Surrogacy leave and EU law: Case C 167/12, C.D. v S.T. and Case C 363/12, Z. v A Government Department, Judgements (Grand Chamber) of 18 March 2014

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Advances in reproductive technology have tended to outpace the capacity of legislators to respond to these changes, leading to difficult legal questions for the courts. Surrogacy is one particular area where advances in technology have led to many legal challenges and have highlighted the failure (in several jurisdictions) to enact appropriate legislation in response to technological developments and/or differing views about what is ‘appropriate’. Two recent cases before the European Court of Justice (CJEU) have raised the issues as to whether either EU secondary legislation (in particular the Pregnant Workers Directive 92/85/EEC and/or the Equal Treatment Directives 2006/54/EC and 2000/78/EC) or fundamental principles of EU law require that the ‘commissioning’ mothers of children born as a result of surrogacy arrangements should be entitled to paid leave equivalent to that provided to pregnant mothers. This note discusses and analyses these two cases. It is argued that – notwithstanding the policy importance of the issues raised – the legal basis for the claims advanced was weak and the Court was correct to hold that there was no right to surrogacy leave under existing EU law.

Facts and questions referred

Advocate General Kokott (in C.D.) described surrogacy as follows:

... 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 ‘[commissioning] 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.

1 In S.H. v Austria, 57813/00, 3 November 2011 the European Court of Human Rights ruled that a ban on artificial procreation techniques for in vitro fertilisation by Austria was not in breach of the Convention on Human Rights as Austria did not exceed the allowed margin of discretion especially in the absence of an established European consensus as to whether such techniques should be allowed while in the USA a state court has ruled that some forms of surrogacy are contrary to public policy and will not be recognised: In re Baby M, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988). See also, for example, litigation in the USA as to whether posthumously conceived children could qualify for Social Security benefits on behalf of her twins as survivors of a deceased wage earner: Astrue v Capato 566 U.S. 000 (2012).

2 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.


4 The UK legislation use the term ‘intended mother’ but to avoid confusion, the term ‘commissioning mother’ is used here throughout.


6 Case C-167/12, C.D. v S.T. opinion, para 2.
Advocate General Wahl (in Z.) stated that surrogacy takes different forms. In ‘traditional surrogacy’, surrogates (women who help commissioning parents to become parents by carrying a child for them) become pregnant using the commissioning father’s sperm and their own ova. By contrast, host or gestational surrogacy involves in vitro fertilisation treatment (IVF) whereby either the commissioning mother or a donor provides the ova employed in the fertilisation process. Under gestational surrogacy arrangements, the surrogate mother is not genetically related to the child she carries.

The two cases were referred to the CJEU by specialist tribunals in the United Kingdom and Ireland (the Employment Tribunal and Equality Tribunal respectively). In the UK, surrogacy is regulated by the Human Fertilisation and Embryology Act 2008 (HFEA). However, UK law does not provide for any general right to paid ‘surrogacy leave’ for commissioning mothers. In Ireland, in contrast, surrogacy remains entirely unregulated and again there is no specific right to paid surrogacy leave.

Ms. C.D. entered into a surrogacy arrangement using the sperm of her partner and the ovum of the surrogate (birth) mother. Subsequent to the birth, she breastfed the child for 3 months and she and her partner were granted full and permanent responsibility for the child under HFEA. Her employer ultimately granted her paid surrogacy leave on a discretionary basis.

Ms. Z suffered from a rare condition of not having a uterus and, therefore, being unable to support a pregnancy. She entered into a surrogacy arrangement in the USA. The child is the genetic child of the couple. Ms. Z was refused paid leave of absence by her employer and offered unpaid parental leave.

The respective tribunals referred three basic issues to the CJEU:

1) Whether the Pregnant Workers Directive (92/85/EEC) provides a right to receive maternity leave to a commissioning mother who has a baby through a surrogacy arrangement (C.D.)?

