

OPINION OF ADVOCATE GENERAL
TESAURO

delivered on 27 January 1993 *

*Mr President,
Members of the Court,*

1. The House of Lords has referred to the Court of Justice for a preliminary ruling four questions on the interpretation of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. ¹

In particular, the national court wishes to establish whether the discrimination as between men and women deriving from the United Kingdom legislation regarding the grant of certain invalidity benefits is justified under Article 7(1)(a) of the directive in question, which allows the Member States to exclude from its scope *'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'*. ² The present case is specifically concerned with the scope of the derogation allowed by that provision with respect to 'other benefits', that is to say benefits other than old-age and retirement pensions.

2. The 'other benefits' at issue in this case are the severe disablement allowance ('SDA')

and the invalid care allowance ('ICA'). They are non-contributory benefits provided for by the Social Security Act 1975, as amended by the Health and Social Security Act 1984, which are payable, respectively, to people who are disabled and incapable of work (section 36) and to people engaged in caring for a severely disabled person (section 37).

Pursuant to section 36(4)(d) and section 37(5) of the Act, a person is not entitled to those benefits if he has attained pensionable age (which is fixed as 60 for women and 65 for men), unless he was so entitled immediately before he attained that age.

3. It was precisely on the basis of those provisions that Evelyn Thomas, Eleanor Morley, Joyce Beard, Frances Cooze and Sarah Murphy were refused the SDA and the ICA by the Adjudication Officer (whose decision was subsequently confirmed by the Social Security Appeals Tribunal). Even though they had had to leave their employment because they had become incapable of working (Thomas and Morley) or to enable them to look after severely disabled people (Beard, Cooze and Murphy), they had already reached pensionable age when they applied for the allowances but had not been entitled to them immediately before attaining that

* Original language: Italian.

1 — OJ 1979 L 6, p. 24.

2 — Emphasis added.

age. In fact, some of the women concerned had continued to work after attaining pensionable age and then stopped work because of supervening invalidity affecting them (Mrs Thomas and Mrs Morley) or another person (Mrs Beard) Mrs Cooze and Mrs Murphy had already stopped working before attaining the age of 60, but had done so specifically in order to enable them to assist their invalid husbands, whose entitlement to invalidity allowances had nevertheless been recognized after the dates on which they attained pensionable age.

With the exception of that lodged by Mrs Morley, which was dismissed, the appeals lodged by the other plaintiffs against the refusal to grant them the SDA or the ICA were upheld by the competent Social Security Commissioner. The Court of Appeal then dismissed the appeals brought by the Secretary of State for Social Security in the cases of Mrs Thomas, Mrs Cooze, Mrs Beard and Mrs Murphy and upheld the appeal brought by Mrs Morley.

4. The Secretary of State for Social Security brought an appeal against the judgment of the Court of Appeal before the House of Lords and the latter referred to the Court of Justice for a preliminary ruling four questions which may be summarized as follows:

(a) What kind of link must there be between a social security benefit and a difference of pensionable ages for a discriminatory measure to fall within the scope of Article 7(1)(a) of the directive?

(b) Must the principle of proportionality be applied, and if so on the basis of what criteria, in determining whether (discriminatory) entitlement to a social security benefit is the consequence of a difference of pensionable ages?

(c) May a Member State rely on statistical data to justify differences of treatment as between men and women or invoke the derogation in question even where a woman is able to show that, despite having reached pensionable age, she is not in receipt of any pension?

(d) Does Directive 79/7 require a Member State that has maintained different pensionable ages to apply a single age-limit (the higher) for the purposes of granting invalidity benefits?

5. By the first question, a ruling is sought from the Court on the scope of the derogation provided for in Article 7(1)(a), with reference to the expression 'the possible consequences thereof for other benefits'. In particular, the national court asks whether that term embraces (a) the provisions necessary to enable the schemes for 'other benefits' to operate consistently with the schemes for old-age and retirement pensions, without giving rise to illogical, unfair or absurd situations; (b) those provisions which the State, in the exercise of its discretion and in observance of the principle of proportionality, has

linked to the provisions in old-age and retirement schemes; or, finally, some other provisions.

