

OPINION OF ADVOCATE GENERAL
LENZ

delivered on 14 April 1994 ^{*}

*Mr President,
Members of the Court,*

A — Introduction

1. The Social Security Commissioner has asked the Court to give a preliminary ruling on the interpretation and application of Council Directive 79/7/EEC of 19 December 1978 ¹ on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

2. The claimant in the main proceedings (hereinafter referred to as 'the claimant') has claimed an increase in her pension in respect of her dependent husband, but her claim has been refused because she does not meet all the conditions for entitlement. The statutory conditions, non-compliance with which led to that refusal, are additional requirements which a woman must meet when claiming in respect of a dependent husband, but which a man is not obliged to meet when claiming in respect of a dependent wife.

3. The provisions governing the conditions for entitlement to increases in retirement pensions in respect of dependent spouses are laid down in sections 45 and 45A of the Social Security Act 1975. ² Section 45 governs the conditions for an increase for a dependent wife, and Section 45A governs the conditions for an increase for a dependent husband.

Section 45A reads:

'(1) Where a Category A retirement pension is payable to a woman for any period —

- (a) which began immediately upon the termination of a period for which the pensioner was entitled to an increase in unemployment benefit, sickness benefit or invalidity pension ... (increases in respect of adult dependants); and

^{*} Original language: German.

¹ — OJ 1979 L 6, p. 24.

² — As amended by the Health and Social Security Act 1984. It should be mentioned, for the sake of completeness, that sections 45 and 45A of the Social Security Act 1975 were repealed with effect from 8 July 1992 and replaced by sections 83 and 84 of the Social Security Contributions and Benefits Act 1992, the terms of which are similar.

- (b) during which the requirements of either paragraph (a) or (b) of subsection (2) below are satisfied (without interruption), to which a man is subject when claiming an increase in pension.

then the weekly rate of the pensioner's Category A retirement pension shall be increased by the amount specified in relation thereto in Schedule 4, Part IV, column 3 ("the specified amount").

That discrimination exists is not disputed.

- (2) The requirements referred to in subsection (1)(b) above are —

5. The claimant considers that the discrimination is contrary to Directive 79/7, in particular the third indent of Article 4(1) thereof, which provides:

- (a) that the pensioner is residing with her husband;

"The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

- (b) that the pensioner is contributing to the maintenance of her husband at a weekly rate not less than the specified amount, and her husband does not have weekly earnings which exceed that amount.

— ...

- (3) ...'

— ...

4. The conditions laid down in section 45A(1) are not amongst the conditions

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions gov-

erning the duration and retention of entitlement to benefits.'

claiming in respect of a dependent wife and for a female pensioner claiming in respect of a dependent husband, is the derogation contained in Article 7(1)(d) of Directive 79/7 to be interpreted as permitting the Member State to impose more stringent conditions on a female claimant than on a male claimant?

6. The defendant, however, argued in the main proceedings that the rules in dispute were covered by the derogation in Article 7(1)(d) of the directive, which provides:

'This Directive shall be without prejudice to the right of Member States to exclude from its scope:

...

(d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife'.

(2) In particular, may the Member State impose a condition such as that contained in Section 45A of the Social Security Act 1975, by which immediately prior to the date upon which the female pensioner became entitled to retirement pension, she must have been entitled to an increase of unemployment benefit, sickness benefit or invalidity pension for such husband, when no such requirement is imposed on a man seeking an increase of retirement pension for a dependent wife?

7. The tribunal hearing the main proceedings has referred the following questions to the Court for a preliminary ruling:

(1) Where a Member State has enacted separate provisions for a male pensioner

(3) If, in the light of the answers to questions 1 and 2, it is necessary for the national judge to determine whether or not national legislation satisfies the requirements of proportionality under Community law, so as to be capable of benefiting from the derogation contained in Article 7(1)(d) of Directive 79/7, what are the specific criteria that the national judge must apply?

