



Unlocking the potential of the EU Charter to ensure equal treatment and non-discrimination between children in childcare leave



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KNOWLEDGE IN ACTION



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Overview

- Introduction
- EU childcare leave legislation
- CJEU case-law
- EU Charter
- Suggestions for solution
- Conclusion



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Introduction

- Early 90s: increasing female participation in labour market
- Reconciliation ⇔ gender equality
- Work vs motherhood
 - Discrimination
 - Woman's problem
- Reconciliation rights ♀

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Introduction

- ~~Woman's problem~~
- Reconciliation: ♀ and ♂
 - Maternity leave
 - Paternity leave
 - Parental leave

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Maternity leave

- Directive 92/85/EEC
- Gender-specific ♀
- 14 weeks (2 compulsory)
- Dual aim:
 - 1) Protection of woman's health and safety
 - 2) Special mother-child relationship (C-184/83 *Hofmann*, 1984)



Paternity leave

- Directive (EU) 2019/1158
- Gender-specific ♂
- 10 working days
- Aim: bonding time between father and child following childbirth



Parental leave

- Directives 96/34/EC, 2010/18/EU and Directive (EU) 2019/1158
- Gender-neutral: ♀ and ♂
- 4 months (2 non-transferable)
- Up to 8 years old
- Aim: leave from work on the grounds of birth/adoption of a child to take care of that child

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Preliminary observations

- Caring relationship: **caregiver** and **care recipient**
- *Ratione personae*: working parents
- **Missing**: children's rights perspective
- Inequalities between children
 - Multiple births
 - Non-traditional family formats: surrogacy, adoption,...

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- 1992 Council Recommendation on Child care

'Reconciliation (...) arises from the care of children.'

- Art. 33 EU Charter

'(...) the right to paid maternity leave and to parental leave follow[s] the birth or adoption of a child.'

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C-519/03 *Commission v Luxembourg* (2005)

- Parental leave is conferred 'on the grounds of the birth or adoption of a child'
- 'such wording reflects only the fact that (...) parental leave is *subject to the condition that a child has been born or adopted*'

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Research question

How can the EU Charter ensure equal treatment and non-discrimination between children in childcare leave?

Art. 20: equal treatment

Art. 21: prohibition of discrimination

Art. 24: rights of the child

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Cases C-167/12 *C.D. v S.T.* (2014) and C-263/12 *Z. v A Government Department* (2014)

- 'Surrogacy cases'
- 'Surrogacy is a form of third-party reproduction in which a woman consents to carry a pregnancy for intended parent(s)' (ScienceDirect)
- Right of intended mothers to any birth-related leave that is equivalent to maternity leave (Dir. 92/85/EEC) or adoption leave?

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C.D. v S.T. and Z. (surrogacy cases)

- No right to maternity leave for intended mothers
- Monistic biological interpretation of motherhood under Directive 92/85/EEC: worker has been pregnant and has given birth
- Right to adoption leave is not mandatory
- No EU consensus

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C.D. v S.T. and Z. (surrogacy cases)

- Opinion AG Kokott
- Functional approach
- Maternity leave for intended mothers
- Art. 24 EU Charter – rights of the child
 - Best interests of the child
 - Right to maintain contact with both parents
- Art. 7 EU Charter – right to family life

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C.D. v S.T. and Z. (surrogacy cases)

- Natural children vs children born via surrogacy
- No children's rights perspective
- No EU Charter-analysis

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Case C-149/10 Zoi Chatzi (2010)

Facts

- Parental leave for twins under Directive 96/34/EC
- Double parental leave?
- 2 preliminary questions:
 - 1) Are children entitled to an individual right to parental leave?
 - 2) Does the number of parental leave periods equal the number of children?

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Case C-149/10 *Zoi Chatzi* (2010)

EU Charter

1) Art. 24:

- **Such protection and care as is necessary for their well-being**
- Best interests of the child
- To maintain on a regular basis a personal relationship and direct contact with both parents

1) Art. 21(1): prohibition of discrimination on the basis of birth



1st question: are children entitled to an individual right to parental leave?

