In Case 12/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the House of Lords of the United Kingdom for a preliminary ruling in the action pending between

EILEEN GARLAND

and

BRITISH RAIL ENGINEERING LIMITED

on the interpretation of the rules of the EEC Treaty on the principle of equal pay for men and women in connection with a difference in travel benefits enjoyed by male and female employees after retirement,

THE COURT

composed of: G. Bosco, President of the First Chamber, acting as President, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, A. Chloros and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

The appellant in the main action, Mrs Garland, is a married woman employed by British Rail Engineering Limited, the whole of the shareholding in which is held by the British Railways Board, a public authority charged by statute with the duty of providing railway services in Great Britain.

During the period of their employment all employees of British Rail Engineering enjoy certain valuable travel facilities which are also extended to their spouses and dependent children.

On retirement former employees, men and women, continue to enjoy travel facilities but they are reduced in comparison with those which they enjoyed during the period of their employment. However, although male employees continue to be granted facilities for themselves and for their wives and dependent children as well, female employees no longer have such facilities granted in respect of their families.

According to the House of Lords "these facilities are not enjoyed by former employees as a matter of contractual right, but employees have a legitimate expectation that they will enjoy them after retirement and it would be difficult in practice for British Rail Engineering to withdraw them unilaterally" without the agreement of the trade unions of which its employees are members.

On 25 November 1976 Mrs Garland complained to an industrial tribunal that British Rail Engineering was discriminating against her contrary to the provisions of the Sex Discrimination Act 1975. The tribunal rejected Mrs Garland's application and she then appealed to the Employment Appeal Tribunal which, by a judgment of 11 November 1977, reversed the first decision. Following a new appeal, by a judgment of 4 April 1979 the Court of Appeal annulled the second decision.

Only the provisions of the Sex Discrimination Act 1975 were invoked on each occasion and the argument centred in particular on the interpretation of section 6 (4) which excludes "provision in relation to death or retirement" from certain provisions of the Act.

The issues of Community law were not raised until the case reached the House of Lords. In view of those issues the House of Lords made an order dated 19 January 1981 in which it puts the following two questions to the Court:

"1. Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after retirement which discriminate against former female employees in the manner described above, is this contrary to:

(a) Article 119 of the EEC Treaty?

(b) Article 1 of Council Directive 75/117/EEC?

(c) Article 1 of Council Directive 76/207/EEC?

2. If the answer to Questions 1 (a), 1 (b) or 1 (c) is affirmative, is Article 119 or either of the said directives directly applicable in Member States so as to confer enforceable Community rights upon individuals in the above circumstances?"

That order making the reference for a preliminary ruling was registered at the Court on 22 January 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 23 March 1981 by the Commission of the European Communities represented by John Forman, a member of its Legal Department, acting as Agent, on 14 April 1981 by British Rail Engineering,

represented by Anthony Scrivener QC and F. Marr Johnson, on 15 April 1981 by Mrs Garland, represented by Thomas Morison QC and Nicolas Underhill, and on 21 April 1981 by the Government of the United Kingdom, represented by R. D. Munrow of the Treasury Solicitor's Department, assisted by Peter Scott QC.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. It did however ask the representative of British Rail Engineering to send it before 30 September 1981 the notices by which employees are informed, before or after their retirement, about the travel facilities in question.

II — Written observations submitted under Article 20 of the Protocol on the Statute of the Court

A — Observations of the appellant in the main action

The appellant in the main action deals with the questions put to the Court mainly in relation to Article 119 of the EEC Treaty and Directive 75/117/EEC on equal pay and, in the alternative — in the event of the Court's rejecting the submissions on Article 119 and the directive on equal pay — in relation to Directive 76/207/EEC on equal treatment.

(a) Article 119 and Directive 75/117 on equal pay

The appellant in the main action first of all considers whether "pay" includes special travel facilities and submits that the case-law of the Court and above all the opinions of Advocates General have conferred a wide ambit on that definition. The benefits in question are "of considerable value", they are featured prominently in recruitment advertising, they form a "significant" part of an employee's remuneration and are granted as a result of the employment relationship; consequently those benefits fall squarely within the definition of Article 119 of the EEC Treaty.