8. The parties to the proceedings are the claimant, the United Kingdom and the Commission.

9. I shall come back to details of the case and the arguments of the parties in the course of my legal analysis.

of the directive. Because the purpose of the directive is to secure the progressive implementation of the principle of equal treatment in social security matters, that power of exclusion is not intended to be available indefinitely. Article 7(2) therefore requires Member States to examine periodically the matters they have excluded under Article 7(1), 'in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned' and to inform the Commission accordingly.³

B — Opinion

10. A number of facts in this case are not disputed. For example, the claimant is within the personal sphere of application of the directive, as defined in Article 2, since she belongs to the category of the 'working population' or of 'retired...workers and self-employed persons'. The facts are within the material scope of the directive, as defined in Article 3, since the benefits in question are benefits which may be granted under a statutory old-age benefits scheme.

12. The key question in this reference is whether a statutory provision such as that contained in section 45A(1) of the Social Security Act 1975, in its relevant version, is covered by Article 7(1)(d) of Directive 79/7 and can thus be excluded from the scope of the directive.

11. The parties agree that Article 4 of the directive lays down the basic principle of equal treatment and gives examples of areas in which the principle is to be implemented. Article 7, on the other hand, allows Member States to exclude a number of statutorily-defined sets of circumstances from the scope

13. The *claimant* argues, essentially, that the discriminatory conditions of entitlement are not covered by the derogation in Article 7(1)(d) of the directive, and that the case-law of the Court requires the derogation to be construed narrowly.⁴ She maintains that the provision excludes from the scope of the directive only the grant of increases in a

³ — See Article 8(2) of the directive.

⁴ — See the judgments in Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, and Case 222/84 *Johnston v Chief Constable for the Royal Ulster Constabulary* [1986] ECR 1651.

man's pension for a dependent wife. As soon as increases are provided for in favour of a dependent husband as well, the pension increase rules fall outside the scope of the derogation, with the result that the more general provision in the third indent of Article 4(1), requiring rules on increases for spouses to be non-discriminatory, is applicable. Furthermore, in the sphere in which the directive applies, new forms of discrimination may not be introduced.

14. The *United Kingdom*, on the other hand, takes the view that the rules in question are covered by the derogation in Article 7(1)(d) of the directive and that the claimant's interpretation would make the derogations in Article 7 nugatory.⁵ An interpretation to the effect that a Member State may no longer rely on that article once any provision is made in favour of specified classes of women would rob the derogating provision of its content because it would oblige the Member State to restructure completely this category of benefits which is expressly excluded from the scope of the directive by Article 7.

15. Such a result would conflict with the purpose of the directive, namely to implement the principle of equal treatment progressively in social security matters, since in

practice it would encourage Member States to maintain the *status quo*.

16. The United Kingdom describes the circumstances surrounding the introduction of the disputed conditions of entitlement in this way. In 1984, national law was adapted to bring it into line with the requirements of Directive 79/7 and, pursuant to the third indent of Article 4(1) of the directive, wives with dependent husbands were granted a right to increases in sickness, invalidity and unemployment benefits. However, under the law as it then stood, women receiving such benefits were liable to suffer a sharp fall in income upon reaching pensionable age. That was because, when Directive 79/7 came into force, and in accordance with Article 7(1)(d) thereof, increases in old-age benefits were available only to husbands in respect of dependent wives. In order to prevent women already dependent on social benefits⁶ from suffering a sharp fall in income on retirement, such women were given a right to increases in old-age benefits, under the circumstances described above. That right, limited in terms of the persons and benefits concerned, cannot in any way be interpreted as the introduction of a new benefit, in the sense of a grant of increases to female pensioners generally in respect of dependent husbands. The benefit was only for women who, on reaching retirement age, had already ceased regular active gainful employment.

⁵ — It refers here to the judgment in Case C-9/91 *R v Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I-4297, paragraphs 14 to 19.

⁶ — Sickness, invalidity and unemployment benefits.

17. The *Commission* takes the view that the provisions in question come within the derogation in Article 7(1)(d) and do not therefore infringe the directive.

18. In order to determine whether the rules in question come within the scope of the derogation in Article 7(1)(d), one has to look first at the wording of that provision, which refers to increases in old-age benefits for dependent wives. Originally, that is to say before the law was amended in 1984, the pension increases in question were granted only to husbands for dependent wives. The earlier rules were undoubtedly covered by Article 7(1)(d) and the rules were essentially maintained after the law was amended. Only a strictly limited group of people were granted the right to comparable pension increases, namely women who, on reaching retirement age, had already ceased active gainful employment and were drawing sickness, invalidity or unemployment benefits for their maintenance, which were increased for their dependent husbands.

