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NEWS REPORT

Country:	Spain
Title:	Supreme Court recognizes maternity leave to a father who had a baby through a surrogacy arrangement
Date:	22 December 2016
Expert:	María-Amparo Ballester-Pastor
<u>Context</u>	
Issue at stake:	Maternity leave for a father who have had a baby through a surrogacy arrangement
Ground of discrimination:	Sex
Source:	National court decision
Field:	Pregnancy and maternity

Content

Case development: In its judgment of 19 October 2016 (appeal number 1650/2015), the Supreme Court confirmed the judgment of the Superior Court of Justice of Catalonia of 9 March 2015 (appeal number 126/2015),¹ which recognized the right of the father of a child who was born from a surrogacy agreement to access maternity leave. Spanish law recognizes the right to maternity leave in the case of childbirth and in the case of adoption², but does not expressly recognize the right to maternity leave when the birth has occurred as a result of a surrogacy agreement. In fact, in Spain surrogacy arrangements constitute an unlawful activity. In the Spanish system, maternity leave is recognized to the mother in the case of childbirth, although she can transfer a part of it to the father. In the case of adoption or foster care, either the mother or father can qualify for maternity leave. In the case that gave way to the judgement of the Supreme Court of 19 October 2016, the surrogacy agreement occurred between the complainant and his partner (both men), and a female North American citizen (the biological mother). The birth took place in the United States and the baby was registered in the Consulate of Spain as the son of both Spanish fathers, without any reference to the identity of the biological mother. The National Institute of Social Security refused to pay maternity leave since the case was not included in any of the two situations that give place to it in Spain, which are childbirth (in which case the mother had to be identified) or adoption³. The judgement of the Superior Court of Justice of Catalonia of 9 March 2015 ruled that even though the maternity leave was not expressly recognized in Spanish legislation for the cases of surrogacy agreements, the situation was similar to maternity leave in the case of adoption, which is recognized by the Spanish legislation.

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<http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=AN&reference=7357012&links=&optimize=20150424&publicinterface=true> , accessed 27 November 2016.

² Article 48. 4 and 48.5 of the Worker's Statute (Royal Legislative Decree 2/2015, of 23 October 2016). http://noticias.juridicas.com/base_datos/Laboral/561075-rdleg-2-2015-de-23-oct-aprueba-el-texto-refundido-de-la-ley-del-estatuto.html#a48 , accessed 27 November 2016.

³ Article 117 of General Law of Social Security (Royal Legislative Decree 8/2015, of 30 October 2015). http://www.seg-social.es/Internet_1/Normativa/095093?ssSourceNodeId=1139#A177 , accessed 27 November 2016.

The National Institute of Social Security appealed to the Supreme Court on the grounds that the judgement of the Superior Court of Justice of Catalonia of 9 March 2015 was contrary to the Judgement of the CJEU of 18 March 2014, C-167/12, Case *C.D. vs. S.T.* The appellant argued that the CJEU ruled in this case that there is not obligation for the Member States to recognize the maternity leave in the case of commissioning mothers or fathers. The Supreme Court, however, confirmed the judgement of the Superior Court of Justice of Catalonia and recognized the right to maternity leave to a commissioning father who has had a baby through a surrogacy arrangement. The Supreme Court established that, according to the CJEU, Directive 92/85 does not in any way preclude Member States from applying or introducing laws, regulations or administrative provisions more favourable to the protection of the safety and health of commissioning mothers or fathers who have had babies through a surrogacy arrangement by allowing them to take maternity leave as a result of the birth of the child.

Decision of the Court: By confirming the judgement of the Superior Court of Justice of Catalonia of 9 March 2015, the Supreme Court has extended the right to maternity leave to a commissioning father who has had a baby through a surrogacy arrangement, even though maternity leave is not expressly recognized in these cases by the Spanish legislation. The judgement of the Supreme Court and the previous judgement of the Superior Court of Justice considered that the fathers who have had babies through a surrogacy arrangement deserve the same right to maternity leave that the parents of an adopted or fostered child, who in the Spanish legislation have expressly the right to access to maternity leave.

Internet link source:

Judgment of the Superior Court of Justice of Catalonia of 9 March 2015 (appeal number 126/2015),
<http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7357012&links=&optimize=20150424&publicinterface=true> (the judgement of the Supreme Court of 19 October 2016 has not been published yet).