The appellant in the main action then sets out to demonstrate that the grant of those benefits to former employees comes within the ambit of Article 119 or the directive on equal pay. It relies on the judgment of 25 May 1971 in Case 80/70 *Gabrielle Defrenne* [1971] ECR 445 and submits that, since the only essential question is whether the benefit in issue is provided as a result of the employment relationship, "it is immaterial whether its actual receipt is deferred until after the termination of the employment".

Lastly, the appellant in the main action submits that the grant of the benefits in question to the employee's family rather than to the employee alone is also immaterial since, in human and economic terms, the interests of the employee and those of his family are the same; Mr Advocate General Warner came to the same conclusion in his opinion in the *Worringham* case (judgment of the Court of 11 March 1981, Case 69/80 [1981] ECR 767) when he stated "The conferment of the right to those benefits on his dependants can, however, in my opinion, properly be regarded as an advantage to the member arising from his employment'.

The appellant in the main action submits that the benefit in question is pay within the meaning of Article 119 of the Treaty and that Article 119 is directly applicable. She believes that the principles formulated by the Court in the *Worringham* case should apply in this case since the respondent in the main action has admitted "both direct and overt discrimination, and has not sought to argue that the discrimination is objectively justifiable on any grounds other than sex"; its case has been based simply on the argument that such discrimination is not unlawful by reason of the exception contained in Section 6 (4) of the Sex Discrimination Act.

(b) Directive 76/207 on equal treatment

The appellant in the main action takes the same line of argument as that which she took in regard to Article 119 and the directive on equal pay. She therefore sets out to demonstrate first of all that if the special facilities in question do not come within the definition of pay they must come within the definition of "working conditions" provided for in that directive on equal treatment since the two directives referred to in the order making the reference for a preliminary ruling as well as the social security directive together form a comprehensive code prohibiting discrimination in all aspects of employment.

She further repeats her submission that the fact that the benefits in question are granted to former employees does not prevent their forming part of "working conditions" referred to in Article 5 of the directive on equal treatment. In any event they are a present right vested in the employee during his period of employment, although only to be enjoyed after retirement.

Finally, the appellant considers that her previous submissions on the grant of the benefits in question to families apply "*a fortiori* when the relevant concept is 'working conditions' rather than 'pay'."

Therefore, should those travel benefits not be "pay" within the meaning of Article 119 of the EEC Treaty and the directive on equal pay, they are in any event "working conditions" within the meaning of the directive on equal treatment.

That directive also has "direct effect". The provisions of the directive are sufficiently clear and precise and leave the Member States no relevant margin of discretion in the performance of the obligations which it imposes. If the obligations are not complied with, then, as Mr Advocate General Capotorti said, "the way would be open for the enforcement, in the Community system, of personal rights of individuals on the basis of the directive itself" (opinion in Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365).

Although in the cases decided by the Court there has been no decision clearly establishing that "a directive may have direct effect to confer rights on an individual against another individual rather than against the government of a Member State", the appellant submits that there is no good reason why a directive should impose obligations only on the governments of Member States especially since the purpose of the directive was to ensure that the obligations as to equal treatment were imposed on both Member States and individuals. Furthermore, since the respondent is a wholly-owned subsidiary of a corporation created by statute for the purpose of operating the national railway service, it is to be regarded as an emanation of the national government.

The appellant appreciates that the period within which Member States were obliged to comply with the directive in question by adopting the provisions necessary for its implementation did not expire until August 1978, that is to say after the making of the application in this case. However, the discrimination complained of by the appellant is not merely a single act occurring before that date but a continuous act which will not "bite" until the date in the future when the appellant retires. Therefore, the Court should be prepared to consider the legal position at the material time rather than at the time of the application, if they are different.

B — Observations of the Commission

After quoting the definition of "pay" set out in the second paragraph of Article 119 of the EEC Treaty the *Commission* states that special travel facilities granted to employees represent benefits in kind paid to workers directly by the employer.

The Commission takes the view, first, that such benefits granted by an employer to his employees should properly be treated as being "in respect of" an employment. Secondly special travel facilities, which also benefit an employee's spouse and children, nevertheless represent consideration in kind which a worker receives directly from the employer in respect of his employment. Thirdly, the fact that the benefits continue to be enjoyed beyond the active working life of an employee and into retirement does not prevent him from receiving them in respect of his employment because they would hardly be "in respect of retirement". Consequently the Commission accepts that "the concept of equal pay extends to special travel facilities granted to spouses and dependent children of employees which continue into retirement".

