

## THE NATIONAL COURT FOLLOW-UP IN THE CJEU CASE “SINDICATUL FAMILIA E.A.” REGARDING THE WORKING TIME OF FOSTER PARENTS IN ROMANIA / Răzvan Anghel

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**Abstract:** *The CJEU judgement in Sindicatul Familia case (C-147/17) is a steppingstone for the working time Directive 2003/88 interpretation and application and for the European debate regarding the foster carer for children statute, the remuneration and working time. The article presents the national court decision following the CJEU judgement accompanied by the author's commentaries. The purpose of the article is to provide legal professionals with the information on the practical results of the dialog between CJEU and national courts and the way national courts use European legislation interpretations given in the preliminary ruling procedure aiming at its uniform application in the EU member states.*

**Key words:** *working time, foster carer, children, workers, labour law, Romanian law, EU law*

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### 1. BACKGROUND OF THE CASE AND NATIONAL LEGISLATION

One of the means of protecting abandoned or orphan children in Romania is placing them in foster families until the age of eighteen. The same type of protection is granted to the children who have been withdrawn from the custody of their parents, permanently or temporarily, due to the fact that the natural parents are unfit or have no means for taking care of their children. The foster parents act as natural parents, taking care of those children full-time. This is a system of care that is spread in European Union in different forms, the statute of such foster parents being different from state to state.

In Romania, the statute of a public employee is recognised for foster parents and they conclude a labour contract before having children placed in their care. Such a contract has a special regulation in Romania, derogatory to the Labour Code (Law no. 53/2003), comprised in Law No. 272/2004 on the protection and promotion of the rights of minors, Government Decree No. 679/2003 concerning the conditions for obtaining authorisation, the certification procedures and the regulations for professional foster parents. The special regulation and the labour contract provide for a presumed eight hours working time per day and 40 hours weekly, and regulates the right to annual paid

leave, with or without the child accompaniment, despite the legal obligations of the foster parents to permanently take care of the children placed in their families.

*Law No. 272/2004 provides:*

*Article 4*

*"For the purposes of this law, the following terms and expressions shall have the following meaning: [...]*

*(d) foster family – persons other than those belonging to the extended family, including relatives by marriage up to the fourth degree and foster parents, who are legally responsible for the upbringing and care of the child."*

*Article 116*

*"(1) The existing public service specialised in the protection of minors under the control of the provincial councils and the local councils of the districts of the municipality of Bucharest [Romania], as well as the public service of social assistance at the level of the provinces and districts of the municipality of Bucharest, are hereby reorganised as the Directorate-General for Social Assistance and the Protection of Minors.*

*(2) The Directorate-General for Social Assistance and the Protection of Minors is a public institution with legal personality, created under the responsibility of the provincial council and the local councils of the districts of the municipality of Bucharest; it shall take over the social assistance functions of the public service at provincial level and also the social assistance functions of the public service at the level of the districts of the municipality of Bucharest.*

*(3) In protecting the rights of minors, the body referred to in paragraph 2 shall perform the tasks laid down in this law and other legislative acts in force. [...]"*

*Article 117*

*"In order to protect and promote the rights of minors, the Directorate-General for Social Assistance and the Protection of Minors shall perform the following principal tasks:*

*(a) coordinate the activities of social assistance and protection of the family and the rights of minors at the level of provinces and districts of the municipality of Bucharest; [...]"*

*Article 121*

*"Family services are services provided, within the home of a natural person or family, for the upbringing and care of a minor separated temporarily or permanently from his or her parents, following a measure placing the child in foster care in accordance with the present Law."*

*Article 122*

*"1) Minors may be fostered by families and persons who are at least 18 years of age, have full capacity, are resident in Romania and have the moral qualities and material conditions necessary for the upbringing and care of a minor separated temporarily or permanently from his or her parents. [...]*

*(3) The activity of the person appointed as foster parent, in accordance with the law, shall be performed on the basis of a special contract for the protection of the minor, concluded with the Directorate-General or with an accredited private body, which shall include the following stipulations:*

*(a). activities for the upbringing, care and education of minors in care shall be performed at home;*

*(b) the programme of work shall be determined on the basis of the needs of the minors;*

*(c) free time shall be arranged in accordance with the programme of the family and of the minors in foster care;*

(d) the continuity of the work performed shall be guaranteed during the statutory leave period, unless during that period separation from the minor fostered with the family is authorised by the Directorate-General.

