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## Once more with 'sympathy' but no resolution for intended mothers: The EU, Ireland and the Surrogacy Dilemma.

Connie Healy

School of Law, National University of Ireland, Galway, Ireland

### ABSTRACT

This article examines the decision of the Court of Justice of the European Union (CJEU) in *Z v A Government Department and the Board of Management of a Community School* and the court's interpretation of existing EU legislation on whether commissioning or intended mothers are entitled to paid leave equivalent to maternity benefit. It highlights the failure of the CJEU in this case to call for specific EU legislation on the issue of surrogacy. The Irish Courts have been more proactive in this regard. The Supreme Court has acknowledged that 'pending the introduction ... of legislation dealing with this field, it is ... not for the courts to attempt to resolve the complex questions that need to be addressed.' This article compares recent decisions of the Irish Courts to that of the CJEU as they struggle to keep abreast with modern society in the absence of legislation at national and EU level.

**KEYWORDS:** Surrogacy, entitlement to paid leave; employment law; disability; recent decisions

### Introduction

In dismissing the appeal in the case of *G v. The Department of Social Protection*,<sup>1</sup> the Irish High Court judge commented that:

[i]t is easy to understand why the appellant feels that she has been treated badly, why the Equality Officer referred to the case as raising "compelling" considerations and why the learned Circuit Court judge accepted that the respondent's decision might seem unfair or unjust.<sup>2</sup>

The case essentially involved a challenge under the Employment Equality Acts 1998-2011 and the Equal Status Act, 2000 as amended, with respect to alleged discrimination against intended or commissioning mothers by virtue of the fact that

they do not receive a 'payment equivalent' to maternity or adoptive leave benefit; payments that are in place for natural or adoptive mothers. The applicant alleged discrimination on the grounds of gender, family status and disability and the corresponding failure by the Department to provide 'reasonable accommodation' under section 4(1) of the Act; specifically their failure as a provider of a 'service' to:

do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.<sup>3</sup>

This article will begin by outlining the Constitutional position of the Family in Ireland and 'motherhood' in an Irish context. It will outline the background facts of the G case and the considerations that led the Court, although sympathetic to the appellant's position, to dismiss her claim; constrained as it was by the lack of legislation governing the issue of surrogacy and more broadly, the need for a new and inclusive definition of what constitutes 'motherhood' or 'being a mother.' It will compare the decision with that of the Court of the Justice of the European Union in *Z v. A Government Department & Ors* (Case C-363/12) delivered on the 18th March, 2014 and address the impact of the lack of a policy on this issue at EU level. Refusing paid leave to a main carer for a child post birth also adversely affects the rights of a cohort of children merely because of the nature and circumstances of their conception and birth and is contrary to their rights under the United Nations Convention on the Rights of the Child (UNCRC).

### **The Changing Structure of Families**

Article 41 of The Constitution of Ireland, enshrined in 1937 provides that the State recognises the 'the Family as the natural primary and fundamental unit group of Society and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.' Further:

The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

Additionally, under Article 41.3.3:

The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

Prior to the passing of the historic Marriage Equality Referendum in May 2015, 'Family' was defined by the Irish courts as a heterosexual family based on marriage.<sup>4</sup> In addition to the special position given to the 'family' as an institution worthy of protection by the State, case law has also recognised personal rights including the right to marital privacy<sup>5</sup> and to procreate or beget a family under Article 40.<sup>6</sup> In discussing personal rights in this context, Mr Justice Griffin in *McGee v. A.G.*<sup>7</sup> asks '...what more personal right could there be in a citizen than the right to determine in marriage his attitude and resolve his mode of life concerning the procreation of children.'<sup>8</sup>

Reverting once again to the Irish Constitution, it is notable that while there is specific protection for mothers and acknowledgement of the role they play within the family,<sup>9</sup> there is no specific definition of motherhood or being a mother. This issue was addressed at length in the recent Irish Supreme case of *M.R and Others v An tArd Chlaraitheoir* [2014] IESC 60. The court was asked to determine whether the birth mother or the genetic mother of twins born as a result of surrogacy could or should be registered as 'mother' on the certificate of birth.<sup>10</sup> While the High Court had held that the genetic mother was the appropriate person to be registered, this was overturned by the Supreme Court. Its reasons for overturning the High Court decision were widely understood as being due to the court upholding the principle of *mater semper certa est*: the mother is always certain. While MacMenamin J was concerned about the links between 'pregnancy, birth and motherhood' and found that these 'close associations are difficult to ignore',<sup>11</sup> Denham CJ (as she then was) was not so convinced. She referred to the 'quotation from Lord Simon of Glaisdale in *The Ampthill Peerage* case,<sup>12</sup> which was initially followed, in many common law jurisdictions' namely that:

Legitimacy is a status: it is the condition of belonging to class in society the members of which are regarded as having been begotten in lawful matrimony by the men whom the law regards as their father. Motherhood, although also a legal relationship, is based on fact, being proved demonstrably by parturition.<sup>13</sup>

Lord Simon was of the view that in contrast, 'fatherhood was a presumption'.<sup>14</sup> This definition of motherhood, Denham CJ acknowledged, was 'evocative of its time' and:

