

OPINION OF ADVOCATE GENERAL
RUIZ-JARABO COLOMER
delivered on 10 June 2003¹

I — Introduction

1. K.B., a British worker, is concerned that her partner, R., who was born a woman but who, following medical gender reassignment, has become a man, should in due course receive the survivor's pension to which he would be entitled as a surviving spouse. United Kingdom legislation, however, prevents transsexuals from marrying on the basis of their acquired gender.

allow a necessarily heterosexual marriage to be contracted. It is true that the Community does not have any powers in this sphere but, if the United Kingdom rules are found to infringe a fundamental right, such a circumstance cannot easily be ignored.

3. This issue in this case may soon be resolved in any event, since it is likely that in the coming months the United Kingdom will enact legislation apt to solve the basic problem, namely the incapacity of transsexuals to marry.

2. The appellant in the main proceedings regards herself as the victim of pay-related sex discrimination. Such a cause of action may be covered by Directive 75/117/EC,² although the unequal treatment complained of does not arise directly from her sex or that of her partner but as a result of national civil rules regulating how a person's sex is determined: in the United Kingdom it is not permissible to amend the Register of Births following a gender reassignment operation, which would

Facts and national procedure

4. K.B., the appellant in the main proceedings, worked for the National Health Service ('the NHS'), the United Kingdom body responsible for public health services, from

¹ — Original language: Spanish.

² — Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19; 'the Directive').

1976 to 1996. She paid contributions to the NHS pension scheme throughout those 20 years and acquired, *inter alia*, a right to annual income of GBP 5 375.86.

The NHS scheme provides for a survivor's pension to be payable to a member's surviving spouse. 'Spouse' means solely a person to whom the member has been married.

5. R., who was born a woman and is registered as such in the Register of Births, suffered from gender dysphoria. Following medical gender reassignment, he became a man in his relationship with K.B. and with the world. They have sustained an emotional and domestic relationship together for many years. Had it been possible, they would have married but, rightly, they took the view that the law barred them from doing so.

6. Since R. is not entitled to marry, he will have no entitlement to a widower's pension in the event of his partner predeceasing him.

7. For that reason, K.B. brought proceedings in the Employment Tribunal, arguing that the NHS's refusal, should the case arise, to award R. a widower's pension amounted to discrimination based on sex, contrary to the provisions of Article 141 EC, read in the light of the case-law of the Court of Justice and, in particular, the

judgment of 30 April 1996 in *P. v S. and Cornwall County Council*,³ and those of Directive 75/117. For K.B., those provisions require that in this context the term 'widowhood' or 'widowerhood' should be interpreted in such a way as to encompass the surviving member of the couple, who would have achieved the status of widower or widow had his or her sex not resulted from surgical gender reassignment.

8. The respondents in the main proceedings, namely the body managing the NHS Pension Scheme (the NHS Pensions Agency) and the Secretary of State for Health, contend that the appellant's claim failed to take account of the judgment of 17 February 1998 in *Grant*,⁴ which stated that an employee's homosexual partner could not benefit from the travel concessions available to heterosexual partners, and also disregarded the fact that, although the Court of Justice confirmed in the judgment in *P. v S.* that the adverse treatment of a transsexual on the basis of the sex acquired as a result of his or her operation infringed the principle of equality, such a person did not thereby acquire all the rights attaching to his or her new gender.

9. The Employment Tribunal and, on appeal, the Employment Appeal Tribunal

3 — Case C-13/94 *P. v S. and Cornwall County Council* [1996] ECR I-2143 ('*P. v S.*').

4 — Case C-249/96 *Grant* [1998] ECR I-621.

concluded that the respondents' arguments were founded. The case was then referred to the Court of Appeal, which has made a reference to the Court of Justice for a preliminary ruling.

13. By letter of 4 October 2002, the Court of Appeal informed the Court of Justice that under national law it was obliged to summon the parties before deciding whether to proceed with the reference for a preliminary ruling.

Procedure before the Court of Justice

10. The request for a preliminary ruling was registered at the Court Registry on 15 March 2001.

11. Following receipt of the written observations of K.B., the United Kingdom Government and the Commission, a public hearing was held on 23 April 2002.

12. On 11 July 2002, the European Court of Human Rights delivered judgments in *Goodwin v United Kingdom* and *I. v United Kingdom*, in which, departing from its earlier case-law, it stated that the fact that it was impossible for British transsexuals to marry in their assigned gender was contrary to the European Convention on Human Rights. In the light of that factor, the Registry of the Court of Justice asked the national court whether it still deemed it necessary to obtain a preliminary ruling from the Court of Justice.