(4) The individual employment contract shall be drawn up as of the date of issue of the director's measure adopting an urgent fostering measure or of the decision of the board for the protection of minors/the court with regard to the fostering measure. [...]"

Government Decree No. 679/2003 provides:

Article 1

"A professional foster parent is a natural person authorised in accordance with the present Decree. The foster parent shall provide, by means of activities performed in his or her own home, for the upbringing, care and education necessary for the harmonious development of the minors in his or her foster or other care."

Article 8

"(1) The activities of persons authorised as professional foster parents shall be performed on the basis of a special individual employment contract, specifically intended for the protection of the minor, which shall be concluded with a public service specialising in the protection of minors or with an authorised private body that is under a duty to supervise and support the work performed by professional foster parents.

(2) The individual employment contract shall be concluded for the period of validity of the authorisation.

(3) The performance of the individual employment contract shall begin from the date of receipt of the placement decision or decision to place the child in the care of the professional foster parent. [...]"

Article 9 of that decree states:

"(1) For every minor received into foster or other care the professional foster parent shall conclude an agreement annexed to the individual employment contract with the employer.

(2) The agreement shall be concluded with the written consent of the husband or wife of the professional foster parent and shall be notified to the board for the protection of minors that ordered the fostering or other care of the minor.

(3) The agreement shall include the following: [...]

(g) specific rights and obligations of the parties."

Article 10

"(1) Professional foster parents shall have the following obligations with regard to the minors received into their foster or other care:

(a) provide for the upbringing, care and education of the minors in order to ensure their harmonious physical, mental, intellectual and emotional development;

(b) provide for the integration of the minors into their own family, guaranteeing them equal treatment with the other family members;

(c) provide for the social integration of the minors;

(d) contribute to preparations for the minors' return to their natural family or their integration into an adoptive family;

(e) permit public service specialists in the protection of minors or the authorised private body to supervise their professional activity and assess the minors' development;

(f) ensure the continuity of their activity during statutory leave, unless separation from the minors in foster or other care is authorised for that period by the employer; [...]

(2). Professional foster carers must immediately inform the specialist public service for the protection of minors or the private body which supervises their activity of any change to

*their personal, family or social situation that is capable of affecting their professional activity.”*

These national regulations combined with the reality of full-time care provided by foster parents created a contradictory situation that led to numerous claims brought to the Romanian courts by foster parents and their trade unions. In such cases, the foster parents asked the courts to award them additional salary rights for overwork and for the work performed on weekly rest days, public holidays and other non-working days, and a compensation for the annual leave they could not benefit from, as they are supposed to keep children under their permanent supervision without any rest periods.

The national courts in Romania faced real difficulty in solving those cases, as they had to deal with an obvious contradiction between the evidence that the work of foster parents is continuous by its nature, and the legal statute of foster parents under the national law that presumed a normal working program for them; the courts also faced the impossibility to determine the foster parents' working time accurately, as the work is done under no continuous supervision of an employer, according to enormously varied needs of a child, mainly in their own home.

Many questions arise regarding the working time of foster parents: are they working when the child is sleeping? Or when the child is away from home, at school? Is working time the time when foster parents passively supervise the child?

The national and European legal framework could not answer those questions, as they were not tailored for such situations.