[t]he words *mater semper certa est*, upon which the appellants laid much stress, is not the basis of Irish law on the issue before the Court. The words simply recognise a fact, which existed in times gone by and up until recently, that a

birth mother was the mother: both gestational and genetic. This was the factual situation until scientific and medical advances enabled persons to avail of assisted human reproduction.<sup>15</sup>

Mr Justice O' Donnell, in the same case, was in favour of a system which registers the birth mother initially but allows for re-registering of the genetic mother as has been adopted in other jurisdictions.<sup>16</sup> He noted that:

From a human point of view it is completely wrong that a system, having failed to regulate in any way the process of assisted reproduction, and which accordingly permits children to be born, nevertheless fails to provide any system which acknowledges the existence of a genetic mother not merely for the purpose of registration, but also in the realities of life including not just important financial issues such as inheritance and taxation, but also the many important details of family and personal life which the Constitution recognises as vital to the human person.<sup>17</sup>

### **So what are the options for couples under Irish Law?**

For many couples, who are not able to have children for physical or medical reasons or who wish to choose alternative means, legally protected options include both domestic and international adoption or, more recently, the possible use of Donor Assisted Human Reproduction (DAHR). DAHR has been provided for under the Children and Families Relationships Act 2015.<sup>18</sup> This Act regulates the process of engaging in DAHR including: the agencies to be used; the storing of embryos; issues of consent and provisions regarding the use of the donated embryos. In addition, it provides for the transfer of parentage.<sup>19</sup>

Surrogacy, as noted by Ms Justice Denham, has not been legislated for. From the limited research available, it is evident that:

the majority of those having recourse to surrogacy are heterosexual couples, usually married, seeking to establish a family composed of a mother and a father with the maximum possible biological link to their child or children – a “traditional family” as understood by most people.<sup>20</sup>

With the introduction of marriage equality, the demand is likely to increase further. The absence of a regulatory framework has led to a ‘lacuna’ in the law that needs to be addressed. Denham CJ was particularly concerned about the impact on the rights

of children 'born in such circumstances' and was satisfied that there was nothing in the Constitution that would 'inhibit the development of appropriate laws on surrogacy.'<sup>21</sup>

The drafting of any legislation in Ireland will have to be undertaken while remaining cognisant of the rights of the Family under Article 41 and also the rights of the child as enshrined in Article 42A of the Constitution.<sup>22</sup> Article 42A, though arguably providing less protection than the UNCRC, incorporates the principles of the 'best interests' of the child into Irish law. Any proposed legislation would have to be mindful of the risks of a Constitutional challenge if these rights were not upheld. The drafting of legislation may be difficult. It is also something for which there appears to be a general lack of political will, perhaps because of the ethical and moral issues involved. Legislative inaction, however, has a crippling effect on the courts' ability to reach 'just' decisions for parents and children who find themselves caught in this 'legal limbo'.<sup>23</sup>

Lack of legislation on the issue of surrogacy is not just a problem in Ireland. There is significant disparity across the EU as to whether surrogacy is permitted at all. Caracciolo di Torella, and Foubert (2015) note that countries broadly fall into three categories:

the "surrogacy-friendly," which provide some express provisions to facilitate surrogacy; the "anti-surrogacy," those which prohibit surrogacy for either commercial or altruistic reasons; and finally those which do not have any relevant legislation in place.<sup>24</sup>

Resulting from this lack of a legal framework, intended parents have had to seek assistance in jurisdictions where surrogacy is permissible and subsequently, to resort to the courts to determine issues of citizenship and parentage.

### **An EU perspective - *Z v. A Government Department & Ors* (Case C-363/12)**

Ms Z suffered from a rare condition where, although she had healthy ovaries and was otherwise fertile, she had no uterus and could not support a pregnancy. Ms Z and her husband arranged for a surrogate mother to give birth to their genetic child in California, where surrogacy is permitted. According to Californian legislation, the child was considered the genetic child of the intended parents: there was no mention of the surrogate mother on the child's (American) birth certificate.

During the surrogate's pregnancy, Ms Z applied for adoptive leave and paid leave of absence. Her initial request was rejected. However, her employer reconsidered and, at a later stage, Ms Z was offered unpaid parental leave. Ms Z brought a complaint before the Equality Tribunal arguing that she had been subjected to discrimination on grounds of sex, family status and disability.<sup>25</sup> EU law governing the protection of Pregnant Workers is provided for under Directive 92/85/EEC (Pregnancy Workers Directive (PWD)).<sup>26</sup> However, as Ms Z acknowledged, she had not been pregnant, nor had she given birth and therefore did not come within the provisions of Directive 92/85.<sup>27</sup> The case came before the CJEU as a result of a referral from the Equality Tribunal in Ireland regarding the interpretation of:

1. Council 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) (Recast Directive)
  - Are Articles 4, 14 and Article 6 of the Directive to be interpreted as meaning that there is discrimination on the grounds of **sex** where a woman – whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoptive leave?<sup>28</sup>
  - In the alternative, if it is found that there was no discrimination, is Directive 2006/54 itself valid with regard to Articles 3 TEU, Articles 8 and 157 of the TFEU and Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union?
2. In relation to Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303) (Framework Directive)
  - Are Articles 3(1) and 5 of the Directive to be interpreted as meaning that there is discrimination on the **grounds of disability** where a woman – who suffers from a disability which prevents her from giving birth, whose genetic child has been born through a surrogacy arrangement, and who is responsible for the care of her genetic child from birth – is refused paid leave from employment equivalent to maternity leave and/or adoptive leave?<sup>29</sup>

- Again, if the refusal to grant paid leave equivalent to maternity and/ or adoptive leave is not contrary to the Directive, in the alternative, is the Directive 2000/78 valid in relation to the Charter of Fundamental Rights of the European Union?
- And, what is the proper interpretation of the obligation under Article 5 thereof to provide 'reasonable accommodation'?