2) Whether a failure to provide for surrogacy leave was a breach of EU gender equality law (both cases); and

3) Whether a failure to provide for surrogacy leave was a breach of EU law on discrimination on the ground of disability, interpreted in the light of the UN Convention on the Rights of People with Disabilities (Z.)?

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7 Case C-363/12, Z opinion, para

8 See the discussion in the Report of the Commission on Assisted Human Reproduction (Dublin, 2005). The absence of legislation has already led to a number of cases including M.R v An tArd Chlaraitheoir [2013] IEHC 91 concerning the recording of parentage on the birth certificate (currently under appeal to the Irish Supreme Court) and R.G. v. Department of Social Protection (unreported Circuit Court judgment of Judge Lindsay, 5th July 2012) concerning a claim for ‘surrogacy benefit’ under national equality legislation (currently under appeal to the Irish High Court).

9 Advocate General Kokott argued that this did not deprive the CJEU of jurisdiction as this was a matter for the referring court and as the legal issues raised were not hypothetical, Case C-167/12, C.D opinion at 24-28.
The cases were referred to the Grand Chamber of the CJEU. As the Court did not formally join the cases, it had the benefit of two separate (and substantially different) opinions from Advocates General Kokott (in C.D.) and Wahl (in Z).  

The Pregnant Workers Directive

Advocate General Kokott in C.D. took the view that the Pregnant Workers Directive should be interpreted so as to provide paid leave to ‘commissioning mothers’. First, she opined that commissioning mothers who were employed and breastfeeding could be subsumed under the term ‘worker who is breastfeeding’ in Article 2(c) of Directive 92/85. She rejected the arguments of the defendant, the Commission, Ireland, the United Kingdom and Spain to the effect that the logic and objectives of Directive 92/85 precluded its application to commissioning mothers. She argued that ‘in view of the possibilities created by medical advances, the objectives pursued by Directive 92/85 mean that the class of persons defined in Article 2 of the directive must be understood in functional rather than monistic biological terms.’

Indeed, Advocate General Kokott was prepared to go further and to hold that – even if not breastfeeding – commissioning mothers should be covered by the Directive. Advocate General Kokott stated that in defining the personal scope of the Directive regard should be had to the objective of protection pursued by maternity leave. She argued that this

includes the unhindered development of the mother-child relationship in the period following the birth. In that regard maternity leave enjoys the primary-law protection of Articles 7 and 24 of the Charter of Fundamental Rights. The fact that under Article 24(3) of the Charter of Fundamental Rights every child is to have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents applies in particular to an infant and its relationship to its mother caring for it and is one of the essential reasons why Directive 92/85 grants maternity leave.

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10 The cases were heard separately by the CJEU although both the advocates’ general opinions and the Court’s ruling were issued on the same days.
11 Case C-167/12, C.D opinion, para 36. Article 2 of Directive 92/85 provides: ‘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.’

12 This was in response to a specific question from the national tribunal although the narrower answer would have been sufficient to dispose of the case before it.
13 Opinion, para 48. She, rather unconvincingly, attempted to distinguish adoptive mothers on the basis that ‘the position differs from adoption, where, as a rule, there is no bond between the intended mother and the child prior to the birth of the latter, created on the basis of an agreement concluded between two women concerning the child’s specific future’ (at 49).
14 Opinion, para 60.
Therefore Advocate General Kokott would have held that

on the basis of teleological reasoning in the light of primary law, Article 2 of Directive 92/85 must, in so far as the granting of maternity leave is concerned, be understood as capable of including [commissioning mothers] who do not actually breastfeed their child. Where a Member State recognises surrogacy and thus the functional sharing of the role of mother between two women, it must act accordingly and confer on the intended mother the relevant rights relating to maternity leave.\(^\text{15}\)