In Romania, this situation resulted in contradictory jurisprudence sanctioned recently by the European Court of Human Rights in the case of *Dumitru v. Romania*.<sup>1</sup> In many cases, the courts have granted foster parents' claims, but many others dismissed those claims, as the Romanian High Court of Cassation and Justice noted as well.<sup>2</sup>

## 2. THE DISPUTE IN THE MAIN PROCEEDINGS

The type of claims explained above were also brought to Constanța Court of Appeal in the case that led to the request for a preliminary ruling of the Court of Justice of European Union. Those foster parents and the *Sindicatul Familia Constanța* trade union representing them brought an action before the Constanța Regional Court (*Tribunalul Constanța*) against the Directorate-General for social assistance and protection of the family and the rights of minors, for additional payments equal to 100% increase of the base salary in respect of the work performed on weekly rest days, public holidays and other non-working days, as well as the compensation equivalent to the allowance *in lieu* of the paid annual leave for the years from 2012 to 2015. As their action was dismissed by the first instance, they appealed against that judgment to Constanța Court of Appeal (*Curtea de Apel Constanța*).

## 3. THE QUESTIONS ADDRESSED TO THE CJEU FOR PRELIMINARY RULING

Even though the national court<sup>3</sup> addressed no less than seven questions to the CJEU, the main issue in the case was whether the Directive 2003/88 applies to the

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<sup>1</sup> European Court of Human Rights, *Dumitru and others v. Romania*, app. no. 57162/09, 25 June 2019.

<sup>2</sup> In its decisions no. 29 of 17 October 2016, pronounced in the procedure of preliminary judgment of the Panels for Clarification of Legal aspects, and decision no. 25 of 26 November 2018, given on the appeal in the interest of law procedure, published in Romanian Official Journal no. 1018 din 19/12/2016 and no. 135 din 20/02/2019 respectively.

<sup>3</sup> The author of this article was a member of the panel that made the preliminary question to the CJEU.

claimants, and that was the first question. The rest of the six questions were only addressed in the case that the CJEU would have answered positively to this first question; those six subsequent questions were actually reflecting insolvable problems generated by application of the Directive 2003/88 provisions in the case of foster parents (see Anghel, 2017b, and 2017a).

The questions addressed were as follows:

*“(1) Must Article 1(3) of Directive 2003/88 in conjunction with Article 2 of Directive 89/391 be interpreted as excluding from the ambit of the directive activity such as the activity of foster parents performed by the applicants?*

*(2) If the answer to the first question is in the negative, must Article 17 of Directive 2003/88 be interpreted to the effect that an activity such as the activity of foster parents performed by the applicants, may be the object of a derogation from the provisions of Article 5 of the directive in accordance with paragraphs 1, 3(b) and (c) or 4(b)?*

*(3) If the answer to the second question is in the affirmative, is Article 17(1) or, if applicable, Article 17(3) or (4) of Directive 2003/88 to be interpreted to the effect that such a derogation must be explicitly laid down, or may it also be implicit as a result of the adoption of special legislation laying down other rules for organising working hours for a particular professional activity? If such a derogation need not be explicit, what are the minimum conditions for it to be considered that national legislation introduces a derogation, and may such a derogation be expressed in the terms deriving from Law No 272/2004?*

*(4) If the answer to Questions 1, 2 or 3 is in the negative, must Article 2(1) of Directive 2003/88 be interpreted to the effect that the period spent by a foster parent with the assisted minor, in his own home or in another place of his choice, constitutes working time even if none of the activities described in the individual employment contract is performed?*

*(5) If the answer to Questions 1, 2 or 3 is in the negative, is Article 5 of Directive 2003/88 to be interpreted as precluding national provisions such as those in Article 122 of Law No 272/2004? And if the answer should confirm that paragraph 3(b) and (c) or paragraph 4(b) of Article 17 of the directive is applicable, must that article be interpreted as precluding that national legislation?*

*(6) If the answer to Question 1 is in the negative and the answer to Question 4 is in the affirmative, may Article 7(2) of Directive 2003/88 be interpreted to the effect that it does not, however, preclude the award of compensation equal to the allowance that the worker would have received during annual leave, because the nature of the activity performed by foster parents prevents them taking such leave or, even though leave is formally granted, the worker continues in practice to perform that activity if, in the period in question, he is not permitted to leave the assisted minor? If the answer is in the affirmative, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?*

