

Statutory Parental Leave and Pay in the UK: Stereotypes and Discrimination

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I. Introduction

The gender pay gap in the UK is one of the highest in Europe. Women are consistently paid lower salaries than men and are less likely to be appointed to high level and high profile positions.² These statistics exist in contrast to the higher levels of enrolment by women than men in higher education.³ Therefore, at some stage between the completion of education and the height of women's careers, it appears that there is some form of systemic discrimination at play. At the same time, men are disproportionately over-represented in higher management positions and are less likely to be the primary carers of children.⁴ It is the thesis of this article that both men and women are subject to systemic discrimination in these regards and that this discrimination is exacerbated by the system of maternity and paternity benefits currently in operation.

In this article, I will first contextualise the issue by outlining the international and European standards in relation to parental rights in Part II. In Part III, I will then outline the current position in UK law, identifying the differences in the treatment of men and women with regard to parental leave and pay.⁵ In parts IV and V, by reference to the Declaration of Principles on Equality 2008 (Principles on Equality),⁶ I will argue that pa-

rental leave provisions in the UK constitute direct discrimination against both men and women, which is incompatible with international, European and domestic standards. Further, I will demonstrate how this has contributed to the perpetuation of gender stereotypes in the UK.

II. International and European Standards for Parental Leave

Maternity rights, and specifically the right to a period of leave from employment before and after childbirth, are mentioned in numerous international treaties. They were first mentioned in 1966 in Article 10(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states that "special protection should be accorded to mothers (...) and working mothers should be accorded paid leave or leave with adequate social benefits".⁷ Subsequently, the Convention on the Elimination of all forms of Discrimination Against Women 1979 (CEDAW) in Article 11(2)(b) obliged states to introduce maternity leave, including the right to return to work "without loss of former employment, seniority or social allowances."⁸ Additionally, Article 3 of International Labour Organisation Convention No. 156, adopted in 1981, provides that:

“Member [States] shall make it an aim of national policy to enable persons with family responsibilities who are engaged (...) in employment to exercise their right to do so without being subject to discrimination.”⁹

Maternity rights relating to employment are also enshrined in a number of regional European texts. The original European Social Charter, adopted in 1991, provides in Article 8 that member states must:

“[F]rom public funds [provide] for women to take leave before and after childbirth up to a total of at least 12 weeks [and] to consider it as unlawful for an employer to give a women notice of dismissal during her absence on maternity leave”.¹⁰

Additionally, European Parliamentary Assembly Recommendation No. R (96) 5 on reconciling work and family life provides that:

“[W]omen should be entitled to legal protection in the event of pregnancy, and, in particular, an adequate period of maternity leave, adequate pay or allowance during this period and job protection.”¹¹

It is clear that there is a trend in both the international and European texts to include provisions encouraging states to implement laws to enable women to continue their employment following becoming mothers. The intention of these provisions has clearly been to ensure that women are not discriminated against due to their unique ability to bear children,¹² by creating obligations on states to take this fact into account in formulating social policies. However, by focussing solely on the role of women in relation to parenthood, men’s role in this sphere has been undermined and unaccounted for. Accordingly, whilst these instruments promote protec-

tion for mothers, equal protection for men as fathers is overlooked.

Earlier treaties made only passing reference to the equal sharing of parental roles. For example, the preamble of CEDAW states:

“Bearing in mind (...) the social significance of maternity and the role of both parents in the family and in the upbringing of children (...) the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.”¹³

Despite recognising the necessity of shared responsibility, the Convention is dedicated to the rights of women and makes no provision for rights to paternity benefits. Furthermore, Article 4(1) of CEDAW specifically provides for “special measures aimed at accelerating de facto equality between men and women”, which will not be considered to be discriminatory.¹⁴ However, “special measures” is not defined within the text and accordingly, is left to be interpreted by national governments in the implementation of CEDAW as domestic policies. Due to the obvious impact of the physical act of childbirth on women it is clear that some “special measures” specifically for women are necessary to achieve equality, for example a short period of leave from employment to recover from the physical trauma of labour.