- No
 - 1) Right is granted to workers
 - 2) Purpose: reconciliation
- Art. 24 EU Charter does not imply 'that children have to be acknowledged as having an individual right to (...) obtain parental leave. It is sufficient for such a right to be conferred on the parents themselves'
- No Art. 21 EU Charter-analysis: discrimination on the basis of birth



2nd question: do twins confer a double parental leave on their parents?

- Number of children \neq number of periods of parental leave
- No automatic double parental leave for twins BUT
- Art. 20 EU Charter (equal treatment): twin parents are in a special situation
- EU law: minimum standards
- Member States must take twin parents' 'particular needs' into account

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Case C-149/10 *Zoi Chatzi* (2010)

Pros

- Interpretation of Art. 20 EU Charter
- Parental leave tailored to the 'particular needs' of twin parents

Cons

- Arts. 21 and 24 EU Charter from a children's rights perspective

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Observations

- Inequalities between children
 - *Zoi Chatzi*: parental leave for single birth vs multiple births
 - Surrogacy cases: no right to birth-related leave
- CJEU does not address these issues
- Lack of engagement with children's rights

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Potential of EU Charter

- Scope of application (Art. 51(1)): obligation to respect and promote the EU Charter
 - 1) EU in all its acts
 - 2) Member States only when implementing EU law
 - ☑ Transposing EU law in national systems

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EU Charter

- Art. 20: equal treatment
- Art. 21(1): non-discrimination
 - Birth status
- Art. 24: rights of the child
 - Such protection and care as is necessary for their well-being
 - Best interests of the child
 - To maintain on a regular basis a personal relationship and direct contact with both parents

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Potential of EU Charter

Triple function:

- 1) Grounds for judicial review:** review the legality of EU secondary legislation with EU Charter
- 2) Compatibility of national legislation with EU Charter**
- 3) Aid to interpretation:** EU secondary legislation and national legislation must be interpreted in line with fundamental rights
Cf. interpretation of Art. 20 in *Zoi Chatzi*

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Potential of EU Charter

- Arts. 20 and 21 EU Charter as benchmarks for childcare leave
 - Art. 21(1): open-ended list of grounds?
 - ‘family status’ is not protected (AG Wathelet in *C-5/12 Betriu Montull*, 2013) BUT
 - ‘length of service’ is protected (*C-49/18 Escribano Vindel*, 2019)
 - ‘Immigration status’ is protected (AG Cruz in *C-443/14 Alo and Osso*, 2016)

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Potential of EU Charter

- Broad interpretation of ‘birth’ under Art. 21(1)
 - ‘surrogacy’ and ‘multiple births’ ⇔ birth
- Case *C-177/88 Dekker* (1990): pregnancy discrimination is direct sex discrimination

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'Not implementing EU law'

- ~~EU Charter~~
 - Leave not provided for under EU law (surrogacy, adoption,...)
 - MS discretionary powers
- International law as gap filler
 - ECHR applies to 'everyone', including children
 - UNCRC protects against 'discrimination of any kind'
 - All EU Member States are States Parties

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Suggestions for solution – surrogacy

- Natural children vs children born via surrogacy
- AG Kokott in *C.D. v S.T.*:
 - Monistic biological vs functional interpretation of Directive 92/85/EEC
 - Mother-child relationship
 - Best interests of the child
- Paternity leave, parental leave,...

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Suggestions for solution – multiple births

- **Double parental leave**
 - Strictly necessary? → Synergies
- **Additional parental leave**
 - Cf. additional maternity leave
 - AG Kokott suggested temporal deductions < double parental leave
- Still important: gender equality

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Conclusion

- EU law: no children's rights
- CJEU: unwilling to engage with children's rights
- Childcare leave: inequalities between children
- Art. 51(1) EU Charter: mainstreaming children's rights
- Benchmarks for review: Arts. 20 and 21(1)
- Other relevant provisions:
 - Art. 7: right to family life
 - Art. 24: rights of the child + best interests of the child principle

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**Thank you for your attention!
Questions?**

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