

JUDGMENT OF THE COURT (Sixth Chamber)

7 December 2000 *

In Case C-79/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgericht Frankfurt am Main, Germany, for a preliminary ruling in the proceedings pending before that court between

Julia Schnorbus

and

Land Hessen,

on the interpretation 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),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, V. Skouris, J.-P. Puissechet (Rapporteur), R. Schintgen and F. Macken, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- Land Hessen, by R.P. Eckert, Ministerialrat at the Ministry of Justice and European Affairs of Land Hessen, acting as Agent,

- the Commission of the European Communities, by C. Schmidt and A. Aresu, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the Opinion of the Advocate General at the sitting on 6 July 2000,

gives the following

Judgment

- 1 By order of 18 January 1999, received at the Court on 4 March 1999, the Verwaltungsgericht Frankfurt am Main (Administrative Court, Frankfurt am Main) referred for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) eight questions on the interpretation 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’).
- 2 Those questions were raised in proceedings between Ms Schnorbus and Land Hessen concerning the deferment of the admission of the former to practical legal training prior to the Second State Examination in law.

Legal context

- 3 Article 1(1) of the directive provides:

‘The purpose of this directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as “the principle of equal treatment”’.

4 Article 2(1) and (4) provides:

‘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.

...

4. This directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in Article 1(1).’

5 Article 3 provides:

‘1. Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

...’.

6 Article 4 provides:

‘Application of the principle of equal treatment with regard to access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining means that Member States shall take all necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

...

(c) without prejudice to the freedom granted in certain Member States to certain private training establishments, vocational guidance, vocational training, advanced vocational training and retraining shall be accessible on the basis of the same criteria and at the same levels without any discrimination on grounds of sex.’

7 Finally, Article 6 of the directive provides:

‘Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4

and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.’

- 8 Under Article 12a(1) and (2) of the Grundgesetz (Basic Law) of the Federal Republic of Germany (hereinafter ‘the Grundgesetz’):

‘1. Men who have attained the age of 18 years may be required to serve in the Armed Forces, in the Federal Border Guard, or in a Civil Defence organisation.

2. A person who refuses, on grounds of conscience, to render war service involving the use of arms may be required to render a substitute service. ...’

- 9 Paragraph 5 of the Wehrpflichtgesetz (Law on Compulsory Military Service) lays down the period of compulsory military service as 10 months and Paragraph 25 of the Zivildienstgesetz (Law on Civilian Service) provides for a period of civilian service which is three months longer.

- 10 Under Paragraph 18a of the Hessisches Beamtenengesetz (Law on Civil Servants in Hesse), in the version resulting from the Law of 11 January 1989 (GVBl. I, p. 26), as amended by the Law of 18 December 1997 (GVBl. I, p. 429), admission to

practical legal training may be refused for a particular date if the funds and number of places provided for by the budget of the *Land* are insufficient.

- 11 Under Paragraph 23(1) of the Juristenausbildungsgesetz (Law on Legal Training), in the version of 19 January 1994 (GVBl. I, p. 74, hereinafter ‘the JAG’):

‘Anyone who has passed the First State Examination in law shall, upon application, be admitted to practical legal training and be appointed a trainee in the judicial service [“Rechtsreferendarin” or “Rechtsreferendar”] as a temporary civil servant. ...’

- 12 Paragraph 24 of the JAG provides:

‘1. Postgraduate trainees in the judicial service shall be employed with effect from the first working day in January, March, May, July, September and November, respectively, of each year.

2. Should the number of applications for admission to practical legal training on a particular commencement date received before expiry of the deadline exceed the number of available training places, appointment may be deferred by up to 12 months. This shall not apply if deferment would result in particular hardship. Lots shall be drawn to select the applicants whose admission will be deferred.’

- 13 Finally, under Paragraph 14a of the Juristenausbildungsordnung (Legal Training Regulations), in the version of 8 August 1994 (GVBl. I, p. 334, hereinafter ‘the JAO’):

‘1. A case of particular hardship for the purposes of Paragraph 24(2) of the JAG shall exist where deferment would result in detriment to the applicant (male or female) which, judged by exacting standards, goes significantly beyond the detriment usually associated with refusal.

2. The following, in particular, may be regarded as cases of particular hardship:

...