*(7) If the answer to Question 1 is in the negative, the answer to Question 4 is in the affirmative and the answer to Question 6 is in the negative, does Article 7(1) of Directive 2003/88 preclude a provision such as that contained in Article 122(3)(d) of Law No 272/2004 in a situation in which that law gives the employer discretion to decide whether to authorise separation from the minor during leave and, if so, is the inability de facto to take leave as a result of the application of that provision of the law an infringement of EU law that meets the conditions for the worker to be entitled to compensation? If so, must such compensation be paid by the State for infringement of Article 7 of that directive or by the public body, as employer, which has not provided for separation from the assisted minor during the period of leave? In that situation, must the worker, in order to be entitled to compensation, have requested permission to leave the minor and the employer have withheld permission?”*

As the CJEU resumed, the referring court expressed doubts as to whether Directive 2003/88 is applicable to the dispute pending since, on the ground that the activity of foster parenting which falls within the field of public administration and in the respective view, it has peculiar characteristics within the meaning of Article 2(2) of Directive 89/391 which inevitably precludes the application of Directive 2003/88, as such activity is comparable to the role of a parent and must be performed on a continuous basis in accordance with the needs of the child and therefore, the activities of a foster parent cannot be planned with precision, but must be organised in a very general way; as a result, the amount of working time inherent in such activities is difficult to calculate and is not compatible with an obligatory period of rest.<sup>4</sup>

#### 4. THE ESSENCE OF THE CJEU PRELIMINARY RULING

By its judgement of 20 November 2018,<sup>5</sup> the CJEU decided that *'Article 1(3) of Directive 2003/88/EC concerning certain aspects of the organisation of working time, read in conjunction with Article 2(2) of Council Directive 89/391/EEC of 12 June 1989, must be interpreted as meaning that the work performed by a foster parent under an employment contract with a public authority, which consists in taking in a child, integrating that child into his or her household and ensuring, on a continuous basis, the harmonious upbringing and education of that child, does not come within the scope of Directive 2003/88.'*

The reason why the Court decided to exclude the foster carer of children from the material scope of Directive 2003/88 is of great importance.

Such exclusion can be based on two reasons: either the claimants do not meet the requirements to qualify as *workers* within the meaning of the EU Law, or the characteristics peculiar to certain specific public service activities or to certain specific activities in the civil protection services, are inevitably in conflict with the Directive provisions.

Contrary to the Advocate General view,<sup>6</sup> the Court found that foster carers are workers within the meaning of the EU Law based on two main findings: first, that *"the individual applicants are, with respect to the public service to which they are contractually linked, in a hierarchical relationship, evidenced by permanent supervision and assessment of their activity by that service in relation to the requirements and criteria set out in the contract, for the purpose of fulfilling the task of protecting the minor, which is conferred on that service by law", and second the fact that "they have broad discretion as to the daily performance of their duties or that the task conferred on them is a 'task of trust' or a task of public interest" do not call into question such an assessment, nor is the fact that "the work performed by foster parents is largely comparable to the responsibilities taken on by parents with regard to their own children".*<sup>7</sup>

Over passing this issue, the CJEU decided however to exclude foster parents from the material scope of Directive 2003/88 based on the second criterion stating that their activity presents peculiar characteristics that are inevitably in conflict with the Directive provisions.

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<sup>4</sup> Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, para. 26.

<sup>5</sup> Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*.

<sup>6</sup> Court of Justice of the European Union, opinion of Advocate General Wahl of 28 June 2018, Case C-147/17 *Sindicatul Familia*.

<sup>7</sup> Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, paras. 45-47.