Relying on the judgment of 8 April 1976 in Case 43/75 *Defrenne* [1976] ECR 455 the Commission submits that the concept of equal pay may "be taken advantage of before the national courts by employees *vis-à-vis* their employers on the basis of the direct effect of Article 119".

Finally, the Commission considers that if its arguments are correct it would follow that neither Directive 75/117 nor Directive 76/207 would find application in the case at hand.

The Commission accordingly suggests the following reply to the questions raised by the House of Lords:

"Special travel facilities enjoyed by the spouses and dependent children of employees which continue on the retirement of the employee constitute 'pay' within the meaning of the second paragraph of Article 119 of the EEC Treaty. In this connection Article 119 may be relied upon before the national courts."

C — Observations of the respondent in the main action

The *respondent in the main action* first of all submits that the special travel facilities in question do not constitute "pay" within the meaning of that expression as used in Article 119 of the EEC Treaty and Article 1 of Council Directive 75/117/EEC; consequently the alleged discrimination is not a contravention of either of those provisions. The respondent argues that such facilities are not "consideration in cash" or "other consideration in kind, which the worker receives in respect of his employment from his employer", first because they

are provided as a matter of concession by British Rail Engineering and not pursuant to any agreement between employer and worker and, secondly, because they are incapable of assessment in financial terms. *A fortiori* the receipt of such facilities by a retired employee shows that the provision of such facilities after retirement forms part of the provision which an employer makes voluntarily for the retirement of that employee; it forms no part of the "pay" which that employee earned during his working years.

The respondent also submits that the facilities in question do not constitute "working conditions" either, within the meaning of Article 1 of Council Directive 76/207.

According to the respondent it is not arguable that the provision of special travel facilities relates to matters of access to employment, promotion or vocational training. The argument must be that those facilities are part of the "working conditions" of an employee; that expression must be construed as indicating that the conditions in question must relate to the work being carried out by the employee at the material time. Viewed in this light the provision of free travel between an employee's place of work and his home is a "working condition". However, discrimination in relation to the provision of other travel facilities would not be discrimination in regard to an employee's "working conditions"; it would only be discrimination in regard to the facilities which the employer afforded to an employee outside his work. In any event, there cannot possibly be discrimination in regard to an employee's "working conditions" after that employee retires from work since there can be no "working conditions" if the employee is no longer working.

In view of the answers proposed to Questions 1 (a), (b) and (c), Question 2 does not arise, but even if those questions were answered in the affirmative, the respondent submits in the alternative that neither Article 119 nor either of the directives is directly applicable in Member States so as to confer enforceable Community rights upon individuals in the circumstances outlined in the order making the reference for a preliminary ruling.

In conclusion the respondent submits that the questions referred to the Court should be answered as follows:

"1. Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after retirement which discriminate against former female employees, such provision is not contrary to Article 119 of the EEC Treaty or Council Directive 75/117/EEC or 76/207/EEC.

2. In the circumstances, Question 2 does not arise."

D — Observations of the United Kingdom

As far as the nature of the facility in question is concerned, the *United Kingdom* states that it could be varied or stopped by British Rail Engineering at any time but emphasizes that in practice that would be difficult and would need to be discussed first with the trade unions concerned. It also points out that the facility is to the greater benefit of women than men since women retire five years before men.

The United Kingdom then goes on to examine successively the three provisions referred to in the questions of the House of Lords.

Article 119

That article signifies that men and women should receive equal pay for equal work. According to the United Kingdom the test of whether there is unlawful discrimination based on sex is whether the relationship between pay on the one hand and work or work's value on the other is different because of the worker's sex. The nature of the facility in question is such that neither its cost nor its value can be compared with the amount or value of the work done to earn it by male and female employees. It is true that the facility may be described as arising out of the worker's employment and that without that employment it would not have been granted, but "once the benefit cannot be related to the work, the principle of Article 119 cannot be invoked". Furthermore, and in any event, such a facility provided after a worker has retired is not within Article 119 at all. That article is meant to affect legal relationships only and is not intended to cover gratuitous gestures by the employer.

