

JUDGMENT OF THE COURT

26 October 1999 *

In Case C-273/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Industrial Tribunal, Bury St Edmunds, United Kingdom, for a preliminary ruling in the proceedings pending before that tribunal between

Angela Maria Sirdar

and

The Army Board,

Secretary of State for Defence,

on the interpretation of the EC Treaty, in particular Article 224 thereof (now Article 297 EC), and 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 (OJ 1976 L 39, p. 40), in particular Article 2 thereof,

* Language of the case: English.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mrs Sirdar, by P. Duffy QC and D. Rose, Barrister, instructed by H. Slater, Solicitor, The Equal Opportunities Commission,
- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, R. Plender QC, S. Richards, Barrister, and R. McManus, Barrister,
- the French Government, by K. Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and A. de Bourgoing, Head of Mission in that directorate, acting as Agents,
- the Portuguese Government, by L. Fernandes, Director of the Legal Service in the Directorate-General for European Community Affairs in the Ministry of Foreign Affairs, and Â. Seiça Neves, a member of that service, acting as Agents,
- the Commission of the European Communities, by P.J. Kuijper and M. Wolfcarius, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Sirdar, represented by P. Duffy and D. Rose; of the United Kingdom Government, represented by J.E. Collins, R. Cranston QC, and R. Plender; of the French Government, represented by A. de Bourgoing; and of the Commission, represented by P.J. Kuijper, at the hearing on 27 October 1998,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1999,

gives the following

Judgment

- 1 By decision of 28 April 1997, received at the Court on 29 July 1997, the Industrial Tribunal, Bury St Edmunds, referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) six questions on the interpretation of that Treaty, in particular Article 224 thereof (now Article 297 EC), and 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 (OJ 1976 L 39, p. 40) (hereinafter 'the Directive'), in particular Article 2 thereof.
- 2 Those questions have arisen in a dispute between Mrs Sirdar, on the one hand, and the Army Board and the Secretary of State for Defence, on the other, concerning the refusal to employ Mrs Sirdar as a chef in the Royal Marines.

Legal framework

3 Article 224 of the Treaty provides as follows:

‘Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.’

4 Article 2(1) and (2) of the Directive provides as follows:

‘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.

2. This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.’

5 Article 9(2) of the Directive provides that ‘Member States shall periodically assess the occupational activities referred to in Article 2(2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.’

The main proceedings

- 6 In the United Kingdom, application of the principle of equal treatment for men and women is governed by the provisions of the Sex Discrimination Act 1975. Section 85(4) of that Act provides: ‘Nothing in this Act shall render unlawful an act done for the purpose of ensuring the combat effectiveness of the naval, military or air forces’.

- 7 According to the decision referring the case, the responsible authorities in the Royal Marines have a policy of excluding women from service on the ground that their presence is incompatible with the requirement of ‘interoperability’, that is to say, the need for every Marine, irrespective of his specialisation, to be capable of fighting in a commando unit. This policy was set out in a report of 10 June 1994 entitled ‘Revised Employment Policy for Women in the Army — Effect on the Royal Marines’. Paragraph 2(b) of that report, which is cited in paragraph 42 of the referring decision, states in particular that: ‘In a small corps, in times of crisis and manpower shortage, all Royal Marines must be capable at any time of serving at their rank and skill level in a commando unit Employment of women in the Royal Marines will not allow for interoperability.’

- 8 Mrs Sirdar had been in the British Army since 1983 and had served as a chef since 1990 in a commando regiment of the Royal Artillery, when she was informed, in February 1994, that she was to be made redundant for economic reasons with effect from February 1995. This redundancy, which was the result of a study conducted into defence costs, affected a total of more than 500 chefs.

- 9 In July 1994 Mrs Sirdar received an offer of transfer to the Royal Marines, who had a shortage of chefs, in a letter which specified that, in order to transfer, she would be required to pass an initial selection board and follow a commando training course. However, when the responsible authorities in the Royal Marines

became aware that she was a woman and realised that the offer had been made to her in error, they informed Mrs Sirdar that she was ineligible by reason of the policy of excluding women from that regiment.

10 After she had been made redundant, Mrs Sirdar brought the matter before the Industrial Tribunal, Bury St Edmunds, arguing that she had been the victim of discrimination based on sex. Since it formed the view that resolution of the dispute required an interpretation of the provisions of the Treaty and the Directive, the Industrial Tribunal decided to refer the following questions to the Court for a preliminary ruling:

- ‘1. Are policy decisions which a Member State takes during peace time and/or in preparation for war in relation to access to employment in, vocational training for, working conditions in, or the deployment of its armed forces where such policy decisions are taken for the purposes of combat effectiveness outside the scope of the EC Treaty and/or its subordinate legislation, in particular Council Directive 76/207/EEC?