To reach this conclusion, the Court started from two principles: first, that “the concept of „public service” for the purpose of the first subparagraph of Article 2(2) of Directive 89/391, has no definition and there are no reference to national law as regards its meaning so, in order to determine its meaning and scope it must normally be given an autonomous and uniform interpretation throughout the European Union (par.54 of the judgement cited); second that the criterion used in the first subparagraph of Article 2(2) of Directive 89/391 is based not on the fact that workers belong to one of the sectors of the public service referred to in that provision, taken as a whole, but exclusively on the specific nature of certain particular tasks performed by workers in the sectors referred to in that provision.”<sup>8</sup>

The Court noted that the applicant foster parents in the main proceedings are all employed by a public authority and their work therefore contributes to the protection of minors, which is a task of the public interest forming part of the essential functions of the State;<sup>9</sup> based on that findings, the CJEU concluded that such an activity must be considered to be covered by the specific activities referred to in the first subparagraph of Article 2(2) of Directive 89/391.<sup>10</sup>

The CJEU decision seems to be of particular importance, as the problem whether the foster carers are workers or not is still an issue in EU.<sup>11</sup> It is also a premiere in the CJEU case-law to admit that a certain activity does not fall within the material scope of Directive 2003/88, as the Court constantly decided that the exceptions based on Article 2(2) of Council Directive 89/391/EEC must be of strict interpretation and should not include any activity that can somehow be planned in advance as long as it is carried out under normal circumstances, even if that would involve some difficulties for the employer.<sup>12</sup>

So, even if the applicants are hired by a labour contract and do not have the statute of public servants, they perform a public service for a public authority in the public administration.

## 5. THE ROMANIAN COURT DECISION FOLLOWING THE CJEU RULING

By its decision no. 117/CM of 2 April 2019, the Court of Appeal of Constanța dismissed the appeal and upheld the regional court judgement.

Before that, on 26 November 2018, by the previously referred decision no. 25, the Romanian High Court of Cassation and Justice decided by a mandatory interpretative ruling given on the appeal in the interest of the law procedure that the regulation on professional foster parents activity does not derogate from the regulation regarding the annual paid leave, and when they assure the continuity of the children care activity, they are not entitled to the compensation equivalent to the leave allowance. By the same decision, the High Court also stated that foster carers are not entitled to supplementary payments for overwork and for work performed on weekly rest days, public holidays and other non-working days. The main reason for this conclusion was that the working program of foster parents is flexible, cannot be accurately determined, and is actually

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<sup>8</sup> Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, para. 55.

<sup>9</sup> Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, paras. 60-61.

<sup>10</sup> Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, para. 63.

<sup>11</sup> Employment Appeal Tribunal London, National Union of Professional Foster Carers (NUPFC) v Certification Officer [2019] UKEAT 0285\_17\_2307, 23 July 2019, retrieved from: [http://www.bailii.org/uk/cases/UKEAT/2019/0285\\_17\\_2307.html](http://www.bailii.org/uk/cases/UKEAT/2019/0285_17_2307.html).

<sup>12</sup> Court of Justice of the European Union, judgment of 5 October 2004, Joined cases C-397/01 to C-403/01 *Pfeiffer and others*; judgment of 12 January 2006, Case C-132/04 *Commission v. Spain*; judgment of 21 February 2018, Case C-518/15 *Matzak*.

organised by themselves. The High Court also took into consideration the preliminary ruling of the CJEU on that matter.

Also, by the decision of 11 December 2018, no. 817, the Romanian Constitutional Court<sup>13</sup> rejected the constitutional appeal regarding relevant provisions of Law no. 272/2004, basically stating in para. 15 that this law provides for a *“particular way of exercising the annual paid leave, adapted to the special nature of the contract under which this professional category carries out its activity.”* The Constitutional Court also took into consideration the previous decision of the Romanian High Court of Cassation and Justice (cf. Athanasiu, Dima, Tunsoiu, & Vlăsceanu, 2016).

The Court of Appeal of Constanța was bound to take into consideration those rulings of the Romanian High Court of Cassation and Justice, and the Romanian Constitutional Court, and cited the reasoning of those decisions.