4. the completion of compulsory service pursuant to Article 12(a)(1) or (2) of the Grundgesetz, or a period of at least two years spent as an overseas aid volunteer within the meaning of the Entwicklungshelfer-Gesetz [Law on Overseas Aid Volunteers] of 18 June 1969 (BGBl. I, p. 549), as last amended by the Law of 18 December 1989 (BGBl. I, p. 2261), or completion of a voluntary community service year within the meaning of the Gesetz zur Förderung eines freiwilligen sozialen Jahres [Law on the Promotion of a Voluntary Community Service Year] of 17 August 1964 (BGBl. I, p. 640) as last amended by the Law of 18 December 1989 (BGBl. I, p. 2261).’

The main proceedings

- 14 In October 1997 Ms Schnorbus passed the First State Examination in law. Under federal and Land Hesse legislation, in order to obtain a post in the judicial service or in the higher civil service, a person must have undergone practical legal training and then have passed the Second State Examination. To that end, she applied to the Hessisches Ministerium der Justiz und für Europaangelegenheiten (Hessian Ministry of Justice and European Affairs, hereinafter 'the Ministry') for admission to the training starting in January 1998.
- 15 By letter of 16 December 1997, the Ministry rejected her application, informing her that, since too many applications had been received, it had been necessary for it to make a selection in accordance with Paragraph 24(2) of the JAG. By letter of 11 February 1998, the Ministry informed her that, for the same reasons, she could not be admitted to the next period of training, starting in March 1998, for which she had maintained her application.
- 16 She then lodged an objection, on 13 February 1998, to the refusal of admission to practical legal training, arguing, in particular, that the selection procedure discriminated against women because of the preference accorded to applicants who had completed compulsory military or civilian service, which can be done only by men. That objection was dismissed on 2 April 1998, on the ground that the rule in question, which was designed to counterbalance the disadvantage suffered by applicants who were obliged to complete military or civilian service, was based on an objective distinguishing factor.
- 17 At the same time, she brought an application for interim relief before the Verwaltungsgericht Frankfurt am Main, seeking appointment as a trainee with effect from the beginning of March 1998. That court upheld her application by

order of 23 February 1998, but that order was set aside on 27 February 1998 by the Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse).

- 18 Finally, on 9 April 1998, she brought an action before the Verwaltungsgericht Frankfurt am Main, seeking a declaration that the refusal of the Ministry to admit her was unlawful and an order requiring Land Hessen to employ her as a trainee for the period of training commencing in May 1998. Having learned, by letter of 28 April 1998, that it had finally been possible to allocate her a place following the selection made for that period of training, she withdrew her action in respect of that period of training but maintained her claims that the previous decisions should be declared unlawful in so far as they constituted, in her opinion, discrimination against her as a woman.
- 19 Although minded to grant her application, primarily on the ground that many more male applicants, who alone are capable of fulfilling one of the conditions governing the assignment of priority for admission to practical legal training, than female applicants, the total number of whom is nevertheless much higher, benefit from such priority, the Verwaltungsgericht took the view, having regard to the contrary position adopted by the Hessischer Verwaltungsgerichtshof in the interim relief proceedings, that it could not give a direct ruling.
- 20 It therefore decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘1. Under Paragraphs 24(2) of the JAG and 14(a) of the JAO, where a decision concerning the admission of applicants to practical legal training is required because the number of applicants exceeds the number of training places, an applicant who has completed service which is obligatory only for men (military or substitute service pursuant to Article 12a of the Grundgesetz) is to be immediately admitted to the training and does not have to satisfy any further requirements in that regard, whereas the admission of other

applicants (female and male) may be deferred by up to 12 months. Does such a rule fall within the scope of 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)?

2. If Question 1 is to be answered in the affirmative, then:

Does such a rule which, insofar as, exclusively in regard to completion of service, it results in the preferential admission of male applicants to practical legal training, amount to direct discrimination on grounds of sex within the meaning of Article 2(1) of Directive 76/207/EEC?

3. If Question 2 is to be answered in the negative:

Does the rule give rise to indirect discrimination?

4. Is the fact that the rule *automatically* results in the preferential admission of men to training without a decision on the matter being subject to an assessment of the individual circumstances or of other relevant factors meriting consideration in the interests of the remaining applicants sufficient to preclude justification of the rule under Article 2(4) of Directive 76/207/EEC because it is to that extent more than a measure to *promote* equal opportunity?

5. If Question 4 is to be answered in the negative:

Is such a rule not justifiable under Article 2(4) of Directive 76/207/EEC because only measures which serve to promote equal opportunity *in favour of women* are permissible thereunder?