The UK’s provisions for women arguably go beyond what is required by way of “special measures” under Article 4(1) of CEDAW. The UK’s maternity provisions provide women with an extended period of leave which arguably goes far beyond what is required to recover from the physical effects of childbirth, and is intended also to enable her to care for the child in its early years. This

provision is based on an out-dated notion that the mother is the only parent properly able to fulfil the primary care role and has resulted in women being effectively forced into the primary care role, as only the mother, and not the father, of a child is entitled to take an extended period of leave.

However, the notion of shared parental rights has been increasingly recognised on the international scene. The Revised European Social Charter adopted in 1996 (not yet ratified by the UK) imposes a further obligation to provide for parental leave for either parent, although the terms are not as prescriptive as for maternity leave. States are obliged to:

“[P]rovide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation.”¹⁵

Additionally, in 2002, European Parliamentary Assembly Resolution 1274 stated that:

“Parental leave was first introduced in Europe (...) as a key element of social and employment policies for women in work (...) [it] has since been adapted to meet the needs not only of women but also of men who wish to balance work and family life (...) The issue of parental leave is closely linked to that of the role of men in family life, since it permits a genuine partnership in the sharing of responsibilities between women and men in both the private and public sphere.”¹⁶

Furthermore, in General Comment No. 20, adopted in 2009, the Committee on Economic, Social and Cultural Rights (CESCR) stated that:

“[D]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for dif-

ferentiation is reasonable and objective (...) Refusal to grant paternity leave may also amount to discrimination against men.”¹⁷

Accordingly, it appears that a trend is emerging which more explicitly recognises the rights of men as fathers and promotes policies which genuinely encourage the sharing of parental responsibilities.

III. Parental Leave in the UK

Rights to parental leave in the UK are a relatively recent phenomenon. The notion of “maternity leave”, as it is currently understood, was not introduced until 1975¹⁸ and a very limited right for up to two weeks paternity leave has only been available since 2002,¹⁹ with some improvements implemented in 2010.²⁰ This changing landscape of parental rights arguably reflects the transformation of societal attitudes towards men and women’s roles, both at home and in the workplace, during this period. However, this article argues that the resulting framework of rights does not enable an equitable division of parental roles.

Maternity

Maternity rights were first introduced in the UK under the Social Security Act 1973. This Act provided for a “Maternity Allowance” to be paid at a statutory rate for an 18 week period commencing up to 11 weeks prior to the expected date of birth.²¹ This legislation did not confer any right of return to work following a period of absence to give birth and care for the child. The right to a period of absence from, and return to, work was not introduced until 1975 under the Employment Protection Act which provided for up to 29 weeks of leave for each pregnancy and the right to return to work with the original employer:

“[I]n the job in which she was employed under the original contract of employment and on terms and conditions not less favourable than those which would have been applicable to her if she had not been so absent”.²²

In essence, this provision attempts to ensure that, upon return to work, women are in the same position they would have been in had they not been absent. However, the extent to which this is possible in practice is questionable. Extended absences may lead to out-dated skills and mean that women lag behind their male peers in terms of years of experience.²³

These rights to maternity leave and allowances have been consistently improved upon since their inception to enable women to more effectively balance their role as a parent with their career. However, they appear to be premised on the expectation that women should be solely responsible for child care and have failed to challenge this underlying assumption.

At present all women are entitled to up to 52 weeks of leave for each pregnancy in addition to the subsequent right to return to work, as originally conferred in the Employment Protection Act 1975.²⁴ This right to maternity leave is available regardless of the length of time a woman has been employed by her present employer.²⁵ Women may also be entitled to statutory maternity pay (SMP), if they have been employed for at least 26 weeks by the end of the 15th week prior to the expected due date. Under SMP, the initial six weeks are paid at 90% of the individual’s average gross weekly earnings, the next 33 weeks are paid at the statutory rates of £135.45 (or 90% of the salary, whichever is lower), and the final 13 weeks are unpaid.²⁶

Paternity

Paternity leave and pay in the UK were not introduced until much later than the equivalent maternity provisions. In 2003 the Paternity and Adoption Leave Regulations 2002 and the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 came into force, conferring on fathers for the first time the right to take a limited period of leave from their employment specifically for the purpose of spending time with and caring for their child. Under these regulations, fathers are entitled to one or two consecutive weeks of paternity leave for each pregnancy.²⁷ In line with the maternity leave and pay provisions, the right to paternity pay was also available where the individual had been employed for at least 26 weeks by the end of the 15th week prior to the expected due date.²⁸