Also, the national court stated that taking into consideration the CJEU judgement, only the rules of national law remain applicable, as it is not the case to apply the provisions contained in Directive 2003/88 (for example art. 7) directly, or to interpret the internal norms in accordance with the provisions of this Directive, since it was established that this Directive does not apply in case of the claimant foster parents.

Besides citing those rulings and the CJEU judgement, the reasoning of the Court of Appeal of Constanța is as follows:

*“Therefore, in view of the special characteristic of the individual employment contract concluded between the plaintiffs and the defendant, as well as the particular way of carrying out the activity, which has, in principle, a continuous character but not a constant intensity, also assuming numerous inactive periods, and the possibility of the maternal assistant to carry out other activities in the personal interest, it cannot be determined in advance nor later, with a minimum precision, what is the actual working time of the worker and there cannot be determined a certain time interval in which the applicants actually worked. Under these circumstances, it cannot be determined that the applicants actually performed work beyond 8 hours daily, as required by art. 120 of the Labour Code; for the same reason, it is not possible to exclude the possibility that the work performed on weekly rest days, which appears to be an inherent consequence of the specificity of the activity characterized by continuity, has been compensated with free hours on working days when the children's needs do not impose any activity. For this reason, the legislature has opted for a special regulation that presumes the accumulation of 8 hours of work a day in the working days, i.e. 40 hours of work per week, starting from the fact that, although the activity is continuous, the work is not performed continuously. In fact, it is unlikely that the applicants will actually work 24 hours a day every day because they would obviously exceed the physical limits of the human body.*

*In the same way, the specificity of the activity, which involves the care of a child in a manner very similar to the parental one, is not compatible with the way of exercising the right to annual leave by the workers who carry out an activity in which the exercise of the tasks is clearly delimited in time and even in space. Moreover, at the request of the court, the defendant filed a record of the annual leave enjoyed by each applicant during the relevant period, indicating whether the employee took the annual leave with the minor in care or without, accompanied by the requests for leave made by the applicants.*

*From the analysis of these documents, it can be seen that out of the 95 applicants, only one made the leave of absence without minors in both 2014 and 2015, while other 3 applicants made the leave without minors in 2014 and other 3 in the year 2015.*

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<sup>13</sup> Published in Romanian Official Journal no. 195, 12 March 2019.



*In the requests for leave addressed to the employer, it is mentioned that the employee became aware that he has the possibility to make the leave without the minor in placement but chooses to make the leave with the minor. These applications are approved by the employer (in the sense of performing the leave of absence in certain periods of time but without separation from minors).*

*These claims were not challenged by the applicants. It does not result in and it was not claimed that the applicants would have asked the employer to make the annual leave of absence with the separation of minors and such requests would have been rejected by the employer.*

*These arguments are sufficient to ascertain the unfounded character of all the applicants' claims."*

## 6. DISCUSSIONS AND CONCLUSIONS

The effect of excluding foster parents from the material scope of Directive 2003/88, but still including them in the category of workers within the meaning of the EU Law may be surprising and paradoxical.

On one hand, foster parents lack the protection provided by Directive 2003/88 that limits working time and provides for mandatory rest time. On the other hand, while being workers, foster parents are still entitled to the protective measures based on the second subparagraph of Article 2(2) of Directive 89/391 which requires the EU Member States to ensure safety and health at work for the workers excluded from its material scope as far as possible, and thus in the light of the objectives of the respective Directive.

At the same time, an exclusion from the material scope of Directive 2003/88 means that not only the rights granted by its provisions, but also the prohibitions comprised in its provisions are put aside. One of those interdictions is that the minimum period of the paid annual leave may not be replaced by an allowance *in lieu*, except for the case where the employment relationship is terminated, as stated in Article 7 of Directive 2003/88. It turns out that in the case of foster parents, such a replacement could have been possible, as the interdictions part of Directive 2003/88 does not apply. Regarding Article 7 of Directive 2003/88, the CJEU clearly stated that a worker must benefit from the annual leave for reasons of safety and security at work and therefore it is not allowed for this leave to be replaced by compensation in the course of performance of the employment relationship not even with the employer's consent.<sup>14</sup> If Directive 2003/88 is not to be applied, then the compensation *in lieu* may be granted for the annual leave, if the employee is not able to effectively benefit in full of its annual paid leave even before the employment relationship would be terminated since the type of an activity is of such a nature that he/she cannot benefit from the annual leave fully or at all.