3. Finally, questions were raised as to the validity of Directive 2000/78 with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which was acceded to by the EU in 2009.<sup>30</sup>

### **The Advocate General's Opinion**

Advocate General Wahl issued his Opinion on 26th September 2013. On considering the facts of the case, he acknowledged the inadequacy of the current framework.

In answering the questions referred by the Equality Tribunal he held that, in relation to Directive 2006/54, there would have to be a male comparator to establish discrimination on the grounds of sex. As a male commissioning parent would be treated the same way as a commissioning mother, however, Wahl was of the view that there was no discrimination on the grounds of sex with regard to Article 4 (equal pay), Article 14 (access to the workforce and working conditions generally), nor was there any discrimination at EU under Article 16 (Adoptive or Parental leave). The issue of adoptive or parental leave under Article 16 has been left to the discretion of individual member states. On finding, therefore, the Directive does not apply to Ms Z, it was unnecessary to determine its compliance with provisions of the Charter.

Examining the questions posed under Directive 2000/78, discrimination on the basis of disability, AG Wahl noted that the issue of disability was not defined in Directive. Subsequent to the accession by the EU of the UN Convention on the Rights of Persons with Disabilities in 2009, disability in the context of this Directive was defined in the case of C-337/11 *HK Danmark* [2013] ECR. The Court held that:

the concept of 'disability' must be understood as referring 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.<sup>31</sup>

Furthermore, the physical, mental or psychological impairments must be 'long-term'.<sup>32</sup>

On the basis, therefore, that Ms Z's disability (having no uterus) did not affect her professional life or ability to work, she was not discriminated against under the Directive. Again, as the Directive was deemed not to apply, there was no need to determine its compliance with the provisions of the Charter.

The EU only requires the Member States to have provisions in place for maternity and/or breastfeeding leave arising as 'a corollary from birth (and breastfeeding).'<sup>33</sup> However, Advocate General Wahl acknowledged that in:

construing the rationale of maternity leave under Directive 92/85 the Court *also* attaches importance to the *special relationship* that develops after birth between the woman and her child. However, I believe that that objective can only be understood in context; as a logical corollary of childbirth (and breastfeeding).<sup>34</sup>

If the objective of the Pregnancy Workers Directive was to protect the woman's biological condition *and* the special relationship between a woman and her child that 'the scope of protection afforded by Article 8 of Directive 92/85 could not ... be meaningfully limited only to women who have given birth, but would necessarily also cover adoptive mothers or indeed, any other parent who takes full care of his or her new-born child.' AG Wahl was of the view that 'that unfavourable treatment vis-à-vis adoptive mothers cannot be ruled out', in jurisdictions where adoptive leave has been provided for.<sup>35</sup> He commented that:

it ought to be left for the referring court to assess, in light of that national law, whether the application of differing rules to adoptive parents and to parents who have had a child through a surrogacy arrangement (and who are recognised as the legal parents of the child) constitutes discrimination.<sup>36</sup>

While AG Wahl expressed 'sympathy' for commissioning parents, he did not believe that it:

is for the Court to substitute itself for the legislature by engaging in constructive interpretation that would involve reading into Directives 2006/54 and 2000/78 (or, indeed Directive 92/85) something that is simply not there (and that to do so would amount ) to encroaching upon the legislative prerogative.<sup>37</sup>

## The Court's Decision

The Court's decision was delivered on 18<sup>th</sup> March 2014. It reached what Caracciolo di Torella and Foubert (2015) have described as 'disappointing but, albeit technically flawless and entirely predictable decisions'.<sup>38</sup> The CJEU followed the Opinion of Advocate Wahl as outlined above in relation to the issues raised. Unlike Advocate Wahl, however, it did not address the issue of whether an adoptive mother could be considered an appropriate comparator in jurisdictions where legislation existed to protect such workers, nor did it highlight or call for the need for legislation on these issues at EU level.

In relation to the applicability of the Pregnancy Workers Directive, the court referred to its decision in the Case C-167/12 *CD v ST* [2014] ECR delivered on the same day. In the *CD* case the CJEU confirmed that Directive 92/85 must be interpreted as meaning that Member States are not required to provide maternity leave pursuant to Article 8 of that directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does, in fact, breastfeed the baby.<sup>39</sup> It applies solely to those who have been pregnant and its aim in the first instance is to protect the health and safety of pregnant workers.