In 2010 the Additional Paternity Leave Regulations and Additional Statutory Paternity Pay (General) Regulations were passed, introducing more extensive rights for fathers to take leave and return to work following the birth of their child. These regulations entitle fathers of children born on or after 3 April 2011, the opportunity to take up to 26 weeks of paternity leave, in addition to the two weeks already provided, for each child.²⁹ Men are entitled to this Additional Paternity Leave (APL) if they have been employed for at least 26 weeks by the 15th week prior to the expected due date **and** the child’s mother was entitled to SMP or SML **and** the child’s mother has already returned to work.³⁰ During this time, men are entitled to Additional Paternity Pay (APP) which is payable at the same rate as SMP, but is only payable during the period that the mother would have been entitled to SMP, had she not returned to work.³¹

APL and APP provisions have vastly improved the situation for fathers wishing to

take time off to care for their children, providing them with a degree of job protection if they wish to take time off after the birth of a child and also providing limited financial support to enable them to do so.

Parental Leave

In addition to the maternity and paternity leave and pay available in the UK, there is also a period of 13 weeks unpaid parental leave that can be taken by each parent for each child.³² The leave can be taken at any point until the child is five years old and is not transferable between parents.³³ In order to be eligible the parent must have been employed for at least a year.³⁴

Differential Treatment

It is important to highlight both the overt differences in the current provisions for maternity and paternity leave, in addition to the less apparent practical implications of these policies. Whilst these provisions do allow for sharing of parental responsibilities on a much greater scale than was possible prior to the new regulations, they do not do so on an equal basis and therefore, arguably do not go far enough in challenging traditional gender stereotypes.

The first and most obvious differentiation of treatment between men and women under these provisions relates to the periods of leave entitlement. Mothers are entitled to up to 52 weeks of leave for each pregnancy, whereas fathers are only entitled to a maximum of 26 weeks leave. Secondly, for women the right to maternity leave becomes available solely upon the basis of becoming a mother. In contrast, men are only entitled to paternity leave once they have been employed by their current employer for a certain period of time, a restriction

which only applies for women in relation to SMP and not leave.

The final distinction is that a man's entitlement to APL and APP is tied to the rights of the woman and how she chooses to exercise them. In order for a man to be entitled to APL or APP, the mother of the relevant child must have been entitled to maternity leave or pay **and** she must have already returned to work. Accordingly, the APL and APP provisions essentially operate as an exchange system whereby the mother is entitled to leave and she may, if she so wishes, allow the child's father to take up to half of her leave and pay. In practice this results in the position that if the mother of the child is not employed or is employed but wants to take her full leave entitlement, then the father will have no right to take leave. On the contrary, a woman's entitlement to maternity leave and pay stands alone and exists regardless of the position of the father.

Accordingly, the law currently creates an ordered system of parental leave, which affords more generous parental rights to women than to men, implying a policy that recognises the role predominantly of mothers in childcare and only secondarily of fathers.

IV. Discrimination

As discussed above, the UK provisions for maternity and paternity benefits clearly constitute differential treatment. Not all differential treatment of men and women amounts to unlawful discrimination and the definition of unlawful discrimination varies both across international instruments and domestic laws. This article relies upon the Declaration of Principles on Equality to define discrimination and argues that the UK's statutory provisions amount to illegitimate discrimination on this basis.

The Declaration defines discrimination as including the following:

“Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another (...) in a comparable situation.

(...)

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”³⁵

Discrimination on the grounds of “sex” is one of the prohibited grounds under the Declaration of Principles on Equality.³⁶ Accordingly, the definition of discrimination has the effect that, if men and women are regarded as being in a “comparable situation” in relation to becoming parents, any differential treatment in relation to parental provisions is direct sex discrimination.

Historically, maternity leave provisions have not been considered to be directly discriminatory. Prior to maternity leave’s introduction there existed an expectation that women would leave their employment in order to give birth to and care for a child. Ceasing employment served the dual purpose of enabling the mother time to recover from the physical act of labour and of providing a full-time primary carer for the child during the early period of its life. Therefore, the introduction of maternity leave in 1975 had the positive impact of providing, for the first

time, the opportunity for women with children to continue in their careers.

