2. Dismisses the application in all other respects;

3. Orders each of the parties to bear its own costs.

Mertens de Wilmars Koopmans Bahlmann Galmot

Mackenzie Stuart O'Keeffe Bosco Due Everling

Delivered in open court in Luxembourg on 8 November 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 7 JUNE 1983 [1]

Mr President,
Members of the Court,

In Case 165/82, an action brought against the United Kingdom, the Commission maintains that the incorrect implementation of Directive 76/207 is fourfold:

1. Contrary to the obligations laid down by the directive, the United Kingdom legislation does not ensure that provisions contrary to the principle of equal treatment which are contained in collective agreements, on the one hand, and in the internal rules of undertakings or the rules governing the independent occupations and professions, on the other hand, are null and void (at law) or may be declared null and void or may be amended (by the courts).

2 and 3. By reason of an erroneous interpretation of the exception provided for in Article 2 (2) of the directive, section 6 (3) of the Sex Discrimination Act (hereinafter referred to as "the Act") excludes from its field of application employment for the purposes of a private household and cases where five or fewer people are employed.

4. By granting to persons of the male sex only very limited access to training for the occupation of midwife and to the occupation itself the United Kingdom is also interpreting Article 2 (2) of the directive in an excessively restrictive manner.

I shall examine each of these complaints.

1 — Translated from the French.

I — 1. By virtue of Articles 3 (2) (b), 4 (b) and 5 (2) (b) of the directive, Member States must take the measures necessary to ensure that any provisions contrary to the principle of equal treatment regarding access to employment (Article 3), access to the various types of vocational training (Article 4) and working conditions (Article 5) are null and void or may be amended. It is of scant importance whether such provisions are contained in individual employment contracts, collective agreements, the internal rules of undertakings or the rules governing the independent occupations and professions.

According to the Commission, the legislation in force in the United Kingdom conforms to those requirements only as far as individual employment contracts are concerned. Section 77 (1) of the Act provides that:

"A term of a contract is void where

(a) its inclusion renders making of the contract unlawful by virtue of [the] Act, or

(b) it is included in furtherance of an act rendered unlawful by [the] Act, or

(c) it provides for the doing of an act which would be rendered unlawful by [the] Act."

However, no legal provision of the same type exists with regard to collective agreements, the internal rules of undertakings or the rules governing the independent occupations and professions. Therefore, in the Commission's view, the clear and unequivocal obligation imposed upon Member States by the above-mentioned articles of the directive is not fulfilled.

2. The United Kingdom does not share that opinion. Its view is that it is unnecessary to adopt a rule similar to section 77 (1) of the Act for collective agreements, the internal rules of undertakings and the rules governing the independent occupations and professions. It considers that to do so would in no way help to ensure attainment of the purpose of Articles 3, 4 and 5 of the directive, namely implementation of the principle of equal treatment in the areas referred to therein.

(a) I shall first consider collective agreements.

In the United Kingdom's view, the existing rules on collective agreements adequately ensure implementation of the directive.

The United Kingdom states in the first place that since the entry into force of the Trade Union and Labour Relations Act 1974, it is not customary for collective agreements to be legally binding and that it is not aware of there being any legally binding collective agreements now in force in the United Kingdom.

It goes on to say that by virtue of section 3 of the Equal Pay Act 1970, collective agreements may be submitted to the Central Arbitration Committee whose task it is to declare what amendments it considers to be necessary in order to remove discrimination in terms and conditions of employment between men and women. The effect of the declarations made by the Committee is in fact that whenever a discriminatory provision is included in an individual employment contract that contract is amended as a result.

The United Kingdom consistently adheres to the view that the directive does not require the annulment or the possibility of annulment or amendment

of documents such as collective agreements which have no legal effect. To impose such a requirement would be rather like "beating the air".

Finally, it particularly emphasizes the fact that if a collective agreement were legally binding — an extremely unlikely eventuality — and if one of its provisions were contrary to the principle of equal treatment, that provision would be void by virtue of section 77 of the Act. The same applies to provisions of a collective agreement which are contrary to the principle of equal treatment and are incorporated in individual contracts.