Let me say at the outset that it is common ground that the persons concerned are covered by the directive *ratione personae*, that the statutory schemes at issue fall within the scope of the directive *ratione materiae* and that the provisions which preclude the grant of the benefits at issue to women who have already attained pensionable age are discriminatory. In order to establish whether the fact that women may not apply for or obtain the SDA or the ICA after the age of 60 whilst men may do so up to the age of 65, is a consequence of the different pensionable ages, it is therefore necessary, in the first place, to consider what causal connection should exist between a social security benefit and the difference of pensionable ages, that is to say the link on the basis of which the discriminatory provision may be regarded, in relation to the benefit in question, as resulting from the difference of pensionable ages within the meaning and for the purposes of Article 7(1)(a) of the directive.

6. The parties agree that there must be a link between the difference of pensionable ages and the other (discriminatory) social security benefits which derive from it; they differ, however, regarding the scope of that causal connection.

The defendants and the Commission maintain that the derogation in question cannot be interpreted in a broad and subjective manner but must extend only to those

consequences which are objectively and necessarily linked with the difference of pensionable ages. If that were not the case, the Member States might well unilaterally link the pensionable age with entitlement to a social security benefit of another kind, with the result that they would be empowered to extend discrimination on grounds of sex.

The United Kingdom, on the other hand, contends that a Member State is free to link the grant of a social security benefit to a difference of pensionable age, provided that it does so within reasonable limits and in observance of the principle of proportionality. Starting from the premise that so long as there are different pensionable ages it will not be possible to guarantee absolute equality of treatment as between men and women with regard to certain other social security benefits but there will always be discrimination or in any event anomalies, the United Kingdom contends that a Member State is free to choose from the various possibilities the one that it considers most appropriate and apt to achieve the objectives which its social security system seeks to achieve. The United Kingdom therefore shows, on the basis of a number of examples, that there would still be discrimination between men and women even if a common age-limit were adopted for entitlement to the benefits in question³ and adds that it is impossible

3 — In particular, the United Kingdom draws attention to the discrimination that would arise in respect of the credits granted to the recipients of the benefits in question to enable them to contribute to the State pension and to the fact that the introduction of a higher age limit would give rise to anomalies in that non-contributory benefits such as the ones at issue would be granted on more advantageous terms than contributory benefits.

unequivocally to define what is meant by necessary consequence. From the foregoing considerations, it infers that it is the very impossibility of finding solutions capable of totally eliminating discrimination that constitutes the link between the difference of pensionable ages and the invalidity benefits in question.

7. That said, I should point out that the Court has repeatedly held that the elimination of discrimination based on sex forms part of the fundamental rights the observance of which it has the duty to ensure,⁴ and it also stated that 'in determining the scope of any derogation from an individual right such as the equal treatment of men and women provided for by the directive, the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view ...'.⁵ It follows, as the Court itself made clear, that the exception in Article 7(1)(a) must be interpreted strictly.⁶

8. More recently, the Court gave a ruling on the point at issue here in its judgment of 7 July 1992 in Case 9/91,⁷ which was concerned with discrimination against men

arising from the fact that they pay contributions for a longer period than women for a pension of the same amount — precisely because of the difference of pensionable age. In that judgment the Court held that discrimination regarding contribution periods falls within the scope of the derogation provided for in Article 7(1)(a) only 'if ... found to be *necessary* in order to achieve the objectives which the directive is intended to pursue by allowing Member States to retain a different pensionable age for men and women' (paragraph 13).

After stating that the Member States are under an obligation periodically to examine matters excluded under paragraph 1 (Article 7(2) and to inform the Commission of their reasons for maintaining any existing provisions (Article 8(2)), the Court considered the aim pursued by the directive through the inclusion of the derogation in question. It stated that although the preamble to the directive does not state the reasons for the derogations which it lays down, it can be deduced from the nature of the exception contained in Article 7(1) of the directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to pensions in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored (paragraph 15).

4 — See the judgment in Case 149/77 *Defrenne v Sabena* [1978] ECR 1365, paragraphs 26 and 27.

5 — Judgment in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38.

6 — See the judgments in Case 152/84 *Marshall v Southampton and South-West Hampshire Health Authority (Teaching)* [1986] ECR 723, paragraph 36, and Case 262/84 *Beets-Propser v Van Lanschot Bankiers* [1986] ECR 773, paragraph 38.

7 — Case 9/91 *The Equal Opportunities Commission* [1992] ECR I-4297.