Although it is obvious that this leave has always constituted a difference in treatment between men and women, in 1975 it was more likely to have been viewed by society as a justified difference in treatment or a form of necessary positive discrimination or affirmative action to correct for the disadvantage that women suffer in their careers as a result of being the physical bearers of children. Accordingly, as **only** women were considered capable of being primary carers in the early years of their child’s life, men and women would not have been regarded as in a “comparable situation” in relation to becoming parents.

Based on this view of parenting and the linking of leave to the physical act of child bearing, the provision of parental leave only for women could constitute a “practice [that] would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons” but that was nonetheless “objectively justified by a legitimate aim”.³⁷ That is, the leave put men in employment who had recently fathered a child at a disadvantage in comparison with women in employment who had just had a child as they were not entitled to the same period of leave. However, the argument would follow that this was objectively justified by the legitimate aim of allowing the only appropriate carer of the child time away from her job to care for the child without ending her career.

Traditional gender stereotypes promoting the perception that women are the most appropriate primary carers of children were extremely influential in British society in 1975 and remain so today. The current maternity

and paternity provisions, whilst constituting an improvement, continue to be based on this out-dated attitude to parental roles. A matter of particular concern is that the Equality Act 2010, the UK's primary piece of anti-discrimination legislation, specifically carves the maternity leave and pay provisions out of its provisions on discrimination, so the leave and pay provisions remain lawful under UK equality law.³⁸

It is submitted that this carve out by the Equality Act is incorrect, and is not in line with modern attitudes to parental roles. The definition in the Declaration of Principles on Equality constitutes the embodiment of what the law should be in this area and the absence of such a carve out in the Principles is in line with a change in social attitudes.

Over the last 40 years there has been a transformation of social attitudes across Europe to these types of gender stereotypes regarding raising children. This is not only evidenced by the provision of parental leave on an equal basis in a number of European countries, but also by judgments from both the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), as discussed below.

Following this change in perception of the purpose of parental leave from being inherently linked to the physical act of child bearing, in which women are uniquely capable, to being more closely entwined with the role of caring for the child, in which both parents are equally capable and should be equally entitled, it is submitted that differences in the parental leave afforded to men and women can no longer be justified as necessary affirmative action for women. As men and women are in a "comparable situation" as regards becoming parents, any differences in

leave entitlement should be viewed as direct discrimination on the basis of gender.

Following this analysis, it becomes clear that the current provisions in the UK for maternity and paternity leave, as described above, directly discriminate against men in relation to their family life by denying them the opportunity to spend equal amounts of time as their partner with their children.

Unintended Consequences

As a result of this direct positive discrimination in favour of women regarding their role as a mother, they have also suffered a distinct disadvantage. As previously only women have been entitled to extended periods of parental leave, and are still entitled to a longer period of leave under less stringent criteria, they have effectively been forced to take up to a year away from employment for each pregnancy. Although women are not required to utilise the full year of their maternity leave allowance, until 2011 leave was not transferable and therefore if it was not used it would be forfeited. Therefore, as the majority of parents consider it beneficial for at least one parent to stay at home with the child, taking an extended period of leave from work has been the only practical option for many mothers.

Accordingly, women have been subject to a detriment in the progression of their careers. It is commonly recognised that taking a year, or several years depending on the number of children, away from employment will necessarily result in slower career progression and lower wages. This was explicitly acknowledged by the UK Commission for Employment and Skills in 2006 when it stated in a report that:

"It has long been known that taking time out of the labour market to have chil-

dren is one of the main reasons that women earn less than men. It reduces the years of work experience that a woman builds up, and therefore reduces one of the factors valued through pay by employers. After an extended period out of work women may face many barriers to returning, such as low confidence and outdated skills. Even after a relatively short period away from work it can be difficult for women to return to or find jobs that match their skills, particularly if they want to work more locally or part time.”³⁹

Accordingly, forcing women to be primary carers necessarily denies them the opportunity to achieve their career goals in the same way as is open to men, on the basis of outdated attitudes to parenting.