It is noteworthy that the Advocate General in the Case C-167/12 *CD v ST* [2014] ECR, where the facts were quite similar, Advocate General Kokott took rather a different view to that of Advocate Wahl. She adopted a rights based perspective, one which centred on a 'functional rather than monistic approach'.<sup>40</sup> She referred specifically to the need for a right to family life for intended parents and their children under Article 7 of the Charter of Fundamental Rights and recognised the separate rights of the child under Article 24 of the Charter; the primacy of the child's 'best interests' and the importance of time to bond with its mother post birth. Indeed, Advocate Kokott acknowledged that the need to bond in a surrogacy situation may be even greater as the woman has not actually given birth to the child.<sup>41</sup> Referring to the fact that the PWD was a product of its time, she focused on the mother-child relationship and the importance of protecting the relationship irrespective of the circumstances of birth. Advocate Kokott was of the opinion that paid leave should be granted to an intended mother (regardless of whether she breastfeeds or bottle feeds the child), once surrogacy is provided for in the particular Member State and any national requirements have been satisfied. However, on deciding the case, the CJEU opted not to follow her opinion, nor did they take any of her arguments into consideration.

### **The Irish Perspective - *G v. The Department of Social Protection***

The facts in the case of *G v. The Department of Social Protection* are very similar to those of Ms Z. Section 2 (1) (a) of the Irish Equal Status Act 2000 defines a 'disability' as *inter alia*

...the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body

The appellant in the case, having had her womb removed as a result of contracting cancer, is thus recognised as having a disability under Irish law. In an effort to overcome such disability, she and her husband, who were otherwise both fertile, entered into a surrogacy agreement in a foreign jurisdiction where such agreements are legal and regulated.<sup>42</sup> She and her husband are the genetic parents of the child, born in January 2011 and are registered as the child's parents on the certificate of birth. Before the child's birth, the applicant contacted her employer about the availability of maternity leave. Her employer was happy to allow her a period of leave but advised that she would need to contact the Department of Social Protection regarding the payment of maternity benefit.

Maternity benefit in Ireland is governed by the provisions of the Maternity Protection Act 1994 and the Maternity Protection (Amendment) Act 2004. These Acts provide that a 'pregnant employee' is entitled to a specified period of leave and the payment of maternity benefit once they have the requisite Pay Related Social Insurance (PRSI) contributions within the relevant period and they have notified their employer of their expected week of 'confinement'. 'Confinement' under Section 41 of the Social Welfare (Consolidation) Act 1993 means 'labour resulting in the issue of a living child, or labour after 28 weeks of pregnancy resulting in the issue of a child whether alive or dead.' Under the Adoptive Leave Acts 1995 - 2005, an adoptive parent is similarly entitled to leave provided, once again, the specified notice has been given to his or her employer and the employee has the required PRSI contributions.<sup>43</sup>

The applicant on contacting the Department of Social Protection was advised that she was not entitled to maternity benefit as she was not a 'pregnant' employee, nor was she entitled to adoptive leave as she was not in a position to provide a certificate of adoption. Acknowledging that she did not come within the confines of the statutory requirements, the applicant claimed that she was seeking a 'payment equivalent' to such statutory benefits. This was refused by the Department on the basis that it would be *ultra vires* the legislation.

## The Equality Authority

As noted earlier, under the provisions of the Equal Status Act s 4(1) discrimination shall also include refusal of a 'service provider' to

do all that is reasonable to accommodate the needs of a person with a disability by providing special treatment or facilities, if without such special treatment or facilities it would be impossible or unduly difficult for the person to avail himself or herself of the service.

In lodging her claim with the Equality Authority, the applicant alleged discrimination on the grounds of gender, disability, family status and the failure of the Department to provide such 'reasonable accommodation.'<sup>44</sup> She argued that although not coming within the statutory definitions of what constitutes a 'mother' not having given birth or adopted a child, she was the:

...biological and genetic mother of the child, and like natural and adoptive mothers, she was primarily responsible for the care and nurture of the baby during that post-natal period;

It was also claimed that she was 'at least in the position of being in *loco parentis*, but was being treated differently from other women responsible for newborn children.' The applicant argued that the 'primary consideration underlying the statutory regime' was:

...the facilitation of the full-time care of the child by his or her primary carer during the critical period of time following his or her introduction to the family

and the failure by the Department, to make such 'reasonable accommodation' for her under section 4(1) of the Act and to provide 'services' in a way which accommodated her needs, was, in itself, discrimination.

The Department, in defending the claim before the Equality Authority, denied that these statutory schemes could be considered 'services' under the Act and that the applicant was, in fact, seeking what could be considered a discretionary benefit; one which was outside of their powers to grant.

The Equality Officer held that the complainant had a 'compelling argument' and did not accept the department's contention that these schemes were not 'services.' As, there was no statutory basis for the payment, however, the Equality Officer held that there was nothing 'invidious, unfair or discriminatory' in the department's decision. To offer her a discretionary payment would be outside their remit. The matter was appealed to the Circuit Court.

## Step 2: The Circuit Court

In the Circuit Court, the judge formulated the test as follows:

Has the appellant been treated less favourably than a natural mother or an adoptive mother on the grounds that she is not able to have a child and yet she is now responsible for a child which has been born to a surrogate mother and to whom she is the biological mother?