2. Are the decisions which a Member State may take in preparation for war and during peace time with regard to the engagement, training and deployment of soldiers in marine commando units of its armed forces designed for close engagement with enemy forces in the event of war outside the scope of the EC Treaty or its subordinate legislation where such decisions are taken for the purpose of ensuring combat effectiveness in such units?

3. Does Article 224 of the EC Treaty, on its proper construction, permit Member States to exclude from the ambit of Council Directive 76/207/EEC discrimination on grounds of sex in relation to access to employment, vocational training [and] working conditions, including the conditions governing dismissal, in the armed forces during peace time and/or in preparation for war for the purpose of ensuring combat effectiveness?

4. Is the policy adopted by a Member State of excluding all women during peace time and/or in preparation for war from service as interoperable marines capable of being excluded from the ambit of Council Directive 76/207/EEC by virtue of the operation of Article 224? If so, what guidelines or criteria should be applied in order to determine whether the said policy may properly be so excluded from the ambit of Directive 76/207/EEC by reason of Article 224?

5. Is the policy adopted by a Member State of excluding all women during peace time and/or in preparation for war from service as interoperable marines capable of being justified under Article 2(2) of Council Directive 76/207/EEC?

6. If so, what is the test to be applied by a national tribunal when considering whether or not the application of the policy is justified?

The first and second questions

- 11 By its first two questions, the national tribunal is asking whether decisions taken by Member States with regard to access to employment, vocational training and working conditions in the armed forces for the purpose of ensuring combat effectiveness, particularly with regard to marine commando units, fall outside the scope of Community law.

- 12 Mrs Sirdar submits that the Court's answer should be in the negative. She argues that there is no provision which specifically excludes the armed forces from the

scope of the Treaty and that no such general exclusion can be inferred from the specific derogations provided for different reasons by the Treaty or the Directive.

- 13 The French, Portuguese and United Kingdom Governments submit, on the contrary, that decisions concerning the organisation and administration of the armed forces, particularly those taken for the purpose of ensuring combat effectiveness in preparation for war, fall outside the scope of the Treaty. Those Governments rely primarily on general considerations derived from the objectives of the Treaty or on specific provisions thereof, such as Article 48(4) (now, after amendment, Article 39(4) EC) and Article 224.
- 14 The Commission takes the view that decisions relating to the organisation and administration of the armed forces are not excluded from the scope of the Treaty but may come within the derogation set out in Article 224 thereof.
- 15 It is for the Member States, which have to adopt appropriate measures to ensure their internal and external security, to take decisions on the organisation of their armed forces. It does not follow, however, that such decisions must fall entirely outside the scope of Community law.
- 16 As the Court has already held, the only articles in which the Treaty provides for derogations applicable in situations which may affect public security are Articles 36, 48, 56, 223 (now, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and 224, which deal with exceptional and clearly defined cases. It is not possible to infer from those articles that there is inherent in the Treaty a general exception covering all measures taken for reasons of public security. To recognise the existence of such an exception, regardless of the specific requirements laid down by the Treaty, might impair the binding nature of Community law and its uniform application (see, to that effect, Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 26).

- 17 The concept of public security, within the meaning of the Treaty articles cited in the preceding paragraph, covers both a Member State's internal security, as in the main proceedings in *Johnston*, and its external security (in this connection, see Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 22, and Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 26).
- 18 Furthermore, some of the derogations provided for by the Treaty concern only the rules relating to the free movement of goods, persons and services, and not the social provisions of the Treaty, of which the principle of equal treatment of men and women on which Mrs Sirdar relies forms part. In accordance with settled case-law, this principle is of general application and the Directive applies to employment in the public service (Case 248/83 *Commission v Germany* [1985] ECR 1459, paragraph 16, and Case C-1/95 *Gerster v Freistaat Bayern* [1997] ECR I-5253, paragraph 18).
- 19 It follows that application of the principle of equal treatment for men and women is not subject to any general reservation as regards measures for the organisation of the armed forces taken on grounds of the protection of public security, apart from the possible application of Article 224 of the Treaty, which concerns a wholly exceptional situation and is the subject-matter of the third and fourth questions (*Johnston*, paragraph 27).
- 20 The answer to the first and second questions must therefore be that decisions taken by Member States in regard to access to employment, vocational training and working conditions in the armed forces for the purpose of ensuring combat effectiveness do not fall altogether outside the scope of Community law.