19. As the United Kingdom has stated, the continued payment of increases upon the attainment of retirement age and the related conversion of entitlement to sickness, invalidity and unemployment benefits into entitlement to old-age benefits is actually intended to prevent such women from suffering a considerable fall in income from the

time of their retirement. Technically, the measure is designed to bring coherence to the granting of sickness, invalidity, unemployment and old-age benefits. The fact that the category of entitled persons has been slightly extended does not change the fundamental character of the benefits, which are increases in long-term old-age benefits paid in respect of dependent wives.

20. The claimant seeks support for her argument from the difference in wording between Article 7(1)(d), which refers to 'a dependent wife', and the third indent of Article 4(1), which refers to 'a spouse'.

21. In my view, the relationship between the third indent of Article 4(1) and Article 7(1)(d) must be clarified schematically.

22. Where the third indent of Article 4(1) lays down the requirement of equal treatment for 'increases due in respect of a spouse', this applies in principle to all benefit schemes falling within the material scope of

the directive. According to Article 3(1)(a), these are 'statutory schemes which provide protection against the following risks:

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment',

and, according to Article 3(1)(b),

'social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a)'.⁷

23. The derogation for the granting of increases in Article 7(1)(d), however, has a narrower scope since it applies only in the case of 'long-term invalidity, old-age, accidents at work and occupational disease benefits', whilst sickness and unemployment benefits are not mentioned. Thus, the spheres of application of the third indent of Article 4(1) and of Article 7(1)(d) are not in fact the same. Figuratively speaking, the sphere of application of the derogation in Article 7(1)(d) is only a segment of the sphere of application of the third indent of Article 4(1). The different choice of words in the two provisions ('spouse' in the one and 'wife' in the other) is not therefore the decisive factor in distinguishing their scope, and, for that reason, I find the textual argument put forward by the claimant unconvincing.

24. It remains to be determined whether the way in which the United Kingdom used the derogation in Article 7(1)(d) of the directive in enacting sections 45 and 45A of the Social Security Act is in accordance with its spirit and purpose. As has been repeatedly mentioned, the purpose of Directive 79/7 is the *progressive implementation* of the principle of equal treatment for men and women in social security matters.⁸ Individual provisions are also to be interpreted in the light of that purpose.

⁷ — As was submitted in the proceedings, the United Kingdom complied with its obligation to equalize benefit increases when making the legislative changes of 1984 in relation to sickness, invalidity and unemployment benefits.

⁸ — See, on this point, the title of the directive, a reference to the grounds of enactment in Article 1. See also the judgment in Case C-9/91 *R. v Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I-4297, at paragraph 14.

25. By amending the law in 1984, the United Kingdom ceased to make full use of the derogation provided for in Article 7(1)(d), the new statutory provisions being a less far-reaching use of the derogation than previous legitimate use.

therefore conflict with the idea of the progressive implementation of equal treatment. Very probably, it would lead to a strengthening of the *status quo*.

26. In my view, the limited extension of the category of entitled persons does not cause the rules on benefit increases to fall outside the scope of the derogation. The inclusion of a specific group of women as potential claimants is 'progress' towards equal treatment of men and women in the granting of pension increases.

29. Unfortunately for the claimant in this case, this interpretation means that Community law affords her no entitlement to the increases she seeks. For all those women already receiving increases, or who will receive them in the future, it represents a step forward from the previous legal position.

27. The practical result of the claimant's legal view would be 'all or nothing'. It would be perfectly permissible, under Article 7(1)(d), to exclude all women as entitled persons, whilst any change in the legal position in favour of women could only be in the form of full equalization.

30. Moreover, it is not necessary to decide, for the purposes of the present case, whether any general introduction of entitlement for women would have to be structured in a non-discriminatory way because only a limited exception from the derogation is involved here.

28. The United Kingdom and the Commission have argued — rightly in my view — that the end effect of that approach would be to impede progress in bringing women into the category of entitled persons and would

31. My first conclusion, therefore, is that provisions such as those contained in sections 45 and 45A of the Social Security Act are covered by Article 7(1)(d).