In 2007, the UK submitted a report to the Committee on the Elimination of Discrimination against Women. In its concluding observations the Committee stated:

“The Committee continues to be concerned (...) about the persistence of occupational segregation between women and men in the labour market and the continuing pay gap, one of the highest in Europe (...) The Committee also recommends that the State party continue its efforts to assist women and men to reconcile family and professional responsibilities and for its promotion of equal sharing of domestic and family tasks (...) The Committee further recommends that the State party encourage men to share responsibility for childcare, including through awareness-raising activities and by taking parental leave.”⁴⁰

Despite growing consensus amongst European states on shared parenting and the move away from traditional gender roles in this sphere, it is clear that the UK provisions continue to disadvantage mothers in their careers.

Whilst provisions governing parental leave in the UK have been consistently improved upon since their inception, it is submitted that these developments have focused too strongly on fixing immediate problems as opposed to creating an equitable distribution of parental benefits between men and women. The original provisions were introduced to correct the immediate ill of women being required to cease their employment upon becoming a mother, a laudable aim. However, the effects of this provision have in fact had pernicious consequences for both men and women. In such circumstances a unified approach to equality which devised policies on the basis of the equal treatment of mothers and fathers, as opposed to present societal attitudes, would have resulted in a fairer system of parental leave.

Even the recent review and consolidation of UK anti-discrimination laws into the Equality Act 2010 has not addressed this issue, but rather has explicitly excluded maternity provisions from the scope of the definition of discrimination. However, as discussed below, recent developments in European law may have significant consequences for the UK legislation in this sphere and raise questions as to its compatibility with European standards.

V. Challenging the Law

Whilst the Declaration of Principles on Equality is not currently enforceable before a court, there are a number of legal mechanisms by which the current UK parental leave provisions may be challenged. In recent years, various preferential provisions for female employees who are mothers have been challenged on the grounds of sex discrimination before regional courts in Europe.

In *Joseph Griesmar v Ministre de L'Economie des Finances et de l'Industrie, Ministre de la*

Fonction publique, de la Réforme de l'Etat et de la Démocratisation,⁴¹ the Court of Justice of the European Union (CJEU) addressed the issue of the differential allocation of service credits to male and female Civil Servants, which were allocated to female employees according to how many children they had and used in conjunction with the length of service to determine pension entitlements. The CJEU established that:

“[T]he national legislature used a single criterion for granting the credit (...) namely that relating to the bringing-up of the children and (...) it simply took it for granted that they were brought up at the home of their mother”.⁴²

It further found that:

“[T]he situations of a male civil servant and a female civil servant may be comparable as regard the bringing-up of children. In particular, the fact that female civil servants are more affected by the occupational disadvantages entailed in bringing up children, because this is a task generally carried out by women, does not prevent their situation from being comparable to that of a male civil servant who has assumed the task of bringing up his children and has thereby been exposed to the same career-related disadvantages.”⁴³

Accordingly, the provisions related to service credits were found to constitute “a difference in treatment on grounds of sex: in regard to male civil servants who have in fact assumed the task of bringing up their children”.⁴⁴

Then, in the 2010 preliminary ruling in *Roca Álvarez v Sesa Start España ETT*,⁴⁵ the CJEU ruled that the denial of “breast-feeding leave” – a 30 minute reduction in the working day available only to mothers for the purpose

of feeding their unweaned child – to male employees who had become fathers where the mother was not also an employee, was a breach of the European Equal Treatment Directive.⁴⁶ Article 2 of the Directive states that:

“1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

(...)

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.”

The CJEU found that “the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child” and therefore “the measure (...) establishes a difference on grounds of sex, within the meaning of Article 2(1)”.⁴⁷

The CJEU was therefore required to determine whether the “breast-feeding leave” was a provision “concerning the protection of women, particularly as regards pregnancy and maternity” falling within Article 2(3). It was held that:

“The leave has been detached from the biological fact of breastfeeding, so that it can be considered as time purely devoted to the child and as a measure which reconciles family life and work following maternity leave.”⁴⁸

Accordingly, the leave did not fall within the meaning of Article 2(3) and was discriminatory.

Following these judgments, it appears that the current UK provisions are not compatible with the European Equal Treatment Directive. The UK system of maternity and paternity does not create a distinction between the period of leave for physical recovery of the mother and the time purely dedicated to caring for the child, nor does it provide for any period of the leave to be shared on an equitable basis.