As regards the direct applicability of Article 119, the United Kingdom submits with reference to the judgment of 31 March 1981 in Case 96/80 *Jenkins* [1981] ECR 911 that even if free travel facilities after retirement are pay for the purpose of Article 119, the provisions of that article cannot be applied directly "without the aid of national or Community measures which resolve the questions of how to approach the differing retiring ages and life expectations which directly affect the cost of the benefit to the employer and its value to the employee".

Article 1 of Council Directive 75/117

Again with reference to the *Jenkins* judgment, cited above, the United Kingdom states that if the benefit in question is not pay for the purposes of Article 119 — which it had tried to demonstrate — Directive 75/117 "is irrelevant".

If on the other hand the benefit is pay for the purposes of Article 119 of the EEC Treaty a question might in theory arise as to the effect of the directive. The United Kingdom here reminds the Court that "it does not consider that directives can have the effect of imposing obligations upon individuals. Directives are addressed only to Member States and purport to impose obligations only upon those States". Furthermore Article 1 of Directive 75/117 contains no provisions which are capable of conferring rights or imposing obligations on individuals as the terms of the directive do not even refer to retirement benefits and afford no guidance as to how they should apply to such matters. It is plain that individuals may not rely upon directives "as having horizontal effect so as to create rights *inter se* which may be enforced as a matter of law".

Article 1 of Council Directive 76/207

In the submission of the Government of the United Kingdom this directive does not touch the lawfulness of the provision of free travel facilities after retirement

since, of the items referred to in Article 1 of the directive, the only one which could conceivably be relevant is social security but as matters of social security are excluded from the directive, the benefits in question do not come within the scope of that directive.

For the same reasons as those advanced in relation to Directive 75/117 the Government of the United Kingdom submits that Directive 76/207 does not have direct effect either, especially as Article 5 "plainly shows that detailed legislation is contemplated to give effect to the general principle with which the directive is concerned". What is more, since the time-limit in Article 9 (1) of that directive expired on 12 August 1978, that is to say after the proceedings in the present case were commenced, "no question of the application of this directive can in any event arise in the present proceedings".

Accordingly, in the view of the Government of the United Kingdom, the Court should answer the questions referred to it by the House of Lords as follows:

"1. Travel facilities voluntarily granted by an employer to employees after their retirement are not pay within the meaning of Article 119 of the EEC Treaty and, if they were, discrimination on the grounds of sex in the granting of such facilities would not give rise to rights enforceable by an individual against his employer or former employer.

2. Such facilities are not within the provisions of Article 1 of Council Directive 75/117/EEC or Article 1 of Council Directive 76/207/EEC and, if they were, those articles would not give rise to rights enforceable by an individual against his employer or former employer."

III — Oral procedure

At the hearing on 7 October 1981 the plaintiff in the main action, represented by C. Carr, Barrister, Lincoln's Inn; the defendant in the main action, represented by A. Scrivener, QC, Gray's Inn; the United Kingdom, represented by P. Scott QC, Middle Temple; and the Commission of the European Communities, represented by J. Forman, acting as Agent, presented oral argument and their answers to questions put by the Court.

The Advocate General delivered his opinion at the hearing on 8 December 1981.

Decision

1 By order dated 19 January 1981 which was received at the Court on 22 January 1981 the House of Lords referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions as to the interpret-

ation of Article 119 of the Treaty, Article 1 of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (Official Journal L 45, p. 19) and of Article 1 of 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 (Official Journal L 39, p. 40).

2 Those questions were raised in the context of a dispute between an employee of British Rail Engineering Limited, a subsidiary of the British Railways Board, which is a body created by the Transport Act 1962 charged with the duty of managing the railways in the United Kingdom, and her employer concerning discrimination alleged to be suffered by female employees who on retirement no longer continue to enjoy travel facilities for their spouses and dependent children although male employees continue to do so.

3 It was submitted before the House of Lords that that situation was contrary to Article 119 and the directives implementing it and the House of Lords therefore referred the following two questions to the Court:

"1. Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after retirement which discriminate against former female employees in the manner described above, is this contrary to:

(a) Article 119 of the EEC Treaty?

(b) Article 1 of Council Directive 75/117/EEC?

(c) Article 1 of Council Directive 76/207/EEC?