(b) As regards the provisions of internal rules and rules governing the independent occupations and professions, the United Kingdom's defence is substantially the same as in the case of collective agreements. By virtue of section 77 (1) discriminatory provisions contained in such documents are null and void in those cases where they have binding force or where they are reproduced in individual employment contracts. However, the defendant also refers to other sections of the Act which assist in combating discrimination. In a case of discrimination regarding employment as a result of the inclusion of a discriminatory provision in the internal rules of an undertaking or in the rules of a body governing an occupation or profession, that discrimination would be caught by section 6 of the Act. Moreover, if an undertaking whose business object was to find employment offered work, by virtue of its internal rules, only to persons of one sex, that would be prohibited by section 15 of the Act. Furthermore, if the provision contrary to the principle of equal treatment related to authorization or qualification for a particular profession or trade, it would be prohibited by section 13 (1) of the Act.

Consequently, the United Kingdom considers that in that case too it is unnecessary to adopt other legislative measures in order to apply the principle of equal treatment to undertakings and the independent occupations and professions, since its present legislation, which comes into operation at the point at which the person discriminated against is prejudiced, already ensures observance of that principle.

3. The Commission is not satisfied with those arguments. It refers to the clear terms of the relevant provisions of the directive by virtue of which the Member States are to take the necessary measures to ensure that provisions contrary to the principle of equal treatment appearing in collective agreements, internal rules of undertakings and rules governing the independent occupations and professions are, or may be declared to be, null and void or may be amended. No rule of law applicable in the United Kingdom makes the fulfilment of that obligation possible. In the Commission's opinion, there is a fundamental difference between a legal situation created by the annulment or amendment of a discriminatory provision, which causes that provision to cease to exist, and the situation at issue, where a provision continues to exist even if, at law, it is unenforceable. The Commission also points out that before 1974 collective agreements were in themselves legally binding and that there is no reason for considering that the same may not apply in the future.

4. In my opinion in this purely legal debate, the Commission's position appears to be more sound, in particular

by reason of the requirements of clarity and legal certainty to which the decisions of the Court attach great importance in cases where a State is charged with failing to fulfil its obligations. It is true that to date the case-law has related to administrative practices which, the Court has held, "cannot ... be regarded as a proper fulfilment of the obligation imposed on Member States to which a directive is addressed by virtue of Article 189 of the Treaty", since those practices "by their nature can be changed as and when the authorities please and ... are not publicized widely enough".[1] But it seems to me that because of the general nature of its terms, the following sentence, taken from the judgment of the Court of 1 March 1983 in Case 300/81, also applies to this case: "It is important ... for each Member State to implement the directive in question in a manner which fully satisfies the requirements of clarity and legal certainty which the directive is intended to achieve in the interests", in this case, of women and men regarding access to employment, training, advancement and working conditions.[2] The terms of Articles 3, 4 and 5 of the directive at issue in this case seem to me to leave Member States no greater margin of discretion regarding the implementation thereof than those of the directive on credit establishments at issue in Case 300/81.

Moreover, a situation in which possibly discriminatory provisions continue to exist in documents such as collective agreements, the internal rules of undertakings and the rules governing the independent occupations and professions is just as ambiguous — above all for workers who in most cases have no legal training — as the situation created by the implementation of a directive merely by means of administrative practices. It should also be noted that workers have easier access to collective agreements, the internal rules of undertakings and the rules governing the independent occupations and professions than to Directive 76/207 or to the United Kingdom laws depriving those documents, in general, of legally binding force. Thus, workers may believe that because their contracts of employment reproduce possibly discriminatory provisions from the types of document referred to they are legal and may not be challenged at law and the workers may therefore be deprived of the advantages of a directive which was in fact adopted for their benefit. In order to avoid such risks of confusion, the best course is to make it possible for such discriminatory provisions to be removed from those documents, as required by the directive.

That course of action is greatly facilitated by the fact that it has already been followed with regard to one of the areas covered by the directive, namely that of working conditions. As has been seen, section 3 of the Equal Pay Act gives the Central Arbitration Committee the task of declaring what amendments need to be made in order to remove any discrimination in that regard where a collective agreement (or an employer's pay structure) contains provisions specifically applicable only to male workers or only to female workers. What is possible with regard to working conditions must be possible with regard to the other matters referred to in the directive.