Most recently, the European Court of Human Rights has considered differential treatment of male and female employees with regard to parental leave. Its judgment in *Konstantin Markin v Russia*⁴⁹ was handed down on 22 March 2012 and addressed the issue of whether parental leave provisions in the Russian Military constituted sex discrimination. Mr Markin, a divorced member of the Russian Military, brought a case against the Russian government for denying him the opportunity to take the three years parental leave to care for his children, an opportunity which was available to all female personnel. The Military Court dismissed Mr Markin's claim for parental leave as having "no basis in domestic law", and declared that under the existing rules he was entitled to either three months parental leave or early termination of his military contract. On appeal the decision was upheld and it was stated that "male military personnel were not in any circumstances entitled to parental leave" under domestic law.⁵⁰

On further appeal, the Russian Constitutional Court also dismissed the applicant's case. Referring to the "special legal status" of the military, the Court held that by voluntarily joining the military the applicant had accepted a limitation on his civil rights and freedoms and therefore denial of parental leave was not incompatible with the right to equality enshrined in the Russian Constitu-

tion.⁵¹ The Court accepted the Russian Government's argument that in granting parental leave only to women it had considered the "limited participation of women in military service" and "the special role of women associated with motherhood", and that if servicemen were entitled to parental leave this would "cause detriment to the public interests protected by law".⁵²

Mr Markin complained of this decision in the ECtHR alleging a breach of his Article 14 right not to be discriminated against in conjunction with his Article 8 right to respect for his private and family life. The first section of the ECtHR found in favour of Mr Markin, holding that there had been a difference of treatment because:

"[I]n contrast to maternity leave (...) which [is] primarily intended to enable the mother to recover from the fatigue of childbirth (...) parental leave and the parental leave allowances (...) are intended to enable the parent to stay at home to look after the infant."

Accordingly, they considered that both parents were "similarly placed" regarding caring for the child.⁵³ The Court subsequently dismissed the Russian government's arguments that the differential treatment was justified in order to protect the operational effectiveness of the armed forces. It found there was a "lack of concrete evidence to substantiate the alleged damage to national security" and further considered that the Russian Constitutional Court, in finding in favour of the government, had:

"[B]ased its decision on a pure assumption, without attempting to probe its validity by checking it against statistical data or by weighing the conflicting interests of maintaining the operational effectiveness of

the army, on the one hand, and of protecting servicemen against discrimination in the sphere of family life and promoting the best interests of their children, on the other”.⁵⁴

Therefore, the Court held that Mr Markin’s Article 14 rights had been breached. The government was then granted leave to appeal to the Grand Chamber.

The Grand Chamber of the ECtHR held that although Article 8 does not “impose any positive obligation on States to provide parental leave allowances”, as such allowances “necessarily affect the way in which [family life] is organised” they fell within the scope of Article 8 and thus “if a State does decide to create a parental leave scheme, it must do so in a manner which is compatible with Article 14”.⁵⁵

In giving its judgment, the Grand Chamber of the Court dealt with a number of arguments that had been put forward by the Russian Government when seeking to justify this differentiation of treatment between male and female military personnel, including the arguments that: the efficiency of the Russian army would be compromised if all personnel were entitled to three years parental leave regardless of gender; the differential treatment acknowledged the special role of women in relation to parenthood; and that military personnel should be considered to have voluntarily waived a number of civil rights by signing up for military service. In examining these arguments, the Grand Chamber reiterated that differential treatment will be considered discriminatory if there is no objective or reasonable justification; that is, no legitimate aim and no proportionality between the aim and the measures used.⁵⁶

As to the first of the government’s arguments, the Grand Chamber stated that measures must be found to constitute a “real threat” to

the operational effectiveness of the military for discriminatory treatment to satisfy the proportionality requirement. Due to the lack of empirical evidence produced by the Russian government it could not be established that allowing male personnel to take parental leave would have any significant impact on the efficiency of the military. Female personnel were entitled to three years regardless of the position, and as Mr Markin had proved, women in his particular position were entitled to the leave without any concern of an impact on operational effectiveness.⁵⁷