Lindsay J. addressed this through two further questions. Firstly, was the appellant treated less favourably and secondly, is it open to the Minister to make a discretionary or special arrangement? She held that although there may be what she described as discrimination in the 'ordinary meaning of the word'<sup>45</sup>; the issue of surrogacy could not have been contemplated at the time the Equal Status legislation was enacted, and therefore any payment would be 'beyond the scope of the Act.'

## Step 3: The High Court

On appeal to the High Court, the appellant argued that the Circuit Court judge had erred in law in finding that the complaint did not come within the scope of the Equal Status Act because surrogacy was not legislated for in Ireland; that she erred in finding that the issue of surrogacy could not come within the scope of the Act merely because such a process may not have been envisaged at the time the Act became law; that she had erred in finding that the appellant had not been discriminated against and finally, in finding that any special provision made for her would have been *ultra vires*.

Counsel for the appellant argued that the core issue in the case was whether such a discriminatory exclusion from the scope of '[the Social Welfare Acts] may itself constitute discrimination within the meaning of the Equal Status Acts 2000-2011'. Should the Department have made special provision and can the Minister be ordered to pay compensation for such discrimination? It was also highlighted to the court that granting the appellant a payment equivalent to that received by natural or adoptive mothers was not going to place a significant financial burden on the State. The appellant fulfilled the necessary requirements regarding PRSI contributions. Ironically, had she been infertile and chosen adoption as an alternative, she would have received a payment. It was also argued that similar schemes were operated in a non-statutory basis and the fact that surrogacy may not have been contemplated at

the time of the enactment of the Equal Status legislation was not a relevant consideration.

The appellant, it was argued, was discriminated against on basis of disability, gender and family status and entitled to redress. In addition, it was alleged that section 14 of the Equal Status Act does not create a charter which allows the state to discriminate through legislation nor should it be allowed reward 'legislative inaction'. As a result of this inaction and failure to recognise grounds that may be considered 'novel or unregulated', the appellant was being denied a remedy.

### **Decision [of the High Court](#)**

The High Court, agreed that there had been an error in the interpretation of the Equal Status Act by the learned Circuit Court judge. The fact that surrogacy may not have been envisaged at the time, did not mean that it could not be considered. The Equal Status Act, the Court acknowledged was a remedial statute. O' Malley, J quoted from Dodd's *Statutory Interpretation in Ireland* (2008 [6.52]) in finding that such statutes were to be:

construed as widely as possible and liberally as can be fairly done within the constitutional limits of the courts' interpretive role. ... to right a social wrong and to provide some means to achieve a particular social result.<sup>46</sup>

Judge O' Malley did not accept the respondent's argument that the Department's provision of 'services' is confined to the services provided as part of a statutory scheme. The court was not convinced of the accuracy of this assertion, pointing to the fact that many schemes were administered on a non-statutory basis and the Department's definition of service was 'too restrictive'. Refusal to grant this payment failed to comply with what the Court described as the 'spirit' of the statutory scheme. She held that such services must be administered according to the general principles of public law.

The statutory provisions at issue in this case relate solely to mothers, whether natural or adoptive. It is clear, in the light of the judgment of the Supreme Court in *M.R and Others v An tArd Chlaraitheoir* [2014] IESC 60 that the appellant cannot claim the status of 'mother' under Irish law. The Court acknowledged this was no doubt a source of great distress to her but, pending the introduction by the Oireachtas of legislation dealing with this field, it is clear from the Supreme Court judgment that it is not for the courts to attempt to resolve the complex questions that need to be addressed. The

courts have to remain vigilant in maintaining a clear path from interfering in the legislative arm of the State.

The High Court noted that on the face of it, the appellant was ‘certainly discriminated against on the basis of disability’ (O’ Malley J, [141]) but that the difficulty lay in the fact that there was no statutory basis for the payment. The judge held that it is not possible to hold that one Act of the Oireachtas, the Social Welfare Act, can be held to be discriminatory when judged by the standards of another Act of the Oireachtas; namely the Equal Status Act. This she believed would result in the Equal Status Act being granted the equivalent of Constitutional status. The Equal Status Act cannot be used to fill the gap created by the lack of legislation on surrogacy and the need for a new and more inclusive definition of being a mother or more broadly being a parent. The appellant, she held, was not entitled to compensation.

Shortly after the handing down of the judgment, the Chief Commissioner of the Irish Human Rights and Equality Commission, called on the Minister for Justice and Equality to address the gap in the legislation by duly amending the Equal Status Acts to ensure that State schemes do not result in discrimination and that applicants are not left without a legal remedy in situations where they feel they have been prejudiced by the provisions currently in place. Specifically, she referred to the duty imposed on the Department of Social Protection under s.42 of the Irish Human Rights and Equality Commission Act 2014 to protect the human rights of those to whom it provides services. However, to date, no amendment has been made.

### **The Impact on the Children**

A factor not addressed in either *Z v. A Government Department & Ors* (Case C-363/12) or *G v. The Department of Social Protection* case was the potential impact of the decision on the children born as a result of the surrogacy arrangement. The United Nations Convention on the Rights of the Child has been the guiding framework within which to consider and examine the impact of policy and legislation on children’s rights. Article 2 of the Convention seeks to eliminate discrimination and ensure that children are treated equally:

irrespective of a child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Being born to a surrogate, and cared for by genetic parents should not mean that children are deprived of their rights. Article 3 (2) of the Convention places an

important obligation on State Parties to 'take all appropriate legislative and administrative measures' <sup>47</sup> to ensure that children's rights are protected. In addition, the UNCRC places an obligation on States Parties to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and to ensure the development of institutions, facilities and services for the care of children.