1 — Most recently in the judgment of 15. 3. 1983 in Case 145/82 *Commission* v *Italian Republic* [1983] ECR 711, paragraph 10 of the decision.

2 — Judgment of 1. 3. 1983 in Case 300/81 *Commission* v *Italian Republic* [1983] ECR 449, paragraph 10 of the decision.

As regards the specific provisions of the Act, which make possible the annulment of any discriminatory clauses of certain types contained in the internal rules of an undertaking or the rules governing an independent occupation or profession, it is sufficient to note that, regardless of their actual scope, they do not cover the whole area covered by the Community provision.

In the circumstances, the first complaint made by the Commission seems to me to be well founded.

II — 1. The Commission considers, in the second place, that the provisions of section 6 (3) of the Act are contrary to the terms of the directive, in particular Articles 3, 4 und 5 thereof. That is the substance of the Commission's second and third complaints.

Section 6 (3) of the Act excepts from the prohibition of discrimination against job applicants and employees, which is laid down in section 6 (1) and 6 (2):

(a) "employment for the purposes of a private household", or

(b) cases "where the number of persons employed by the employer, added to the number employed by any associated employers of his, does not exceed five (disregarding any persons employed for the purposes of a private household)."

However, as the United Kingdom pointed out during the oral procedure, that exception is not unqualified; even in the cases referred to in section 6 (3) employers are prohibited by virtue of section 4 of the Act from victimizing any of their employees who seek to avail themselves of the rights granted to them by law regarding equal treatment or who help other people to do so.

In the United Kingdom's view, the jobs covered by that exception fall within the field of application of Article 2 (2) of the directive in conjunction with Article 9 (2) thereof.

By virtue of Article 2 (2), the directive is to 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". Article 9 (2) provides for its part 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".

2. The United Kingdom considers that "employment ... for the purposes of a private household" and employment in very smal undertakings may be excluded from the field of application of the directive because they involve close personal relationships between employees and employers, so that it would not be legally possible to prevent the latter from employing persons of a particular sex.

The United Kingdom thus bases its view on that part of Article 2 (2) by virtue of which discrimination is lawful with regard to those occupational activities for which, by reason of the context in which they are carried out, the sex of the worker constitutes a determining factor.

In the case of employment for the purposes of a private household, it states

that such employment frequently involves very close personal relationships between employer and employee and that the employee often lives in the household, as in the case of resident companions or personal maids. It also contends that, contrary to the Commission's view, the concept of "private household" is clear. Thus, if a chauffeur is not actually employed in his employer's household but for the purposes of his business, the exception will not apply.[1] On the contrary, a family cook or gardener will normally come within that exception.

With regard to employment in very small undertakings, the United Kingdom draws attention in the first place to the strictly limited character of the exception. Whilst persons employed for the purposes of a private household are not to be taken into account in the figure of five employees, the exception does not on the other hand extend to cases where associated employers maintain a number of small establishments each of which employs no more than five persons but which together employ more. The defendant State also justifies that exception by reason of the close personal relationships that often exist in small undertakings. It mentions by way of example female owners and managers of small shops, in particular those who are elderly, who desire to employ assistants of their own sex.

It considers therefore that at the present time it is justified in not applying Directive 76/207 in the United Kingdom to the types of employment referred to in section 6 (3) of the Act, in view of the social developments which have taken place.

1 — *Heron Corporation Limited* v *Commis* [1980] ECR 713, a case on analogous provisions of the Race Relations Act 1976.

3. In my opinion this argument has been effectively refuted by the Commission.

(a) Like the Commission I consider, in general terms, that since Article 2 (2) of the directive provides for an exception it must be strictly construed. I also consider, for the same reason, that it is for the Member States to prove that a particular occupational activity may be excluded from the field of application of the directive because, by reason of the nature thereof or the context in which it is carried out, the sex of the worker constitutes a determining factor.