As to the government’s argument that women have a special role in relation to parenthood, the Court reiterated that “gender equality is today a major goal” of the Council of Europe and that “reference to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex.”⁵⁸ The Court noted the change in societal attitudes by pointing out that sufficient consensus amongst European states demonstrated a move away from the Court’s earlier judgment in *Petrovic v Austria*⁵⁹, in which maternity leave provisions were held not to discriminate against men. Emphasising this issue, the Court considered:

“[T]hat the Government’s reference to positive discrimination is misconceived. The different treatment of servicemen and servicewomen as regards entitlement to parental leave is clearly not intended to correct the disadvantaged position of women in society of ‘factual inequalities’ between men and women (...) The Court agrees with the applicant and the third party that such difference has the effect of perpetuating gender stereotypes and is disadvantageous both to women’s careers and to men’s family life.”⁶⁰

Finally, in relation to the government's argument that servicemen voluntarily waive their constitutional rights, the Court accepted that for the protection of "national security" certain restrictions regarding the entitlement to parental leave would be permissible in order to ensure the efficient running of the army. However, these limitations must not discriminate on the basis of gender. For example, it may be permissible to offer only two years parental leave to service men and women as opposed to the three years available to the civilian population, as although this may be considered discrimination on the basis of professional occupation, it is justifiable under Article 8(2) in the interests of national security. It stated that:

"[S]uch a general and automatic restriction applied to a group of people on the basis of their sex must be seen as falling outside any acceptable margin of appreciation, however wide (...) and as being incompatible with article 14."⁶¹

The implications of this judgment cannot be overstated. The judgment clearly emphasises the importance of the advancement of gender equality and recognises the societal move away from the gender stereotype of the woman as the primary carer towards a model of equal sharing. With these acknowledgements made, the Court has set a high threshold for governments to cross in order to be able to successfully justify differential parental leave provisions for men and women. In particular, the Court was clear that, even in the armed forces context (and its close association with national security), in the absence of expert evidence or statistical data to back up a claim on the impact of a requirement of equal treatment on operational effectiveness, no such justification would be accepted.

In light of this latest judgment, it is difficult to envisage an argument that could be made by the UK government to successfully justify the current differential treatment under UK law. It appears that the current UK provisions are not compatible with the ECHR as interpreted by the ECtHR in *Konstantin Markin v Russia*. Therefore, the current statutory schemes in the UK are ripe to be challenged before the courts – challenges which would appear to have a strong chance of success.

VI. Conclusion

Throughout this article I have explored both international and domestic standards of parental leave and the effects which these have had on men's and women's roles as parents and employees. It has been demonstrated that the current provisions governing entitlement to parental leave in the UK directly discriminate against men and have indirectly had a negative impact on women in the progression of their careers. Despite advancements in societal attitudes, the statutory scheme of maternity and paternity benefits in the UK continues to promote out-dated stereotypes and inhibit men and women from partaking in the work and home life on equal terms. Finally, I have highlighted the incompatibility of these provisions with the ethos of recent international texts and developments in European case law.

Although current standards do not effectively guarantee equality at home and in the work place, they have at each stage of development represented significant improvements and reflected the gradual evolution of societal attitudes towards shared parental responsibilities and away from traditional gender stereotypes. However, the lack of attention to the indirect consequences of these provisions has resulted in working men being effectively excluded from primary care roles and women

being effectively forced into them. Accordingly, at present further advancements are required to keep apace with current attitudes and domestically enforceable rights to non-discrimination in the workplace. Employment

benefits based on traditional stereotypes of both women's and men's roles in the home and workplace cannot be continued, and must be reassessed in light of new legislation and modern attitudes.

1 Vanessa Long is an expert in human rights, holding an LLM in International and Human Rights Law. She would like to acknowledge the assistance of Sarah Mitchell and Joanna Whiteman who provided detailed comments on a draft of this article.

2 As reported by the Fawcett Society, available at: <http://www.fawcettsociety.org.uk/index.asp?PageID=321>.

3 Vincent-Lancrin, S., "The Reversal of Gender Inequalities in Higher Education: An On-going Trend", in OECD, *Higher Education to 2030*, OECD Centre for Educational Research and Innovation, 2008, Chapter 10, available at: <http://www.oecd.org/edu/cei/41939699.pdf>.

