



## European network of legal experts in gender equality and non-discrimination

### NEWS REPORT

<b>Country:</b>	Greece
<b>Title:</b>	Discrimination in the granting of parental leave
<b>Date:</b>	28 May 2017
<b>Expert:</b>	Sophia Koukoulis-Spiliotopoulos
<b>Context</b>	
<b>Issue at stake:</b>	The Judges Code provides that a judge whose spouse does not work is not entitled to parental leave unless the spouse is unable to look after the child due to illness or injury
<b>Ground of discrimination:</b>	Sex
<b>Source:</b>	National court decision: Greek Council of the State Plenum judgment 2511/2017
<b>Field:</b>	Parental leave
<b>Applicable law:</b>	Directive 2010/18/EU, Articles 20, 24 and 33 EU Charter of Fundamental Rights, the general principle of EU law on the reconciling of family and work, Article 21 Greek Constitution

### Content

**Case development:** Article 53(2) of the Civil Servants' Code (CSC)<sup>1</sup> granted mothers and fathers a nine-month paid parental leave. However, according to Article 53(3) CSC, fathers whose wife does not work are not entitled to this leave, unless their wife was unable to look after the child due to illness or injury. A judge, Mr. Maïstrellis, was refused parental leave on the basis of this provision, which also applied to judges. He brought an action for the annulment of the refusal before the Council of the State (Supreme Administrative Court; CS). Meanwhile, the provision was repealed<sup>2</sup> following the Commissions intervention, but it had already been copied in Paragraph 24 of Article 44 of the Judges Code,<sup>3</sup> in sex-neutral language: 'a judge whose spouse is not in work is not entitled to parental leave unless his/her spouse is unable to look after the child due to illness or injury.' As the impugned refusal relied on Article 53(3) CSC, it was this provision, not the sex-neutral provision that was applicable to the case. The CS (judgment 1113/2004) referred to the CJEU the question whether Directives 96/34 and 2006/54 precluded national provisions such as that of Article 53(3) CSC. The CJEU in *Maïstrellis*,<sup>4</sup> recalling that Directives 96/34 and 2006/54 provide for an 'individual right' to parental leave for each parent on the ground of the birth or adoption of a child, to enable them to take care of that child, ruled that these Directives preclude national provisions, such as that of Article 53(3) CSC.

<sup>1</sup> Civil Servant' Code: Act 3528/2007, OJ A 26/09.02.2007.

<sup>2</sup> By virtue of Article 6(2) of Act 4210/2013, OJ A 254/21.11.2013.

<sup>3</sup> By virtue of Article 89 of Act 4055/2012, OJ A 51/12.03.2012.

<sup>4</sup> CJEU *K. Maïstrellis v. Ypourgos Dikaïosynis, Diafaneias kai Anthroponon Dikaïomaton*, Case C-222/14, ECLI:EU:C:2015:473.

The CS judgment in compliance with this ruling (the 'post-*Maïstrellis* CS judgment') is still pending. However, even if the CS upholds his action, Mr. Maïstrellis may well be again refused the parental leave on the basis of the sex-neutral provision, which is still on the books. He will then again have to search for recourse with the CS, while his child will have exceeded the age up to which the leave is granted. He will thus not be able to enjoy his leave at all and both the CS and the CJEU judgments will have no *effet utile*.<sup>5</sup>

However, by a recent judgment the CS Plenum (2511/2016) solved the problem for another judge in a way which is favourable to Mr. Maïstrellis. It upheld an action by a female judge for the annulment of the refusal to grant her parental leave on the basis of the above sex-neutral provision of the Judges' Code, because her husband did not work. The CS first invoked the provisions of the Greek Constitution on equality of Greek citizens before the law (Article 4(1)); protection of the family, marriage, motherhood and childhood (Article 21(1)); the State obligation to plan and implement a demographic policy (Article 21(5)); the State guarantee of human rights and (Article 25(1)). It then invoked Article 6(1) TEU which confers to the EU Charter of Fundamental Rights (the Charter) the same legal value as the Treaties; Article 20 of the Charter (equality before the law); Article 24 of the Charter (rights of the child); and Article 33 of the Charter (family and professional life). It then referred to Act 4075/2012 which transposed Directive 2010/18, noting that this Act repealed all less favourable provisions and provided that it does not affect more favourable provisions of laws, decrees, internal regulations, collective or individual agreements. The CS also noted that in *Maïstrellis* the CJEU underlined that the right to parental leave is 'an individual right of each parent'.