The fifth and sixth questions

- 21 By these questions, which should be examined before the third and fourth questions, the national tribunal asks whether, and if so under what conditions, the exclusion of women from service in combat units such as the Royal Marines may be justified under Article 2(2) of the Directive.
- 22 Mrs Sirdar and the Commission, as well as, by way of alternative argument, the Governments which have submitted observations, take the view that the justification provided for such an exclusion must be assessed by reference to the criteria which the Court set out in *Johnston*, ensuring in particular compliance with the principle of proportionality. The United Kingdom Government, however, takes the view that judicial review in this area is necessarily limited and must confine itself to the question of whether the national authorities could reasonably have formed the view that the policy in issue was necessary and appropriate.
- 23 Under Article 2(2) of the Directive, Member States have the option of excluding from the scope of that directive occupational activities for which, by reason of their nature or the context in which they are carried out, sex constitutes a determining factor; it must be noted, however, that, as a derogation from an individual right laid down in the Directive, that provision must be interpreted strictly (*Johnston*, paragraph 36).
- 24 The Court has thus recognised, for example, that sex may be a determining factor for posts such as those of prison warders and head prison warders (Case 318/86 *Commission v France* [1988] ECR 3559, paragraphs 11 to 18), or for certain activities such as policing activities where there are serious internal disturbances (*Johnston*, paragraph 37).

- 25 A Member State may restrict such activities and the relevant professional training to men or to women, as appropriate. In such a case, as is clear from Article 9(2) of the Directive, Member States have a duty to assess periodically the activities concerned in order to decide whether, in the light of social developments, the derogation from the general scheme of the Directive may still be maintained (*Johnston*, paragraph 37).
- 26 In determining the scope of any derogation from an individual right such as the equal treatment of men and women, the principle of proportionality, one of the general principles of Community law, must also be observed, as the Court pointed out in paragraph 38 of *Johnston*. That principle requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public security which determine the context in which the activities in question are to be performed.
- 27 However, depending on the circumstances, national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State (*Leifer*, paragraph 35).
- 28 The question is therefore whether, in the circumstances of the present case, the measures taken by the national authorities, in the exercise of the discretion which they are recognised to enjoy, do in fact have the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim.
- 29 As pointed out in paragraph 7 of this judgment, the reason given for refusing to employ the applicant in the main proceedings as a chef with the Royal Marines is the total exclusion of women from that unit by reason of the ‘interoperability’ rule established for the purpose of ensuring combat effectiveness.

30 It is clear from the documents in the case that, according to the findings already made by the national court, the organisation of the Royal Marines differs fundamentally from that of other units in the British armed forces, of which they are the 'point of the arrow head'. They are a small force and are intended to be the first line of attack. It has been established that, within this corps, chefs are indeed also required to serve as front-line commandos, that all members of the corps are engaged and trained for that purpose, and that there are no exceptions to this rule at the time of recruitment.

31 In such circumstances, the competent authorities were entitled, in the exercise of their discretion as to whether to maintain the exclusion in question in the light of social developments, and without abusing the principle of proportionality, to come to the view that the specific conditions for deployment of the assault units of which the Royal Marines are composed, and in particular the rule of interoperability to which they are subject, justified their composition remaining exclusively male.

32 The answer to the fifth and sixth questions must therefore be that the exclusion of women from service in special combat units such as the Royal Marines may be justified under Article 2(2) of the Directive by reason of the nature of the activities in question and the context in which they are carried out.

The third and fourth questions

33 In view of the answer to the fifth and sixth questions, it is unnecessary to reply to the third and fourth questions.

Costs

- 34 The costs incurred by the United Kingdom, French and Portuguese Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Industrial Tribunal, Bury St Edmunds, by decision of 28 April 1997, hereby rules:

1. **Decisions taken by Member States in regard to access to employment, vocational training and working conditions in the armed forces for the purpose of ensuring combat effectiveness do not fall altogether outside the scope of Community law.**
2. **The exclusion of women from service in special combat units such as the Royal Marines may be justified under Article 2(2) 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, by reason of the nature of the activities in question and the context in which they are carried out.

	Rodríguez Iglesias	Moitinho de Almeida	
Edward	Schintgen	Kapteyn	Puissochet
Hirsch	Jann	Ragnemalm	

Delivered in open court in Luxembourg on 26 October 1999.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President