turn. Referring inter alia to its seminal judgment in *Dekker* (77/88, EU:C:1990:383), it noted that the refusal to provide maternity leave would constitute direct discrimination on grounds of sex within the meaning of Article 2(1)(a) 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) if the fundamental reason for that refusal applied exclusively to workers of one sex. Yet, under Irish law, a commissioning father is treated in the same way as a commissioning mother in a comparable situation: neither is entitled to paid leave equivalent to maternity leave. The CJEU therefore concluded that there was no direct discrimination. Moreover, the refusal to grant leave did not put female workers at a particular disadvantage compared with male workers. Hence, there was also no indirect discrimination under Article 2(1)(b) of Directive 2006/54.

Furthermore, the CJEU held that 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) did not oblige Member States to provide maternity leave to a commissioning mother, who is hence not subject to less favourable treatment related to the taking of maternity leave, and consequently 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. Nevertheless, as A.G. Wahl pointed out (point 49), Member States are entitled to provide for more extensive protection, whether for biological, surrogate, or adoptive mothers or indeed fathers.

With respect to adoptive leave, the CJEU simply held that Directive 2006/54 preserves the freedom of the Member States to grant adoption leave or not, and that the applicable conditions, other than dismissal and return to work, are outside its scope.

As the situation of a commissioning mother as regards both the grant of maternity leave and adoptive leave was not governed by Directive 2006/54, it was 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 of Fundamental Rights of the EU ("the Charter"). In essence, Ms. Z's case failed in this respect because the type of discrimination she complained about is neither covered by Directive 2006/54, nor by the provisions of the Treaties cited. Moreover, the Charter cannot be used to extend the scope of EU law to situations not covered by it (see Article 51(2) Charter and *Dano*, C-333/13, EU:C:2014:2358, para. 88, for example).

The CJEU's analysis of discrimination on the basis of disability was based mostly on an interpretation of 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) in light of the UNCRPD.

Referring to Article 216(2) TFEU and its settled case law on the status of international agreements concluded by the Union (e.g. *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864 ("*ATAA*")), the CJEU held that the UNCRPD forms an integral part of the EU legal order, is binding on its institutions, and prevails over EU acts, which have to be as far as possible interpreted in a manner consistent with it.

In particular, as the CJEU had held in *HK Danmark*, C-335/11 and C-337/11, EU:C:2013:222, and confirmed in *FOA*, C-354/13, EU:C:2014:2463, the concept of 'disability' in Directive 2000/78/EC refers to a limitation resulting from long-term physical, mental, or psychological impairments that may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. That definition aligns Directive 2000/78/EC with the UNCRPD. However, the scope of the definition, like that of Directive 2000/78/EC, is limited to employment and occupation, and that is what upended Ms. Z's case. Indeed, both A.G. Wahl and the CJEU viewed the inability to have a child by conventional means as not in itself preventing the commissioning mother from having access to, participating in or advancing in employment. While Ms. Z's condition may well constitute a "disability" within the meaning of the UNCRPD, it did not constitute a "disability" within the meaning of Directive 2000/78, which hence did not apply to her situation. The CJEU also concluded on that basis that it was unnecessary to examine the validity of Directive 2000/78 in the light of Article 10 TFEU and Articles 21, 26, and 34 of the Charter.

Furthermore, both A.G. Wahl and the CJEU took the UNCRPD, given its "programmatic" nature, not to meet the conditions (see e.g. *ATAA*) for use as a basis for validity review. They referred in particular to obligations on the states parties to adopt all appropriate legislative, administrative and other measures for its implementation and to consult closely with and actively involve persons with disabilities in that process. The CJEU further supported that conclusion by referring to the declaration concerning the competence of the EU with regard to matters governed by the UNCRPD. Many treaties concluded by the Union contain similar declarations, mostly on request of other parties. Is the CJEU implying that the presence of such a declaration always prevents the treaty in question from being used as a basis for validity review? The Court's holding that there was "no need to examine the nature and broad logic" of the UNCRPD appears to leave the door ajar for other provisions than those at issue here being used as a basis for validity review. However, the CJEU added (at para. [90], emphases added): "*[T]he provisions of that Convention* are not, as regards their content,

provisions that are unconditional and sufficiently precise . . ., and . . . 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." That holding seems unfortunate in two respects. First, the CJEU appears to be ruling on the UNCRPD in general (also para. [89]) rather than on the specific provisions relied on (as in paras [84]–[86]). Second, the equalisation of the direct effect of an international agreement with its suitability as a basis for validity confirms *Intertanko and Others* (C-308/06, EU:C:2008:312), and prima facie moves away further from the more apposite approach in earlier judgments, such as *Netherlands v Parliament and Council*, C-377/98, EU:C:2001:523. There, the Court had dissociated the direct effect and validity analyses, by holding that even if the treaty at issue contained provisions "which do not have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the [Union] as a party to that agreement" (at para. [54]). That said, while the Court in *Z* refers explicitly to "direct effect", its analysis appears in substance to focus on the pertinent question whether the provisions at issue are unconditional and sufficiently precise, instead of (like in *Intertanko*) on the for these purposes inapt issue of whether they create rights for individuals.

As neither the prohibition on sex discrimination, nor the UNCRPD can ground a right to surrogacy leave in EU law, a remedy must be found in national law, and in the long term probably through legislation at EU level. Against that background, A.G. Wahl's suggestion (points 66–67) that where national law provides for paid adoption leave or another form of leave not contingent on pregnancy, the national court ought to assess whether the application of differing rules to adoptive parents and to surrogacy parents constitutes discrimination, is helpful.

However, extending the scope of protection under EU legislation to commissioning parents, while arguably desirable, is not to be done by the CJEU. It involves taking a decision on issues on which there still exist profound differences between the Member States (see L. Brunet et al., *A Comparative Study on the Regime of Surrogacy in EU Member States* (European Parliament 2013)), including some Member States (e.g. the UK) allowing surrogacy, but making no provision for paid leave, and others (e.g. France) maintaining an outright prohibition. Such a decision ought to be the subject of political debate, and is in essence a legislative prerogative (see Opinions of A.G. Wahl in *Z*, points 74 and 120–121; and, by analogy, A.G. Sharpston in *Gómez-Limón Sánchez-Camacho*, C-537/07, EU:C:2008:688, points 54–56, and *Sturgeon and Others*, C-402/07 and C-432/07, EU:C:2009:416, points 91–95).

Finally, *Z* demonstrates that some confusion persists as to the relevant test to determine whether provisions of an international agreement can be

used to review the validity of EU acts, and the more recent Grand Chamber judgment in *Council v Stichting Natuur en Milieu and Pesticide Action Network Europe*, C-404/12 P and C-405/12 P, EU:C:2015:5 also appears to be not entirely unequivocal in that respect. An unambiguous clarification by the Court is therefore overdue.

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