4 European Commission, Employment, Social Affairs and Equal Opportunities, "Men and Gender Equality – tackling segregated family roles and social care jobs", 2012.

5 Due to length restrictions, this article does not address equality issues surrounding same sex couples' rights to parental leave and pay, nor does it discuss adoption, leave and pay provisions.

6 *Declaration of Principles on Equality*, The Equal Rights Trust, 2008.

7 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI)(1966).

8 Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180 (1979).

9 Workers with Family Responsibilities Convention, C156, 67th ILC session (23 June 1981).

10 Council of Europe, European Social Charter, 18 October 1961, ETS 35.

11 European Parliamentary Assembly Recommendation, No. R (96) 5.

12 This article acknowledges, but does not seek to address the fact that the status of pregnancy as being "unique" to women is no longer entirely accurate given the potential, in certain circumstances, for transgendered men who have kept their female reproductive organs, to give birth. See for example, the case of Thomas Beattie, as reported by the BBC at: <http://news.bbc.co.uk/1/hi/world/americas/7488894.stm>.

13 See above, note 8.

14 Ibid.

15 Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

16 European Parliamentary Assembly Resolution 1274, 26 March 2002.

17 Committee on Economic, Social and Cultural Rights, *General Comment No. 20*, E/C.12/GC/20, 2 July 2009.

18 Section 35, Employment Protection Act 1975, c. 71.

19 Regulation 4, The Paternity and Adoption Leave Regulations, 2002, No. 2788.

20 Additional Paternity Leave Regulations and Additional Statutory Paternity Pay (General) Regulations, 2010, No. 1056.

21 Social Security Act 1973, c. 38, section 16.

22 See above, note 18, section 48.

23 Department for Work and Pensions, "Maternity rights and mothers' employment decisions", Research Report No 496, 2008, p. 3, available at: <http://research.dwp.gov.uk/asd/asd5/rports2007-2008/rrep496.pdf>.

24 The Maternity and Parental Leave etc. Regulations, 1999, No. 3312, section 7.

- 25 Ibid., sections 4-5.
- 26 Statutory Maternity Pay (General) Regulations, 1986, No. 1960, regulations 2(5) and 22.
- 27 See above, note 19, regulation 5.
- 28 Social Security Contributions and Benefits Act 1992, sections 171ZA-171ZE of Part XIIIA.
- 29 See above, note 20, regulation 5(2).
- 30 Ibid., regulation 4(2).
- 31 See above, note 28, section 171ZEA(2).
- 32 See above, note 24, regulation 14.
- 33 Ibid., regulation 15.
- 34 Ibid., regulation 13.
- 35 See above, note 6, Principle 5.
- 36 Ibid.
- 37 See above, note 6, Principle 5.
- 38 See Equality Act 2010, Schedule 22, section 2(1)(a).
- 39 UK Commission for Employment and Skills, “Women and Work – Shaping a Fairer Future”, 2006, p. 29, available at: <http://www.ukces.org.uk/publications/women-and-work-fairer-future>.
- 40 Committee on the Elimination of Discrimination against Women, Forty-first session, 18 July 2008, Para 39.
- 41 *Joseph Griesmar v Ministre de L’Economie des Finances et de l’Industrie, Ministre de la Fonction publique, de la Réforme de l’Etat et de le Démocratisation*, Case C-366/99, 29 November 2001.
- 42 Ibid., Para 55.
- 43 Ibid., Paras 55-56.
- 44 Ibid., Para 58.
- 45 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA*, Case C-104/09, 30 September 2010.
- 46 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.
- 47 See above, note 45, Paras 24-25.
- 48 Ibid., Para 28.
- 49 *Konstantin Markin v Russia* (Application No. 30078/06) European Court of Human Rights, 22 March 2012.
- 50 Ibid., Para 145.
- 51 Ibid., Para 34.
- 52 Ibid.
- 53 Ibid., Para 48.
- 54 Ibid., Para 57.
- 55 Ibid., Para 130.
- 56 Ibid., Para 125.
- 57 Ibid., Para 149.
- 58 Ibid., Para 127.
- 59 *Petrovic v Austria* (156/1996/775/976) European Court of Human Rights, 27 March 1998.
- 60 See above, note 49, Para 141.
- 61 Ibid., Para 148.