Although the Pregnant Workers Directive was not directly raised by the Irish tribunal in the Z. case, Advocate General Wahl correctly decided that it was necessary – before considering the equal treatment issues – to clarify the scope of protection afforded by EU law in relation to maternity leave.\(^\text{16}\) In contrast to Advocate General Kokott he took the view that the scope of the Directive was clearly confined to pregnant workers. He pointed out that

broadening the scope of Directive 92/85 – and, consequently, extending a right of paid leave of absence from employment to a female worker whose genetic child is born to a surrogate – would result in a contradictory situation, whereby Directive 92/85 would extend a right of paid leave of absence to a female worker undertaking surrogacy, but would not extend such a right, by the same token, to a working adoptive mother – or indeed to a father, whether through surrogacy or otherwise.\(^\text{17}\)

The Court, without much hesitation, followed the latter approach. It pointed out that

maternity leave was intended

first, to protect a woman’s biological condition during and after pregnancy and, secondly, to protect the special relationship between a woman and her child over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.\(^\text{18}\)

The Court stated that it followed

from the objective of Directive 92/85, from the wording of Article 8 thereof, which expressly refers to confinement, and from the case-law of the Court ..., that the purpose of the maternity leave provided for in Article 8 of that directive is to protect the health of the mother of the child in the especially vulnerable situation arising from her pregnancy.\(^\text{19}\)

While the Court had held that maternity leave was also intended to protect the special relationship between a woman and her child, that objective concerned only the period after

\(^{15}\) Opinion, para 63. Advocate General Kokott went on to consider the practicalities of how leave could be allocated but as her approach was rejected by the Court this is not considered here.

\(^{16}\) Case C-363/12, Z opinion, para 42.

\(^{17}\) Case C-167/12, C.D judgement, para 51.

\(^{18}\) Judgment, para 34.

‘pregnancy and childbirth’. Therefore, the Court held that the grant of maternity leave under Article 8 of Directive 92/85 ‘presupposes that the worker entitled to such leave has been pregnant and has given birth to a child’.

**Equal treatment on grounds of sex**

Advocate General Kokott, having come to a positive conclusion in relation to the applicability of the Pregnant Workers Directive, gave short shrift to the broader equal treatment issues. She argued that Directive 2006/54 was not relevant as the issues did not concern ‘the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation’ within the meaning of Article 1 of Directive 2006/54 as issues concerning maternity leave were addressed in Directive 92/85.

Advocate General Wahl addressed the issue in more depth but also decided against the mother. As a preliminary point, he noted that the Court’s case-law established a distinction between discrimination on grounds of pregnancy and maternity (under Article 2(2)(c) of Directive 2006/54) and other forms of prohibited sex discrimination (under Articles 2(1)(a) or 2(1)(b) of that Directive). In the case of discrimination on grounds of pregnancy or maternity the existence of a (male) comparator is not necessary whereas it is in all other cases. Given that the less favourable treatment alleged in the Z. case did not relate to her being pregnant, the Advocate General considered it necessary to identify a male comparator. On this basis, Advocate General Wahl did not accept that Ms Z has been subject to prohibited discrimination on grounds of sex rather than on the basis of the ‘refusal of national authorities to equate the situation of a commissioning mother with that of either a woman who has given birth or an adoptive mother’.

Turning to whether primary law affected this position, the referring court had asked whether Directive 2006/54 is compatible with Articles 3 TEU, Article 8 TFEU and Article 157 TFEU as well as Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union. Advocate General Wahl accepted that these provisions could form a basis for the review of EU secondary legislation. However, as he had already taken the view that there was no discrimination on grounds of sex, no question of compatibility with the Treaty provisions arose. As regards the Charter provisions, Advocate General Wahl pointed out that, in accordance with Article 51(1) of the Charter, its provisions are only addressed to Member States when implementing EU law. He stated that