9. The Court's dicta just referred to obviously concern not the consequences arising for other benefits from a difference of pensionable ages but rather the discrimination relating to the obligation to pay pension contributions and the calculation of them. It is also clear, however, that *since the purpose of the derogation contained in Article 7(1)(a) is to authorize the temporary maintenance of the advantages accorded to women with respect to pensions in order to enable the Member States progressively to make an adjustment* (culminating in the determination of a single pensionable age for both men and women), any other discrimination concerning social security benefits is a consequence of the difference of pensionable age and therefore falls within the scope of the above-mentioned derogation (on the same basis as that indicated by the Court regarding discrimination in respect of contribution periods) only if and to the extent to which it is necessary to allow the Member States to maintain different pensionable ages temporarily without significantly affecting the complex balance of the social security system, from the financial point of view in particular (as in the case of pension contributions), or the consistency of the system as a whole.

10. Let us consider the benefits at issue in this case. As has already been said, the SDA and the ICA are non-contributory benefits, the grant of which is thus not based on contributions paid and which, therefore, from that point of view, have no impact on the financial mechanisms set up for the purpose. More generally, I must say that the view that the link between the difference of

pensionable ages and the benefits in question is necessary to preserve the financial equilibrium of the entire social security system seems to me to be untenable.

And indeed, the statements made by the United Kingdom concerning the important financial consequences of, for example, fixing a common age-limit for men and women (65 years) are undermined by the fact that, under the Social Security (Overlapping Benefits) Regulations 1979, the amount of an invalidity benefit taking the place of income is liable to be reduced by the amount of the old-age pension. It is nevertheless true that, by contrast with old-age pensions, invalidity benefits are not taxable; but the impact of this affects not so much the financial equilibrium of the pension system as the fact that the benefits in question received by women aged between 60 and 65 will be partially taxed, which is not the case for men in the same age bracket.

The United Kingdom also asserted that there would be an increased financial burden since people who would not normally be entitled to a pension might be entitled to one of the invalidity benefits at issue in this case. In that regard, two remarks will, I think, suffice. The first is that it should not be forgotten that those people are covered by Directive 79/7. The second is that whilst it is indeed possible that some people who have not paid

sufficient contributions for entitlement to a pension may, on the other hand, obtain one of the benefits in question, it is also true, as the Commission stated without being challenged by the United Kingdom, that in such circumstances the people in question will not benefit from income support, which is granted, under the national legislation, to people who have insufficient resources to support themselves.

11. Nor does it seem to me to be reasonably arguable that the grant of the benefits in question to women who have already passed pensionable age is liable to prejudice the consistency of the social security system. In particular, the fact — mentioned by the United Kingdom — that the benefits in question are granted to replace lost income following the materialization of a risk covered by them is not decisive, particularly since the fact that women acquire the right to a pension before men does not imply, as far as Community law is concerned, that they can be compelled to stop work before men. In other words, the determination of a different pensionable age cannot result in women being prevented from working for as long as men.⁸ And it appears that the United Kingdom system actually allows retention of regular employment and deferral of the pension date for a maximum of five years after the attainment of pensionable age (section

27(5) of the Social Security Act 1975 provides in fact that a person is automatically deemed to retire five years after attaining pensionable age). It should be added that, according to information made available in the course of the procedure, almost 20% of women continue to work after attaining pensionable age.

And this is precisely the situation in which some of the women in the main proceedings find themselves: they continued working after reaching 60 years of age and it was only after that age that their invalidity or the need for them to care for a disabled person arose. Admittedly, the number of cases is small, since as a rule women cease working when they reach pensionable age, but nevertheless the situation that they represent is a reality that cannot be ignored. It is not therefore correct to treat all women as if they stop working as soon as they reach pensionable age, thus specifically penalizing those women whose continue to work after the age of 60. Nor does it seem to me to be proper to deny the benefits in question to women who, although having reached pensionable age, are not yet in receipt of a pension and have not yet requested one (as in the case of Mrs Cooze and Mrs Murphy).