The CS recalled that Article 21(1) of the Constitution requires that 'the legislator introduce provisions granting leave to working persons, including judges, in order to enable them to raise their children. This obligation also derives from Article 33(2) of the [Charter]; this is a principle of EU law on reconciling family and professional life, initially expressed in Directive 96/34 and currently in Directive 2010/18'. The CS also recalled that the judges' parental leave 'was linked by the legislator to the provisions in force for civil servants each time, the only difference being that the start of the judges' parental leave must be arranged the soonest possible, within 2 months of the expiry of maternity leave. This difference is justified by the need for a smooth functioning of the courts – a ground of public interest. However, no ground of public interest is invoked in the *travaux préparatoires* of Act 4055/2012 (introducing the impugned provision). The CS concluded that the impugned provision conflicted with Article 21 of the Constitution and annulled the refusal to grant the leave to the claimant, as this refusal relied on an unconstitutional provision. We can infer from the invocation of the relevant EU law provisions and principles that the CS interpreted Article 21 of the Constitution in the light of EU law.

While the *Maïstrellis* ruling concerns the repealed sex discriminatory provision, not the sex-neutral one, it contains a sentence of a broader scope: '[the Directive does] not in any way provide that one of the parents can be denied the right to parental leave, inter alia, because of the employment status of his or her spouse'.<sup>6</sup> This creates an obligation for the Greek State not to apply and to repeal the sex-neutral provision of the Judges' Code, and in any event to grant the parental leave to Mr Maïstrellis. Therefore, in view also of the above CS Plenum judgment, the post-*Maïstrellis* CS judgment must uphold Mr Maïstrellis' action. Let us only hope that it is given soon, so that it has an *effet utile*, as noted above. In any event, as all state authorities bear the obligation to implement EU law,<sup>7</sup> the Ministry of Justice – the author of the refusal to grant the leave to Mr Maïstrellis – is under the obligation to grant him the leave, in compliance with the CJEU *Maïstrellis* ruling, without waiting for the post-*Maïstrellis* CS judgment.

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<sup>5</sup> See Koukoulis-Spiliotopoulos, S., 'Greece', *European Gender Equality Law Review* 2-2014, pp. 62-66; and 'Greece', *European Equality Law Review*, 2-2015, pp. 112-113, both available at: [http://ec.europa.eu/justice/gender-equality/document/index\\_en.htm#rights](http://ec.europa.eu/justice/gender-equality/document/index_en.htm#rights), accessed 20 May 2017.

<sup>6</sup> CJEU *Maïstrellis*, Paragraphs 29, 31 and 36 (emphasis added).

<sup>7</sup> See the leading CJEU Case 14/83 *S. von Colson and E. Kamann* [1984] ECR I-1891, Paragraph 26.

**Decision of the Court:** CJEU *K. Maïstrellis v. Ypourgos Dikaïosynis, Diafaneias kai Anthropinon Dikaïomaton*, Case C-222/14, ECLI:EU:C:2015:473.

**Key points of analysis:** The Judges Code provides that a judge whose spouse is not in work is not granted parental leave, unless his/her spouse is unable to look after the child, due to illness or injury. Declaring this provision unconstitutional, the CS Plenum annulled a refusal to grant parental leave to a female judge on the basis thereof. In *Maïstrellis* the CJEU ruled that Directive 2010/18 precludes a provision depriving a parent of parental leave '*because of the employment status of his or her spouse*'. Mr. Maïstrellis must thus be immediately granted the leave; otherwise, the Greek State will be in breach of EU law.