Guidance has also been provided through General Comments issued by the Committee on the Rights of the Child. General Comment No. 7,<sup>48</sup> for example, refers to the need for a supportive:

framework of laws, policies and programmes for early childhood which assists (children) in developing strong emotional attachments to their parents or other caregivers, from whom they seek and require nurturance, care, guidance and protection, in ways that are respectful of their individuality and growing capacities.<sup>49</sup>

This need to bond with children post birth period when a child is settling in with an adoptive family has been accepted at EU level.<sup>50</sup> Children who enter the family through surrogacy similarly need time to bond.<sup>51</sup>

While there is, at present, no legally binding obligations on businesses with regard to human rights, it is clear that the intention of the UNCRC was to ensure that children's rights would not be adversely affected by parents' working conditions or the absence of parental leave. General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, emphasises the importance of 'family-friendly workplace policies' noting that account must be taken of the 'impact of working hours of adults on the survival and development of the child at all stages of development and must include adequately remunerated parental leave.'<sup>52</sup>

It is clear from the facts in the cases mentioned that the applicants' employers, in both cases being emanations of the State, made efforts to support the commissioning parents by providing periods of leave, either paid or unpaid after the birth of their child<sup>ren</sup>, even in circumstances where there was no legal obligation for them to do so. The State should also support private businesses in this regard by ensuring that paid leave is available to commissioning parents as ~~it~~ is available to parents who have their children naturally or those who adopt. In both cases, the mothers in question had fulfilled the statutory requirements in relation to their PRSI contributions which would have 'entitled' them to payments had the mothers given birth to the child or adopted the child under the relevant legislation. Without further research, it is not possible to elicit the number of cases where payments would be requested arising out

of surrogacy arrangements. However, it is fair to assume, at this point in time, that it would not place a significant burden on the State, in situations where claimants are already 'entitled' to benefits resulting from their PRSI contributions.

### **A Care centred approach?**

From the decisions of the CJEU and the Irish courts, the lack of a legal framework, has led to difficulty, particularly for the courts, in securing what may be considered a 'just' outcome for many families. Academics have called for an approach that focus less on the 'ethic of rights' and more on the 'ethic of care'.<sup>53</sup>

Carol Gilligan (1982, p 385) notes that there are three main criteria to the 'ethic of care'. This first element is that of relationships – in these cases, taking a more broad-based approach to what constitutes family and parenthood; the second is the principle of actuality, examining the actual facts of the parties' lives including the circumstances of the child's life; and thirdly with respect to the children born in these circumstances, the activity of care: who provides the care on a day to day basis. Selma Sevenhuijsen, (1998, p111) argues that movements by Governments to take a more care-centred approach would assist to address the gendered notion of woman as care givers, thus:

enabling men to build intimate and caring relationships with women and children, by making it possible in terms of time, space and material resources. This would imply that a more satisfactory distribution of labour and care between men and women would be a political priority. When care is re-evaluated and freed from its gender-load and its associations with sexual difference, it also becomes a less daunting more attractive proposition for men to identify with care and to adopt a caring identity.<sup>54</sup>

Or can it be, as proposed by Joy Kroeger-Mappes (1994, p108), a case that rather than there being a division between the ethic of rights and the ethic of care that the 'two ... are part of one system, the ethic of care functioning as a necessary base for the ethic of rights'?<sup>55</sup> An interesting distinction has also been made by Smart and Tronto. They highlight the differences between 'caring about' and 'caring for'. 'Caring about', in these cases implies, perhaps, the broader societal implications of surrogacy and what some may view as the destruction of the traditional concept of motherhood, ethical issues regarding so called 'designer babies' *versus* the more immediate difficulties encountered in ensuring that the parties involved: commissioning parents, the surrogate mother and children born as a result of surrogacy arrangements are 'cared for' (Smart 1995, p 177, Tronto, 1989).

## Conclusion

Surrogacy undoubtedly presents challenging but not insurmountable difficulties from an employment law perspective. It is clear that the Irish courts have expressed their frustration with the lack of legislation in this area and outdated assumptions as to what constitutes motherhood and being a mother. Without a considered review and update, the Courts will continue to be restricted in the remedies they can provide for parents and their children who find themselves in this 'legal limbo'. It is clear from the judgments referred to earlier that the Irish Supreme Court was not accepting of the principle of *mater semper certa est* and referred to the need for a broader definition of motherhood which acknowledges the gestational *and* genetic aspects in the light of recent developments in medical science. Additionally, O'Donnell J in *M.R and Others v An tArd Chlaraitheoir* [2014] IESC 60 was keen to stress the difficulties that would be encountered for genetic mothers in the longer term should their status of motherhood not be acknowledged. The immediate effect, as was evident in the G case - lack of entitlement to social welfare protections that they were otherwise eligible for (having the requisite PRSI contributions). As noted by O' Donnell J, a system that provides for the registration of the birth mother initially with the option of re-registering the genetic mother would seem to be a workable option; the maternity benefits similarly being apportioned in an equitable manner. The issue of what should happen in a situation where a commissioning mother was not genetically related to the child was not addressed by the court but this is something that will need to be addressed in any proposed legislation. A move away from the outdated concept of *mater semper certa est* will be a first step and will ensure that commissioning mothers are brought within the net of legislation and social welfare schemes; the aim of which is purportedly to protect mothers in these very kind of situations; arguably the objective of employment legislation and social welfare schemes for almost 30 years.