6. If Question 5 is to be answered in the negative:

Is the mere fact that only men are required to do service under Articles 12a(1) and (2) of the Grundgesetz itself to be regarded as an actual existing inequality within the meaning of Article 2(4) of Directive 76/207/EEC which in itself prejudices men's opportunities in the areas referred to in Article 1(1) of the directive, or are the disadvantages faced by women in employment and the risks to which they are in fact exposed on grounds of their sex also to be taken into account before such a conclusion can be reached?

7. Can the rule in Paragraphs 24(2) of the JAG and 14(a) of the JAO be justified under Article 2(4) of Directive 76/207/EEC solely on the ground that it counterbalances disadvantages not faced by women as they are not required to do service?
8. Can Article 6 of Directive 76/207/EEC found a right of access to training where refusal of access is based on discrimination and there are no other available sanctions in the form of a right to compensation?

The admissibility of the questions referred for a preliminary ruling

- 21 Referring to the case-law of the Court, Land Hessen expresses doubts with regard to the admissibility of the questions referred for a preliminary ruling. It explains that the national provisions at issue are no longer in force, since the procedure for recruitment to practical legal training was fundamentally modified in May 1998. Moreover, even if no applicant who had completed compulsory military or civilian service had been granted priority, Ms Schnorbus would not have been able to obtain a place in March 1998, because of her low placement in the draw (she was drawn 250th, whereas only 140 places were available). Finally, the answers to the questions submitted would not effect the outcome of the proceedings pending before the national court because the action for a declaration of unlawfulness brought by the plaintiff was inadmissible for absence of a legal interest.
- 22 It is sufficient to note in this regard that the Court has consistently held that it is solely for the national court, which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, the need for a preliminary ruling in order to enable it to give its judgment (see, in particular, Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921, paragraph 59, and Case C-228/96 *Aprile v Amministrazione delle Finanze dello Stato* [1998] ECR I-7141, paragraph 11). Furthermore, it is not for the Court to determine whether the decision whereby a matter is brought before it was taken in accordance with the rules of national law governing the organisation of the courts and their procedure (see, in particular, Case C-39/94 *SFEI and Others v La Poste and Others* [1996] ECR I-3547).
- 23 Consequently, if the questions submitted concern the interpretation of Community law, the Court is, in principle, obliged to give a ruling. The only circumstances in which that does not apply are where it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the

questions submitted to it (*Bosman*, cited above, paragraph 61, and Case C-36/99 *Idéal Tourisme v Belgian State* [2000] ECR-I-6049, paragraph 20).

24 Since that is not the case here, the questions submitted must be examined.

The first question

25 By its first question, the national court essentially asks whether national provisions such as those at issue in the main proceedings, in so far as they govern the dates of admission to practical legal training, fall within the scope of the directive.

26 Land Hessen proposes that this question be answered in the negative. According to it, the provisions at issue concern only the waiting period prior to admission to the practical legal training guaranteed by law, and do not include any element which would justify application of the directive.

27 The Commission contends that no distinction should be made between access to the practical training as such and the waiting period prior to admission to that training. Since practical legal training constitutes both a period of training and employment, the provisions governing the conditions of access to that practical training, including the temporal aspects, fall within the scope of the directive.

28 It is sufficient to note in this regard that the provisions at issue govern the circumstances in which the admission of applicants to practical legal training may

or may not be delayed because there are not enough places. Since that practical training constitutes a period of training and a necessary prerequisite of access to employment in the judicial service or the higher civil service, such a delay may affect the development of the career of the persons concerned. Such provisions therefore fall within the scope of the directive, which applies to employment in the public service (see Case 248/83 *Commission v Germany* [1985] ECR 1459, paragraph 16, and Case C-1/95 *Gerster* [1997] ECR I-5253, paragraph 18).

- 29 The answer to the first question must therefore be that national provisions governing the date of admission to the practical training which is a necessary prerequisite of access to employment in the civil service fall within the scope of the directive.

The second question

- 30 By its second question, the national court asks whether national provisions such as those at issue in the main proceedings, in so far as they result in preferential admission to practical legal training for male applicants who have completed compulsory military or civilian service, constitute direct discrimination on grounds of sex.
- 31 Land Hessen and the Commission propose that this question be answered in the negative. In particular, they take the view that the persons favoured by the rules at issue are favoured not on the basis of the sex of the applicant but because of

disadvantages arising from a deferment, which may be suffered by men and women alike.