14. On 5 March 2003, the Court of Appeal stated that it continued to take the view that an answer to the question referred was necessary, since the point of the judgment in *Goodwin* was different from that in the main proceedings. It added that imminent changes in legislation or judicial precedent might provide a solution to the case in the main action without the need for a ruling from the Court of Justice.

Relevant national law

15. The Sex Discrimination Act 1975 makes it unlawful for an employer to discriminate directly against a person of one sex by treating her or him less favourably than he treats or would treat a member of the opposite sex. It also prohibits indirect sex discrimination, which it defines essentially as the application of a uniform condition or requirement which has a disproportionate and unjustified adverse impact on one sex.

16. Following the judgment in *P. v S.*,⁵ the United Kingdom introduced the Sex Discrimination (Gender Reassignment) Regulations 1999. These regulations amended the Sex Discrimination Act 1975 and brought direct discrimination on the ground of an employee's gender reassignment within the scope of the Act. However, the legislation dealing with equal treatment as regards pay (the Equal Pay Act 1970) and pensions (the Pensions Act 1995) was not amended.

17. The NHS pension scheme provides for a pension to be paid to the widow or widower of NHS employees. The fact of being a widow or widower implies that there is a surviving spouse.

18. Under English law, marriage is defined as the voluntary union between a man and a woman. For that purpose, on the basis of the rule laid down by the High Court in 1971 in *Corbett*,⁶ sex must be determined by reference to chromosomal, gonadal and genital factors whilst the fact that a person has undergone surgery cannot be taken into account.

19. Furthermore, section 11(c) of the Matrimonial Causes Act 1973 provides that a marriage is void if the parties are not respectively male and female.

20. In its judgment of 10 April 2003 in *Bellinger v Bellinger*,⁷ the House of Lords dismissed an application for recognition of a marriage celebrated by a transsexual in her acquired gender. The House of Lords understood English law not to give legal recognition to a change of gender. It none the less made a declaration that section 11(c) of the Matrimonial Causes Act was incompatible with the European Convention on Human Rights for the purposes of

The new provisions define gender reassignment as 'a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex'.

According to the Guide to the new legislation, 'transsexualism affects an estimated 5 000 people in the United Kingdom. Medical treatment to enable transsexual people to alter their bodies to match their gender identity is highly successful. The process is known medically as "gender reassignment"'.

⁶ — *Corbett v Corbett* [1971] Probate Reports 83.

⁷ — [2003] UKHL 21.

⁵ — Cited at point 7 above.

section 4(2) of the Human Rights Act 1998. The purpose of that declaration is to urge the Government to enact, as a matter of urgency, the necessary measures to put an end to the incompatibility.⁸

must abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay. Pursuant to Article 4, Member States are to take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay will be, or may be declared, null and void or may be amended.

Relevant Community law

21. Article 141 EC establishes that the principle of equal pay for male and female workers for equal work or work of equal value is to apply (paragraph (1)). 'Pay' means not only the ordinary wage or salary but also any other consideration paid, directly or indirectly, in cash or in kind, by the employer to the worker in respect of his or her employment (paragraph (2)).

22. The first paragraph of Article 1 of Directive 75/117⁹ provides that the principle of equal pay for male and female workers means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. Under Article 3 of that Directive, Member States

23. The Court of Justice has consistently held that the concept of pay, as defined in Article 141 EC, does not encompass social security schemes or benefits, in particular retirement pensions, directly governed by legislation.¹⁰ On the other hand, benefits granted under a contractual pension scheme, which essentially relate to the employment of the person concerned, form part of the pay received by that person.¹¹ For the purposes of determining whether a retirement pension falls within the scope of

8 — The House of Lords did not consider it possible to read the disputed provision in a way which is compatible with the Convention, as provided for in section 3(1) of the Human Rights Act.

9 — Cited at point 2 above.

10 — Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 22; Case C-7/93 *Beune* [1994] ECR I-4471, paragraph 44, and Case C-50/99 *Podesta* [2000] ECR I-4039, paragraph 24.

11 — Case 170/84 *Bilka* [1986] ECR 1607, paragraph 22; *Barber*, paragraph 28; *Beune*, paragraph 46; Joined Cases C-234/96 and C-235/96 *Vick* [2000] ECR I-799, paragraph 32; and *Podesta*, paragraph 25.