2. If the answer to Questions 1 (a), 1 (b) or 1 (c) is affirmative, is Article 119 or either of the said directives directly applicable in Member States so as to confer enforceable Community rights upon individuals in the above circumstances?"

Question 1

4 To assist in answering the first question it is first of all necessary to investigate the legal nature of the special travel facilities at issue in this case which the employer grants although not contractually bound to do so.

5 It is important to note in this regard that in paragraph 6 of its judgment of 25 May 1971 in Case 80/70 *Defrenne* [1971] ECR 445, at p. 451, the Court stated that the concept of pay contained in the second paragraph of Article 119 comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer.

6 According to the order making the reference for a preliminary ruling, when male employees of the respondent undertaking retire from their employment on reaching retirement age they continue to be granted special travel facilities for themselves, their wives and their dependent children.

7 A feature of those facilities is that they are granted in kind by the employer to the retired male employee or his dependants directly or indirectly in respect of his employment.

8 Moreover, it appears from a letter sent by the British Railways Board to the trade unions on 4 December 1975 that the special travel facilities granted after retirement must be considered to be an extension of the facilities granted during the period of employment.

9 It follows from those considerations that rail travel facilities such as those referred to by the House of Lords fulfil the criteria enabling them to be treated as pay within the meaning of Article 119 of the EEC Treaty.

10 The argument that the facilities are not related to a contractual obligation is immaterial. The legal nature of the facilities is not important for the purposes of the application of Article 119 provided that they are granted in respect of the employment.

11 It follows that where an employer (although not bound to do so by contract) provides special travel facilities for former male employees to enjoy after their retirement this constitutes discrimination within the meaning of Article 119 against former female employees who do not receive the same facilities.

12 In view of the interpretation given to Article 119 of the EEC Treaty, which by itself answers the question posed by the House of Lords, there is no need to consider points (b) and (c) of Question 1 which raise the same question with reference to Article 1 of Directive 75/117/EEC and of Directive 76/207/EEC.

Question 2

13 Since Question 1 (a) has been answered in the affirmative the question arises of the direct applicability of Article 119 in the Member States and of the rights which individuals may invoke on that basis before national courts.

14 In paragraph 17 of its judgment of 31 March 1981 in Case 96/80 *Jenkins* v *Kingsgate* [1981] ECR 911, at p. 926, the Court stated that Article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the article in question, without national or Community measures being required to define them with greater precision in order to permit of their application.

15 Where a national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish

that the grant of special transport facilities solely to retired male employees represents discrimination based on difference of sex, the provisions of Article 119 of the Treaty apply directly to such a situation.

Costs

16 The costs incurred by the Commission of the European Communities and the Government of the United Kingdom of Great Britain and Northern Ireland, which have submitted observations to the Court, are not recoverable. As this case is, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

hereby rules:

1. **Where an employer (although not bound to do so by contract) provides special travel facilities for former male employees to enjoy after their retirement this constitutes discrimination within the meaning of Article 119 against former female employees who do not receive the same facilities.**

2. **Where a national court is able, using the criteria of equal work and equal pay, without the operation of Community or national measures, to establish that the grant of special travel facilities solely to retired**

male employees represents discrimination based on difference of sex, the provisions of Article 119 of the Treaty apply directly to such a situation.

Bosco Touffait Due Pescatore Mackenzie Stuart
O'Keeffe Koopmans Chloros Grévisse

Delivered in open court in Luxembourg on 9 February 1982.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber,
Acting as President

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 8 DECEMBER 1981 [1]

Mr President,
Members of the Court,

The background to Case 12/81, now before the Court, is the understandable desire of Mrs Garland to be able to continue to enjoy the same travel facilities as retired male employees of her employer, British Rail Engineering Limited, after she attains pensionable age. The travel facilities for retired male employees are also available to their wives and dependent children. It appears from a letter of 4 December 1975 which was sent by the British Railways Board to the trade unions and is contained in the file on the case that since 1976 female employees have in this respect been treated in the same way as men during their employment. However, it appears from the same letter that after female employees retire facilities for the members of their families are withdrawn. Mrs Garland's dispute with her employer eventually reached the House of Lords. The House of Lords has put the following questions on the case to the Court:

"1. Where an employer provides (although not bound to do so by contract) special travel facilities for former employees to enjoy after

1 — Translated from the Dutch.