12. In the light of the foregoing considerations, I am of the opinion that the discrimination arising from the United Kingdom provisions on invalidity benefits could be regarded as a consequence of the difference of pensionable ages within the meaning of Article 7(1)(a) of the directive only if it were

⁸ — In that connection, see the judgment in Case 163/82 *Commission v Italy* [1983] ECR 3273 in which the Court stated that a domestic provision under which female workers, although fulfilling the requirements for entitlement to an old-age pension, may choose to continue to work until they reach the same age as that laid down as the limit for men, is to be regarded as one of the 'most important working conditions' (see also the Opinion of Advocate General Sir Gordon Slynn in *Marshall*, above, [1986] ECR 725, in particular at page 730).

necessary to guarantee the consistency and financial equilibrium of the pension system, a requirement that does not appear to be satisfied in the present case. In any event it is for the national court to establish, in the light of the information produced, whether that condition is satisfied.

13. It seems to me that the solution at which we have thus arrived with respect to the first question makes it unnecessary to give a specific answer to the other three questions and I shall therefore advert to them only briefly.

14. The second question put to the Court is whether, and if so according to what criteria, the principle of proportionality must be applied to a case such as the present one. Whilst it is true that in the *Johnston* judgment cited earlier the Court stated that 'in determining the scope of any derogation from an individual right such as the equal treatment of men and women ... the principle of proportionality ... must be observed', it is also true, as shown by the foregoing considerations, that that principle is not important in itself for the purpose of determining what consequences are objectively linked with the difference of pensionable age.⁹ It is therefore unnecessary to give an answer to the second question.

15. As regards the third question, which concerns the importance of statistical data, suffice it to observe here that, as is apparent from what I have already said in reply to the

first question, since the right to equal treatment is an individual right it is not possible to adopt a generalized approach in disregard of the fact that many women continue to work after pensionable age. More generally, it must then be observed that, as is apparent from the case-law of the Court¹⁰ regarding equal treatment, discrimination against one sex or the other cannot be justified on the basis of statistics. It follows that, in principle, reliance on the derogation provided for in Article 7(1)(a) of the directive cannot be based exclusively on the conduct of the majority of the members of a given group.

16. Finally, in its last question the House of Lords asks whether, where national law lays down different pensionable ages for men and women, Directive 79/7 requires a Member State to apply the upper age-limit laid down as the pensionable age (in this case, 65 years) for the purposes of invalidity benefits. Let me merely say that, having regard to the aim of the directive, in particular Article 4 thereof, what is important is that women should be treated in the same way as men whose circumstances are the same.¹¹

9 — On this point, see the Opinion of Advocate General Van Gerven in Case 9/91, above.

10 — See in particular the judgment in Case C-184/89 *Nimz* [1991] I-297, paragraph 14, and Case C-229/89 *Commission v Belgium* [1991] ECR I-2205.

11 — In that connection, it is noteworthy that the Court has consistently held that the group discriminated against must, pending legislative intervention, be treated in the same way and be subject to the same scheme as the other group whose circumstances are the same — see *inter alia* the judgment in Case C-377/89 *Cotter and McDermott*, paragraph 18.

Accordingly, the grant of the invalidity benefits in question to everyone under 65 (common age) could, where the other conditions are fulfilled, be conditional upon the persons concerned not receiving or not yet having applied for an old-age pension. The United Kingdom's preoccupation that the grant of such benefits would thus be based on a pretence, since it cannot be proved that the woman in question would have continued

working if invalidity had not supervened, seems to me to have no basis. On the contrary, the pretence lies rather in the fact of treating as a 'pensioner' a woman who is not in receipt of any pension and has in fact continued working after reaching 60, subsequently ceasing to work because of invalidity affecting her or another person whom she looks after.

17. In the light of the foregoing considerations, I suggest that the Court reply as follows to the questions referred to it by the House of Lords:

- (1) Article 7(1)(a) of Directive 79/7/EEC is to be interpreted as meaning that, where a Member State lays down different pensionable ages for men and women for the purposes of granting old-age or retirement pensions, only such discrimination in relation to other social security benefits as is necessarily and objectively linked with the difference of pensionable age is permissible.
- (2) Article 7(1)(a) of Directive 79/7/EEC does not authorize a Member State to rely only upon statistical data concerning the working population in order to justify differences of treatment between men and women regarding benefits other than old-age and retirement pensions.
- (3) Directive 79/7/EEC requires the Member States to treat in the same way people of different sexes who are in the same situation and therefore, where appropriate, to apply the same age-limit for the grant of invalidity benefits.