A policy at EU level and clear guidelines are also necessary. While it may be difficult to achieve consensus with respect to the moral and ethical considerations involved, this should not provide an excuse for inaction. The approach taken by the CJEU in the cases of *Z v. A Government Department & Ors* (Case C-363/12) and *Case C-167/12 CD v ST* [2014] ECR has effectively been to wash their hands off the situation. By finding reasons based on the way these, now outdated, Directives have been framed, they have managed to avoid addressing the deeper issues involved. There has been no analysis or engagement in assessing the extent to which the Directives may be discriminatory in themselves based on the provisions of the Charter of Fundamental Rights. In addition, persons with disabilities will continue to be prejudiced by the narrow focus determined in EU case law and employers or relevant State departments will continue to escape liability based on the lack of an appropriate comparator.

Families need an assurance that their rights under Article 7 will be protected and that their children's rights to have their best interests taken into account under Article 24 will be respected.

AG Wahl's opinion, though not legally binding, did somewhat open the door to the possibility of adoptive mothers/parents as comparators – especially in jurisdictions like Ireland where adoptive leave is provided for by the State. AG Kokott for her part addressed the rights-based approaches. She, like Denham CJ in the Irish Supreme Court, was willing to consider the impact of these situations for the children involved.

It is evident that further research may assist to determine, in so far as is possible, the number of people that actually use surrogacy. Difficulties may be encountered in that many agreements are not recorded in the State. Statistics, however, may help convince the legislature that this is an issue that their electorate wish them to address. For the vast majority, surrogacy may be a last resort – an emotional journey made more difficult by lack of political will to engage at EU and national level.

## Notes

<sup>1</sup> 2015 IEHC 419

<sup>2</sup> *Ibid* para [146]

<sup>3</sup> Equal Status Act 2000 Number 8 of 2000 Available at

<http://www.irishstatutebook.ie/eli/2000/act/8/enacted/en/html>

<sup>4</sup> *The State (at the Prosecution of Leontis Nicolaou) v. An Bord Uchtala* 1966 IR 567

<sup>5</sup> *McGee v Attorney General* [1974] IR 284

<sup>6</sup> *Murray v Ireland* [1985] IR 532

<sup>7</sup> 1965 IR 294

<sup>8</sup> *Ibid.* at p 333

<sup>9</sup> Article 41 2 1° - In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved. This provision has caused controversy as it is viewed as being of its time and misogynistic in modern society.

<sup>10</sup> Pursuant to s.60(8) of the Civil Registration Act, 2004

<sup>11</sup> S.60 of the Civil Registration Act, 2004

<sup>12</sup> *The Amphill Peerage case* [1977] AC 547

<sup>13</sup> *Ibid* at 577

<sup>14</sup> *Ibid*

<sup>15</sup> *Ibid.* at 577

<sup>16</sup> See, for example, s.54 of the Human Fertilisation and Embryology Act 2008 in the UK. Judge O' Donnell was referring specifically to genetic mothers in this case. In his view '[n]ow that DNA testing is available, that means that genetics determine parenthood, and more specifically, motherhood. He did not consider the position of commissioning mothers that may not be genetically related to the child.

<sup>17</sup> *M.R. and Others v An tArd Chlaraitheoir* [2014] IESC 60. <http://www.courts.ie/judgments.nsf/bce24a8184816f1580256ef30048ca50/516ac26fc227e31780257d890055587a?OpenDocument> [38]

<sup>18</sup> To-date this section of the Act has not been commenced.

<sup>19</sup> S.9 of the Children and Families Relationship Act - the intending mother must consent **before** the procedure is performed to the application and confirm that she understands that she will become the mother of the child. This the model that has been also proposed by some in relation to how the issue of parentage in surrogacy cases should be determined. See Brian Tobin 'Forging a surrogacy framework for Ireland: the constitutionality of the post-birth parental order and pre-birth judicial approval models of regulation' (2) 2017 *Child and Family Law Quarterly*

<sup>20</sup> Carol Coulter 'Why surrogacy has nothing to do with same-sex marriage Surrogacy in UK is mainly used by heterosexual couples not gay counterparts The Irish Times, Mon, Apr 27, 2015. These figures, which indicate that 80 per cent of applicants for parental orders were heterosexual couples, and the majority of those were married, are based on information gathered by University of Huddersfield Repository. It has to be acknowledged however, that all intended parents may not apply for parental orders and prior to the Human Fertilisation and Embryology Act 2008, only married parents could apply.