As regards more specifically the two exceptions contained in section 6 (2) of the Act, the Commission points out in the first place, on the basis of its report to the Council on the implementation of the directive, that there are no such exceptions in any Member State other than the United Kingdom. Although it is unnecessary to draw from this any conclusions from the legal point of view, I think it may nevertheless be stated with regard to that situation that it would be quite astonishing if it were only in the United Kingdom that the present stage of social development prevented the application of the directive to employment for the purposes of a private household or in very small undertakings.

(b) The Commission also claims that "employment for the purposes of a private household" is an extremely imprecise notion. It emphasizes in particular that no guidance is given as to what a "household" is or when it is considered to be "private". It wonders in particular whether the expression must be interpreted narrowly or broadly and what categories of worker should be included therein. I am not entirely

convinced by the Commission's argument. It is in fact quite possible, as the United Kingdom has indicated, that the content of this concept may be progressively defined by case-law, which is the usual manner in which the content of a concept having legal implications is defined.

Likewise, I do not associate myself with the criticism made by the Commission regarding the figure of five employees adopted for the second exception contained in section 6 (3) of the Act. If it is admitted at the outset that an exception is justified for very small undertakings, that figure, which does not appear to be manifestly inappropriate, must also be allowed in view of the fact that every choice necessarily involves a threshold which to some extent, however small, is bound to be arbitrary.

(c) There are other reasons which enable me to adhere to the Commission's view regarding the specific matter of the types of employment referred to in section 6 (3) of the Act. In the first place, the United Kingdom has not furnished proof that in all the cases covered by the exception at issue the conditions in which the work in question is performed make it necessary to allow employers to practise discrimination. It is not true that all occupational and professional activities capable of being covered by the exception contained in that provision involve the close personal relationships which constitute the justification for it.

As the Commission rightly points out, the defendant itself admits this in the words it uses: employment for the purposes of a private household frequently (and therefore not always) involves very close personal relationships; close personal relationships often (here too, not always) exist in small undertakings.

I also consider that the terms of section 6 (3) do not satisfy the condition laid down in Article 2 (2) by virtue of which the exclusion must relate to "occupational activities". There is no doubt that it is not necessary, as the United Kingdom rightly points out, for the exclusion of occupational activities pursuant to Article 2 (2) to be effected by listing them activity by activity; it seems to me to be perfectly permissible for a Member State to implement the directive by enacting laws which prohibit discrimination, reiterating the actual wording of that article and, for the rest, leaving the national courts to determine case by case, subject to review by this Court under Article 177 of the Treaty, what occupational activities are excluded from the general prohibition. But it cannot be considered, without stretching the meaning of the words, that the concepts of employment for the purposes of a private household (and not for example the concept of resident domestic staff) and employment in undertakings with five or fewer employees correspond to occupational activities.

For the foregoing reasons, the second and third complaints made by the Commission also seem to me to be well founded.

III — The last complaint made by the Commission against the United Kingdom regarding the fulfilment of its obligations under Directive No 76/207 also involves the question of the interpretation to be given to Article 2 (2) thereof. It concerns

the exclusion of midwives from the field of application of the Act.

1. Section 20 of the Act provides that midwives are excluded from the provisions of subsections 6 (1) and (2) (a) and that section 14 concerning vocational-training bodies does not apply to the training of midwives. It should however be added that that provision has also amended the legislation relating to midwives (for England and Wales, the Midwives Act 1951) so as to allow persons of the male sex access to and the right to engage in that occupation. However, on a transitional basis, that access is limited, since men are entitled to follow midwifery training courses only in centres approved by the Minister.[1] At the present time, two centres have been approved, one in London and the other in the Central Region of Scotland. Similarly, by virtue of paragraph 3 (2) of Schedule 4 to the Act, a man may engage in the occupation of midwife only at the places designated by the Minister, namely four hospitals in London and Edinburgh.