The third question

32. There thus remains the Social Security Commissioner's third question, inquiring about the 'specific criteria' for applying the proportionality principle. This is no doubt a reference to the rule that derogations may not go beyond what is appropriate and necessary for achieving the aim in view.⁹

33. The positions of the parties on that question may be summarized as follows.

The claimant believes the question is relevant only if her legal argument is not accepted. If Article 7(1)(d) were found to be applicable, it would be for the national court to determine whether the statutory provisions came within the limits of the derogation, and the proportionality principle would apply in making that determination.

It was submitted on behalf of the United Kingdom that there is no scope for the appli-

cation of the proportionality principle in the present case. If, however, the Court should find the principle applicable, the United Kingdom refers to the Opinion of Mr Advocate General Van Gerven in the *Equal Opportunities Commission* case,¹⁰ in which he argued that the proportionality principle has a limited function in the application of Articles 7 and 8 of Directive 79/7.

The Commission takes the view that the proportionality principle is inapplicable in the present case. The issue of proportionality arising in the *Thomas* case¹¹ was somewhat different, because that case concerned the interpretation of Article 7(1)(a), which left scope for assessment in interpreting the words 'possible consequences ... for other benefits'.

34. The Court has applied the proportionality principle in determining the limits of derogations. In its judgment in the *Johnston* case¹² it said this in relation to the interpre-

⁹ — Judgment in Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651, at paragraph 38.

¹⁰ — Opinion of Mr Advocate General Van Gerven of 12 May 1992 in Case C-9/91 *R. v Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I-4318, at paragraph 13.

¹¹ — Judgment in Case C-328/91 *Secretary of State for Social Security v Thomas and Others* [1993] ECR I-1247.

¹² — Cited in footnote 9 above.

tation of the derogation provided for in Article 2(2) of Directive 76/207: ¹³

‘It must also be borne in mind 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.’ ¹⁴

35. The role of the national court in applying the proportionality principle may be described as follows. If the determination of a dispute entails the consideration and appraisal of facts, that is a matter for the national court hearing the dispute. ¹⁵ The proportionality principle comes into play, however, only in so far as there is scope for assessment.

36. The *Equal Opportunities Commission* case ¹⁶ and the *Thomas* case, ¹⁷ in which the courts making the references had inquired about the applicability of the proportionality principle, turned on the interpretation of Article 7(1)(a) of Directive 79/7, which contains an indeterminate legal concept. ¹⁸ Even in those cases, the Court did not expressly apply the proportionality principle.

37. In the *Equal Opportunities Commission* case, Mr Advocate General Van Gerven referred to the restricted role of the principle in the application of Articles 7 and 8 of Directive 79/7, since those provisions already contained a procedure for balancing the interests involved. ¹⁹

38. In the *Thomas* case, Mr Advocate General Tesauo took the view that the proportionality principle had no independent significance in that particular context. ²⁰

39. All those considerations are of practical importance only if one assumes that the pro-

13 — 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).

14 — Paragraph 38.

15 — See the *Johnston* case, paragraph 39.

16 — Judgment in Case C-9/91 *R. v Secretary of State for Social Security, ex parte Equal Opportunities Commission* [1992] ECR I-4297.

17 — Case C-328/91 *Secretary of State for Social Security v Thomas and Others*, cited in footnote 9.

18 — ‘Possible consequences ... for other benefits.’

19 — Opinion of Mr Advocate General Van Gerven, at paragraph 13.

20 — Opinion of Mr Advocate General Tesauo, at paragraph 14.

proportionality principle applies. In the present case it is a matter of determining the scope of the derogation in Article 7(1)(d) of Directive 79/7. The wording of that article contains no indeterminate legal concepts. According to the interpretation of the relevant provisions given above, the national leg-

islation remains within the limits allowed by the derogation. In the circumstances, a delimitation of the derogation, which would require a balancing of the interests involved, is not needed. The referring tribunal does not, therefore, need to apply the proportionality principle.

C — Conclusion

40. I therefore propose that the Court should give the following answer to the questions submitted by the national tribunal:

Article 7(1)(d) of Directive 79/7 is to be interpreted as covering provisions such as those in sections 45 and 45A of the Social Security Act in so far as they extend the category of entitled persons to include a group of women, even if the criteria for determining that group turn out to be an additional condition of entitlement for women.

In the circumstances, the proportionality principle does not have to be applied.