<sup>21</sup> *M.R. and Others v An tArd Chlaraitheoir* [2014] IESC 60. <http://www.courts.ie/judgments.nsf/bce24a8184816f1580256ef30048ca50/516ac26fc227e31780257d890055587a?OpenDocument> [114]

<sup>22</sup> Article 42A of the Irish Constitution

1 the state recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° in exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children (sic) to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the state as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have

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failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of i brought by the state, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially (sic) affected, or ii concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

<sup>23</sup> Opinion of Advocate General Wahl delivered on 26 September 2013 Case C-363/12 *Z. v A Government Department and the Board of Management of a Community School* [37]

<sup>24</sup> Caracciolo di Torella, E., and Foubert, P., (2015) 'Surrogacy, Pregnancy and Maternity Rights: A Missed Opportunity for a More Coherent Regime of Parental Rights in the EU', 40 (1) *European Law Review* 52-69 at 56.

<sup>25</sup> Articles 1 & 2 Directive 2006/54/EC - equal opportunities 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) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, 16), and also the validity of those two directives.

<sup>26</sup> In accordance with Article 1 of Directive 92/85, the purpose of that directive is 'to implement measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding'.

The eighth recital in the preamble to Directive 92/85 emphasises that pregnant workers and workers who have recently given birth or who are breastfeeding constitute a specific risk group and that there is a need to take measures to ensure their safety and health.

According to the 14th recital, the vulnerability of pregnant workers and of workers who have recently given birth or who are breastfeeding makes it necessary for them to be granted the right to maternity leave.

Under Article 8, Member States are required to take measures to ensure that workers within the meaning of Article 2 (pregnant workers and workers who have recently given birth or who are breastfeeding) are entitled to a continuous period of maternity leave of a least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice.

Article 11(2) provides, in relation to the period of maternity leave governed by Article 8, that a payment to, and/or entitlement to an adequate allowance for, workers within the meaning of Article 2 must be ensured during the period of maternity leave.

<sup>27</sup> See decision in Case C-167/12 *C.D.* [2014] ECR delivered by the CJEU on the same day as Ms Z's case.

<sup>28</sup> Emphasis added.

<sup>29</sup> Emphasis added.

<sup>30</sup> Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention of the Rights of Persons with Disabilities, OJ 2010 L 23/35. The Convention does not contain a definition of disability, but affirms the social model in Article 2. Significantly, the Preamble also notes that disability is an evolving concept and that 'disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others'.

<sup>31</sup> C-337/11 *HK Danmark* [2013] ECR [38] Emphasis added.

<sup>32</sup> *Ibid* at [39] [C-184/83 Hofmann v Barmer Ersatzkasse](#).

<sup>33</sup> *Ibid*.

<sup>34</sup> Para 47 Emphasis added.

<sup>35</sup> *Ibid* [47].

<sup>36</sup> Para 67.

<sup>37</sup> *Ibid* [120].

<sup>38</sup> *Ibid*.

<sup>39</sup>See Salford, H., Hollingsworth, K., and Gilmore, S., (eds) (forthcoming 2017) *Rewriting Children's Rights Judgments: From Academic Vision to New Practice*: Hart. The case of Case C-167/12 C.D. v S.T is rewritten from a children's rights perspective by Eugenia Caracciolo di Torella, as part of this work.

<sup>40</sup> Case C-167/12 C.D. v S.T Opinion of Advocate General Kokott delivered on 26 September 2013. [48]

<sup>41</sup> Ibid [46] [See also C-184/83 Hofmann v Barmer Ersatzkasse](#).

<sup>42</sup> California

<sup>43</sup> S 8 (3) of the Adoptive Leave Act 1995 refers to 'an employed adopting mother (or sole male adopter)'.

<sup>44</sup> Section 5(1) of the Act.

<sup>45</sup> Emphasis added

<sup>46</sup> Dodd, D., *Statutory Interpretation in Ireland* (Tottel, 2008 [6.52])

<sup>47</sup> Emphasis added.

<sup>48</sup> UN Committee on the Rights of the Child, General Comment No.7.(2005 Implementing the Rights of the Child in Early Childhood)  
<<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>>

<sup>49</sup> Ibid [6 b].

<sup>50</sup> See also C-184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047 [25] -To protect health but also to protect the relationship. Also referred to as the 'very delicate initial period' post adoption in C-163/82 *Commission v Italy*

<sup>51</sup> Case 163/82 *Commission v Italy* ECR 3273.

<sup>52</sup> UN Committee on the Rights of the Child, General Comment No.16 (2013) on State Obligations regarding the impact of the business sector on children's rights

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en) [20]

<sup>53</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982).Caracciolo di Torella, E., (2016) [Shaping and Re-Shaping the Caring Relationship in European Law: A Catalogue of Rights for Informal Carers'](#) 28 *Child and family Law Quarterly* 'Shaping and Re-Shaping the Caring Relationship in European Law: A Catalogue of Rights for Informal Carers'-261-281.

<sup>54</sup> Selma Sevenhuijsen, *Citizenship and The Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (Routledge 1998) 111.

<sup>55</sup>Joy Kroeger-Mappes, (1984) 'The Ethics of Care - vis a vis the Ethic of Rights: A Problem for Contemporary Moral Theory' 9 (3) *Hypatia* 108.

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