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20 Para 36.
22 Case C-167/12, C.D. v S.T. opinion, paras. 80-82.
23 Para 55. Thus the Advocate General noted that in Case C-506/06 Mayr [2008] ECR I-1017, the Court held that a worker who underwent IVF treatment could not rely on Directive 92/85 in relation to dismissal, if the fertilised ova have not yet been transferred into her uterus and she was, therefore, not pregnant within the meaning of that Directive. However, the Court went on to hold that the dismissal of a female worker because she is undergoing a treatment which forms a crucial stage of the IVF process and which directly affects only women constitutes direct discrimination on grounds of sex Directive 76/207/EEC, (now replaced by Directive 2006/54).
24 Opinion, para 62.
In other words, to trigger the application of the Charter, a sufficiently close link to EU law must be established. In that sense, invoking a Charter provision will not suffice to transform a situation otherwise falling within the ambit of national law into a situation covered by EU law. This is so because the Charter falls to be applied only in so far as a case concerns, not only a Charter provision, but also another rule of EU law which is directly relevant to the case.\(^\text{25}\)

On Advocate General Wahl’s view (outlined above) no such connection existed in this case. Therefore, he concluded that Directive 2006/54 did not apply where a woman, whose genetic child has been born through a surrogacy arrangement, is refused paid leave of absence from employment equivalent to maternity leave and/or adoption leave.

The Court again broadly followed the Advocate General’s approach. It first considered whether the refusal to provide maternity leave to a commissioning mother constituted discrimination on grounds of sex, within the meaning of Directive 2006/54. The Court agreed with Advocate General Wahl that a commissioning father would be treated in the same way as a commissioning mother in a comparable situation, and that the refusal of leave was not based on a reason that applied exclusively to workers of one sex.\(^\text{26}\) Turning to indirect discrimination, the Court shortly stated that there was ‘nothing in the file ... to establish that the refusal to grant the leave at issue puts female workers at a particular disadvantage compared with male workers.’\(^\text{27}\) As to whether the refusal to provide paid leave equivalent to adoptive leave to a commissioning mother constituted discrimination on grounds of sex, within the meaning of Directive 2006/54, the Court held that that Directive allowed 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, were outside its scope.\(^\text{28}\)

With regard, to the validity of Directive 2006/54 in the light of the Treaty and the Charter provisions, the Court simply noted that it 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.\(^\text{29}\)

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\(^\text{25}\) Para 71.

\(^\text{26}\) Case C-167/12, C.D. v S.T judgement, para 47; Case C-363/12, Z judgement, para 52.

\(^\text{27}\) Ibid. paras 49 and 54 respectively.

\(^\text{28}\) Case C-363/12, Z judgement, para 65. Advocate General Wahl had opined that that unfavourable treatment vis-à-vis adoptive mothers could not be ruled out and proposed that it be left for the referring court to assess, in light of national law, whether the application of differing rules to adoptive parents and to parents who have had a child through a surrogacy arrangement constituted discrimination (opinion, paras 66-67). He noted, however, that the Court had held that the principle of equal treatment in EU law did not extend to differential treatment of biological fathers vis-à-vis adoptive fathers in the context of national legislation that did not fall within the scope of EU law: Case C-5/12 Betriu Montull [2013] ECR I-0000, paras 71 to 73.

\(^\text{29}\) Ibid. para 64.
Equal treatment on grounds of disability

Finally, Advocate General Wahl turned to the question of disability discrimination (which was not raised in C.D.). Here the Irish Equality Tribunal asked whether Directive 2000/78, interpreted if necessary in the light of the UN Convention on the Rights of People with Disabilities (UNCRPD), meant 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 constituted discrimination on the ground of disability, and, if not, whether that Directive was valid in the light of Article 10 TFEU, Articles 21, 26 and 34 of the Charter, and the UN Convention.

Advocate General Wahl pointed out that the Court had already given a partial reply in Ring – which he described as marking a paradigm shift in the Court’s case-law - where the Court confirmed that Directive 2000/78 must be interpreted, as far as possible, in conformity with the UN Convention. There, drawing on the UNCRPD understanding of disability, the Court ruled that the concept of ‘disability’, which is not defined in Directive 2000/78, refers to

a limitation which results in particular from 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.