The CJEU concluded in the "*Sindicatul Familia*" case that in accordance to the second subparagraph of Article 2(2) of Directive 89/391 as regards the arrangement of their working time, the Romanian authorities have ensured safety and health of the foster parents as much as possible.<sup>15</sup>

However, one question still remains: would it have been an appropriate solution to grant the foster parents' compensation *in lieu* for the annual leave? It is clear that since they theoretically benefit from the annual leave without being separated from their foster

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<sup>14</sup> See, among others, Court of Justice of the European Union, order of 21 February 2013, Case C-194/12 *Maestre García*, para. 28.

<sup>15</sup> Court of Justice of the European Union, judgment of 20 November 2018, Case C-147/17 *Sindicatul Familia*, para. 82.

children, their daily activities do not differ in any way from usual activities during the rest of the year, as they are not released from the obligation to take care of the child. Even though such a compensation would have been in discussion only if the foster parents asked the employer to take the annual paid leave without the child, a legal possibility available for them, and that was not the case in that particular litigation. A different approach could have been taken to verify if, during the annual leave period, the foster parents actually perform work and if so, to determine if this work, being performed during rest time, could be considered as an overwork that would entitle foster carers to overtime payment even if they are not entitled to compensation *in lieu* for the annual leave. But in the main litigation, the claimants did not ask for overtime payment related to the work done during the annual leave.

Since the Romanian High Court of Cassation and Justice decided by a mandatory interpretative ruling that foster parents are not entitled to the compensation equivalent to the leave allowance, and the Romanian Constitutional Court decided that the legal provision interpreted in such way is not in contradiction to the Romanian Constitution, the Court of Appeal of Constanța could not decide otherwise but to dismiss the appeal.

As for the entitlement to supplementary payment considering the work performed on weekly rest days, public holidays, and other non-working days, and overwork, it is also clear that the nature of work makes it impossible to determine exactly the amount of time used for performing work to the benefit of the child exclusively, or what is the duration of the time used for working for the mutual benefit in the household and how it should be considered, or whether the time used for providing supervision of the child without any activity done should be considered as working time, or if the time when the child is out of the direct supervision of a foster parent stands for the working time (e.g. the child is away at school).

That is why it was legally presumed by law that foster parents work 40 hours a week, 8 hours a day, so we deal with a presumed duration of working time.

As for the legal relations between foster parents and public authorities, namely if that is an employment relation or not, and if foster parents are workers within the meaning of the EU Law, the consequences of the CJEU are still to follow. For the moment, it is worth to notice that the London Court of Appeal decided that foster parents in the UK are not workers under the meaning of a special regulation regarding the registration of a trade union, on the ground, among many others, that they do not conclude a labour contract and the allowance they receive cannot be considered as salary or any type of remuneration for the work done, even though the Court did not exclude the possibility of finding, in an appropriate case, that a foster carer is a worker under a contract.<sup>16</sup>

Still, the CJEU judgement in *Sindicatul Familia* case is a steppingstone for the Working Time Directive interpretation and application, and for the debate regarding the foster carer statute and working time that is more likely to generate effects on the national case law in the EU countries in the upcoming years.

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<sup>16</sup> Employment Appeal Tribunal London, *National Union of Professional Foster Carers (NUPFC) v Certification Officer* [2019] UKEAT 0285\_17\_2307, 23 July 2019, retrieved from: [http://www.bailii.org/uk/cases/UKEAT/2019/0285\\_17\\_2307.html](http://www.bailii.org/uk/cases/UKEAT/2019/0285_17_2307.html), paras. 48-49.

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