I would add that, as the United Kingdom pointed out in response to a question put to it by the Court, those restrictions should soon to be lifted. Those changes, which are to be made by means of orders which are in course of preparation, should enter into force at the end of August of this year. However, needless to say, that legislative development does not affect the assessment to be made, from the legal point of view, of the United Kingdom rules — only the state of the legislation when these proceedings were commenced is relevant for that purpose.[2]

2. In the United Kingdom's view, the discriminatory provisions in force are justified by Article 2 (2) of the directive by reason of the specific nature of the occupation of midwife and the conditions in which midwives work. The United Kingdom adds that those provisions have been periodically reviewed in the light of social developments, pursuant to Article 9 (2) of the directive. It was in fact as a result of wide-ranging consultations with the health authorities, the professional and occupational groups concerned and other organizations regarding the report on two studies on male midwives carried out in London and in the Central Region of Scotland that the United Kingdom Government recently reached the conclusion that the present restrictions on vocational training and the employment of men as midwives should now be lifted. It should however be noted that the removal of those restrictions has been made subject to two conditions: women must have the possibility of being cared for by a female midwife if they so choose and, if a male midwife is provided, there must be appropriate supervision.

(a) The defendant justifies its position in the first place on the basis of the specific features of the duties of a midwife in the United Kingdom. It emphasizes the unique rôle played by

1 — Paragraph 3 (1) of Schedule 4 (transitional provisions) to the Act.

2 — In that regard, see the Opinion of Mr Advocate General VerLoren van Themaat of 10. 5. 1983 in Case 170/78 and the references cited therein, pp. 1 and 2.

midwives during the pre-natal period and particularly during the post-natal periods as regards care involving intimate personal contact with the woman. It also points out that midwives remain with patients for extended periods and at frequent intervals and that they may have to be on duty alone, particularly at night, in the midwifery ward of a hospital and above all at the patient's home. Disregarding a minority of women who give birth at home aided only by a midwife (8 156 births in 1980), regard must be had to the much more frequent situation where women who have given birth in hospital are cared for at home by midwives for 10 days after delivery (586 352 in 1980; in the same year, there were 615 708 births where the mothers remained in hospital for the 10 days following delivery).

In that respect, the work of a midwife is distinguished, according to the United Kingdom, from that of gynaecologists (or obstetricians) and from general practitioners who undertake obstetric work. The United Kingdom admits that at the actual moment of birth, the difference between the role of midwife, the obstetrician and the general practitioner is less great. Moreover, it observes that the urgent needs of the moment may cause women and their husbands to be less concerned about intimate procedures carried out by a man.

But, for the rest, it states that specialists and general medical practitioners are rarely alone with patients because a female attendant is almost invariably present. It also notes that the care provided by them is usually intermittent and of short duration.

This distinction does not seem to me to be convincing at the present time, when facilities for the provision of care of various kinds at the same place are becoming more and more widespread and no longer raise the same problems.

(b) The United Kingdom placed emphasis on the specific features of the occupation of midwife and expresses the fear that certain women (or their husbands) may refuse the services of male midwives. It fears that if such women were not permitted to choose a female midwife, they may put themselves and their newborn children at risk by refusing any care. It considers in particular that members of certain ethnic minorities living in the United Kingdom may react in that way. Accordingly, a degree of caution is required: immediate and unrestricted access for men to the occupation of midwife would entail the risk of substantial opposition among those ethnic minorities, and indeed among other groups. In other words, the gradual introduction of the concept of male midwives and of the principle of equal treatment in the occupation of midwife is necessary, in the opinion of the United Kingdom, in order to take into account, in particular, the sensitivities and beliefs of people who live in the United Kingdom but whose cultural background is not in the strict sense British.

3. The Commission, without contesting the truthfulness of those observations,

replies that in practice the reactions apprehended by the United Kingdom should not raise difficulties in so far as, on the one hand, account will be taken of the preferences of women in confinement and, on the other hand, at least for some time to come, male midwives will no doubt remain the exception rather than the rule. This argument is considered by the United Kingdom as tending to permit discrimination "in practice" but not in law.

I do not consider that the alleged specific nature of the conditions in which the occupation of midwife is practised in the United Kingdom in such as to justify, under Article 2 (2) of the directive, the discriminatory rules against men. I think that the guarantee of a free choice for patients, which is maintained in the proposed British rules, is a condition which is necessary and sufficient to allay the fears expressed by the United Kingdom Government.

For all the foregoing reasons, I propose that the Court should give judgment as follows:

1. By failing to adopt all the provisions needed in order to comply with 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, the United Kingdom has failed to fulfil its obligations under the Treaty.

2. The United Kingdom shall pay the costs.