While the cause of the disability (congenital, accident or illness) is irrelevant, the Court held that the impairment must be ‘long-term’. However, Advocate General Wahl pointed to an important difference insofar as whereas the UN Convention refers broadly to participation in society, the Court’s definition covers only participation in an occupation or employment. While he accepted that Ms Z’s condition might constitute a long-term limitation, which ‘results in particular from physical, mental or psychological impairments’, he was not persuaded that Directive 2000/78 applied to the specific circumstances of this case because that condition did not hinder her ‘full and effective participation’ in employment on an equal basis with other workers.

The Court again broadly followed this approach. Following its recent decision in Ring/HK Danmark, it ruled that Directive 2000/78 must, as far as possible, be interpreted in a manner that is consistent with the UN Convention. Therefore, the concept of ‘disability’ within the meaning of Directive 2000/78 refers 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. The Court agreed with Advocate General Wahl that the

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31 Opinion, para 79 citing Joined Cases C-335/11 and C-337/11 Ring [2013] ECR I-0000. This case is referred to by the Court as HK Danmark.

32 Ring, para 38.

33 Or ‘professional life’ as the Court’s translation service persists in mistranslating this concept. Opinion, para 90.

34 Judgement, para 75 citing C-337/11 HK Danmark [2013] ECR I-000.

35 Para 76.
inability to have a child by conventional means does not in itself, prevent a commissioning mother from having access to, participating in or advancing in employment. Nor was there evidence that, in the present case, Ms Z.’s condition in itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her employment.\textsuperscript{36} In the circumstances, the Court held that Ms Z.’s condition did not constitute a ‘disability’ within the meaning of Directive 2000/78, and that therefore that Directive was not applicable.\textsuperscript{37}

In terms of comparability with the UN Convention, the Court pointed out that even where the ‘nature and the broad logic’ of an international treaty permit the validity of European Union law to be reviewed in the light of that treaty, it is still necessary that the relevant provisions of that treaty are ‘unconditional and sufficiently precise’.\textsuperscript{38} However, the Court agreed with the Advocate General that the Convention was ‘programmatic’ and consequently, the implementation of the UN Convention was subject to the adoption of subsequent measures which are the responsibility of the Contracting Parties. The provisions of the Convention were not, consequently, unconditional and sufficiently precise and did not have direct effect in European Union law. Therefore, the validity of Directive 2000/78 could not be assessed in the light of the UN Convention.\textsuperscript{39} As in the case of the Equal Treatment Directive, the Court declined to rule on the compatibility with the Treaty and Charter provisions on the grounds that this had no bearing on the outcome of the main proceedings.\textsuperscript{40}

Conclusion

It was always somewhat difficult to identify a sound legal basis for the EU law issues advanced in these cases. Nonetheless, the fact that the cases were taken up by the Grand Camber and, subsequently, Advocate General Kokott’s positive opinion might have led to some expectation that the CJEU might take a major step in its interpretation of EU law so as to accommodate (at least some aspects of) surrogacy. Ultimately the Court did not do so and, it is submitted, it was correct not to do so as there is simply no firm basis in EU law for the arguments advanced. However, one might raise some more minor concerns about some aspects of the Court’s approach.

Pregnant Workers Directive - While the issues raised by the references are obviously important, the Court was clearly correct to arrive at its conclusions in relation to the scope of the Pregnant Workers Directive. Notwithstanding Advocate General Kokott’s considerable contribution to the development of EU law, her opinion in this case amounted – in Advocate General Wahl’s words - to ‘encroaching upon the legislative prerogative’ by reading into EU law something that is simply not there.\textsuperscript{41} It was not a question of extending legislation in the light of general principles of equal treatment law but simply on the basis that a judicial official

\textsuperscript{36} Para 81.
\textsuperscript{37} Para 82.
\textsuperscript{38} Para 85.
\textsuperscript{39} Paras 88-90.
\textsuperscript{40} Para 83.
\textsuperscript{41} Case C-363/12, Z opinion at para 120.
considered the circumstances of a particular group (‘commissioning mothers’) to be analogous to that of pregnant workers and on the basis of a (very general) reference to the rights of children under the EU Charter of Rights. In practice, as Advocate General Wahl pointed out, the inclusion of surrogacy arrangements under the Pregnant Workers Directive would leave adoptive mothers excluded – an entirely anomalous situation which again highlights the extent to which Advocate General Kokott’s proposed solution would amount to judicial legislation.