- 32 As was noted in paragraph 13 of this judgment, Paragraph 14a of the JAO provides for a number of circumstances which may be taken into account for priority access to practical legal training. They include the completion of compulsory military or civilian service. In such a case, the benefit of the priority envisaged by the abovementioned provisions cannot be regarded as being directly based on the sex of the persons concerned.
- 33 According to the criteria established by the case-law of the Court, only provisions which apply differently according to the sex of the persons concerned can be regarded as constituting discrimination directly based on sex (see, in particular, Case C-249/96 *Grant v South-West Trains* [1998] ECR I-621, paragraph 28).
- 34 The answer to the second question must therefore be that national provisions such as those at issue in the main proceedings do not constitute discrimination directly based on sex.

The third question

- 35 By its third question, the national court asks whether national provisions such as those at issue in the main proceedings, in so far as they result in preferential

admission to practical legal training for male applicants who have completed compulsory military or civilian service, constitute indirect discrimination on grounds of sex.

- 36 Land Hessen proposes that the answer be in the negative. In particular, it argues that the determination of hardship cases as envisaged by the provisions at issue is based on criteria unconnected with the sex of the persons concerned and that the statistics relied on by the national court, which relate to only one admission date, are not significant.
- 37 The Commission contends that those statistics, according to which the percentage of female applicants who were admitted as hardship cases to practical training commencing in March 1998 was considerably lower than that of male applicants, even though women accounted for approximately 60% of the total number of applications, reveal indirect discrimination within the meaning of the case-law of the Court.
- 38 However, it is not necessary in this case to analyse the specific consequences of the application of the JAO. It is sufficient to note that, by giving priority to applicants who have completed compulsory military or civilian service, the provisions at issue themselves are evidence of indirect discrimination since, under the relevant national legislation, women are not required to do military or civilian service and therefore cannot benefit from the priority accorded by the above-mentioned provisions of the JAO to applications in circumstances regarded as cases of hardship.
- 39 The answer to the third question must therefore be that national provisions such as those at issue in the main proceedings constitute indirect discrimination based on sex.

The fourth, fifth, sixth and seventh questions

- 40 By these questions, which must be examined together, the national court essentially asks whether justification of the rules at issue on the basis of Article 2(4) of the directive is precluded because those rules automatically result in preferential admission for men, towards whom, according to the national court, that provision is not directed, or whether, on the contrary, it must be accepted because those rules counterbalance disadvantages not faced by women.
- 41 Land Hessen is of the opinion that the exceptional admission provided for by the rules at issue is by no means automatic, since it involves a specific examination of the circumstances of each applicant. Moreover, those rules are justified solely on the ground that they are intended to counterbalance disadvantages not faced by women, since the latter are not required to do national service.
- 42 After pointing out that the measures envisaged in Article 2(4) of the directive may apply equally to men and to women, the Commission submits that the rules at issue are justified in so far as they seek to reduce the inequality suffered by men as a result of the obligation to do military or civilian service.
- 43 As was noted in paragraph 38 of this judgment, a measure giving priority to persons who have completed compulsory military or civilian service is evidence of indirect discrimination in favour of men, who alone are subject by law to such an obligation.

- 44 However, it is clear that the provision at issue, which takes account of the delay experienced in the progress of their education by applicants who have been required to do military or civilian service, is objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay.
- 45 In such circumstances, the provision at issue cannot be regarded as contrary to the principle of equal treatment for men and women.
- 46 Furthermore, as the Commission points out, the advantage conferred on the persons concerned, whose enjoyment of priority may operate to the detriment of other applicants only for a maximum of 12 months, does not seem disproportionate, since the delay they have suffered on account of the activities referred to is at least equal to that period.
- 47 The answer to the abovementioned questions must therefore be that the directive does not preclude national provisions such as those at issue in the main proceedings, in so far as such provisions are justified by objective reasons and prompted solely by a desire to counterbalance to some extent the delay resulting from the completion of compulsory military or civilian service.

The eighth question

- 48 In view of the answers given to the previous questions, it is unnecessary to answer the eighth question.

Costs

- 49 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt am Main by order of 18 January 1999, hereby rules:

1. National provisions governing the date of admission to the practical legal training which is a necessary prerequisite of access to employment in the civil service fall within the scope 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.
2. National provisions such as those at issue in the main proceedings do not constitute discrimination directly based on sex.

3. National provisions such as those at issue in the main proceedings constitute indirect discrimination based on sex.

4. Directive 76/207 does not preclude national provisions such as those at issue in the main proceedings, in so far as such provisions are justified by objective reasons and prompted solely by a desire to counterbalance to some extent the delay resulting from the completion of compulsory military or civilian service.

Gulmann

Skouris

Puissochet

Schintgen

Macken

Delivered in open court in Luxembourg on 7 December 2000.

R. Grass

C. Gulman

Registrar

President of the Sixth Chamber