**Gender equality** - The Court dealt somewhat summarily with the issues of gender discrimination. Clearly, given the Court’s previous case-law, the failure to provide paid surrogacy leave would not appear to fall within the narrow category of cases involving discrimination against one sex, whereby a direct comparator is not required. Nonetheless, although it is not clear what evidence was presented, one might well argue that – given gendered patterns of childcare and breastfeeding - women are likely to be disproportionately affected by a lack of paid surrogacy leave. However, even if one accepted that there was a disproportionate impact on women, the difference in treatment in EU law was clearly objectively justified by, inter alia, the lack of any consensus amongst EU states on issues of surrogacy and the varying legal status of surrogacy arrangements in the different Member States.

Both the Court and Advocate General Wahl relied on the Court’s earlier decision in *Mayr* in support of their view that Z. did not involve discrimination which applied exclusively to workers of one sex.\(^{42}\) This view was clearly correct in the instant case but *Mayr* itself is a rather dubious precedent. In *Mayr*, the CJEU ruled that the dismissal of a female worker because she was undergoing treatment linked to the IVF process constituted direct discrimination on grounds of sex. This conclusion is rather debatable. Despite the CJEU’s comment that the IVF treatment in question ‘directly affects only women’,\(^{43}\) IVF treatment, in fact, will involve both parents and there are specific reproductive issues which apply to men (such as intra-cytoplasmic sperm injection (ICSI)) but which may be linked to the provision of IVF.\(^{44}\)

**Disability** - Finally, this case highlights the rather uncomfortable fit between the Court’s adoption of the UN’s broad definition of disability for the purposes of the UNCRPD and the fact that the EU Directive only applies to employment-related issues. It might be preferable to separate out the two issues of (i) the definition of disability and (ii) the link to employment. It seems almost certain that Ms. Z.’s condition would be categorised as a disability under the UNCRPD. Whether it restricted her participation in employment might have been considered

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\(^{43}\) *Mayr*, para 50. The statement appears to have been strictly correct if one focusses narrowly on the specific treatment involved in that case but is questionable in relation to the broader procedure.

\(^{44}\) See the Canadian case of *Canada (Advocate General) v Buffett* 2007 FC 1061 which involved a claim, under the Canadian Human Rights Act, by a male member of the Canadian Forces for the provision of in vitro fertilization (IVF) with intra-cytoplasmic sperm injection (ICSI). Mr. Buffett argued that there was discrimination as female members of the Canadian Forces with infertility problems are entitled to IVF at public expense. The Human Rights tribunal upheld his claim on both issues but the Federal Court ruled that Mr. Buffett had been discriminated against only in relation to the failure to fund the ICSI and not the IVF treatment.
separately. In itself, it would seem that the disability did not directly hinder her participation in employment. However, the disability led to her decision to enter into a surrogacy arrangement and the lack of paid leave might be seen as hindering her ability to participate in employment in the same way that that lack of paid maternity leave might hinder a woman’s ability to participate in employment. Again, however, even if one accepted that the lack of paid surrogacy leave had a disproportionate impact on people with disabilities,\textsuperscript{45} it would arguably be justified for the reasons discussed above.

In this case one can hardly criticise the EU legislature for failing to act on an issue which is prohibited in several Member States and where even those Member States which have allowed it (\textit{de jure} or \textit{de facto}) have not legislated for surrogacy leave at national level. However, the attention generated by these cases, in addition to others pending at national level, and the increasing number of parents opting for surrogacy arrangements may lead to some change in this position over time. One might expect, however, given the very different views of Member States on surrogacy that national solutions will predate an EU response.

\textsuperscript{45} Other than the evidence relating to Ms. Z herself, it is not clear that this general case was supported by evidence.