Article 141 EC, the decisive criterion is the existence of a link between the employment relationship and the retirement benefit, whereas the structural elements of the system do not play a decisive role.¹²

24. The Court of Justice has also stated that a survivor's pension provided for on the same conditions falls within Article 141 EC. It has stated in that connection that that interpretation is not negated by the fact that the widow's or widower's pension, by definition, is not paid to the worker but to his or her survivor, since such a benefit is an advantage deriving from the survivor's spouse's membership of the scheme, so that the pension is vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the spouse's employment.¹³ The surviving spouse may rely on Article 141 EC in order to have the principle and scope of the entitlement to payment of a survivor's pension recognised.¹⁴

Transsexuals' right to marry

25. A transsexual, for the purposes of medical science, is a person who, although

presenting the phenotypical and genotypical features of one sex, feels strongly that he or she belongs to the other sex, whose outer appearance and demeanour he or she has adopted and as a member of which he or she wishes to be accepted for all purposes and at any price. Transsexualism can thus be defined as a syndrome where the anatomical (gonadal) or biological (chromosomal) sex of a patient is not congruent with his or her psychological sex.¹⁵

15 — The syndrome has always existed and has been better understood in primitive cultures, removed from the influence of Christianity. M. Vargas Llosa in *El Paraíso en la otra Esquina*, Ed. Alfaguara, Madrid, 2003, pp. 67 and 68, 434 and 436, for example, recalls these tendencies among the Maoris in recounting the adventures of the painter, Paul Gauguin, in Tahiti. Prior to the developments in medicine and surgery in the second half of the 20th century, women who felt compelled to be men had to resort to complicated strategies and run great risks, which generally turned out badly. In 1566, Henry Estienne tells of a case which occurred in Fontaine, in which a woman disguised herself and worked as a stable boy; she married another woman, with whom she lived happily for two years until the device which she had been using to fulfil her conjugal duties was discovered; she was arrested and burned alive.

In the 18th century, there were female pirates like Anne Bonney and Mary Read or the French woman, Geneviève Premoy, who, passing herself off as the knight, Balthazar, was decorated and received the order of Saint Louis from Louis XIV himself. Many women managed to be soldiers or sailors. In the judicial proceedings which followed, it is stated that some of them claimed that their conduct was predestined by God; that when they were born their parents were hoping for a boy; that, although they appeared to be women, their nature was in fact male. Fear that their deception would be discovered pushed these women to suicide, as in the case of Catherine Rosenbrock in 1765, who, having spent 12 years working as a sailor and soldier in Holland, returned home to Hamburg, where her mother accused her of having denied her female sex; she was arrested for misconduct and attempted to kill herself.

Mlle de Maupin was one of the most famous actresses of French 17th-century theatre. She was hugely successful singing male roles at the Paris Opera. Whilst on tour, she ran away to Marseilles to seduce a local girl but, when she revealed her identity, she was imprisoned and condemned to death. Her popularity and pressure of public opinion resulted in the conviction being quashed. From then on, although she continued to dress as a man, the authorities decided to ignore her flirtations. C. Spencer, *Homosexuality: a history*, (1995), London, Fourth Estate, refers to certain of these cases.

12 — Case C-351/00 *Piirko Niemi* [2002] ECR I-7007, paragraph 45.

13 — Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraphs 12 and 13, and Case C-147/95 *Evrenopoulos* [1997] ECR I-2057, paragraph 22.

14 — Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 19.

The unshakeable belief of transsexuals that they must obtain recognition, including at law, that they belong to the other sex can be seen in their willingness to undergo hormone treatment to change their secondary sexual characteristics and to have surgery to bring about the anatomical alteration of the genital organs by removal and reconstruction. Chromosomal patterns remain unaltered, so what is known as biological sex remains the same.¹⁶

Transsexualism is clearly different from the various conditions associated with sexual orientation (heterosexuality, homosexuality or bisexuality), where the individual unequivocally accepts his or her sex and any problems arise fundamentally in emotional expression, and from transvestism, which entails wearing the clothes of the opposite sex for sexual gratification.

26. I wish to make clear that although, in principle, the obstacle preventing transsexuals from marrying is the impossibility of amending data in the Register of Births in order to reflect the change of gender, the fact is that their right to marry is thereby restricted in the absence of general acceptance of associations between persons of the

16 — See the judgment of the Corte Costituzionale (Constitutional Court, Italy) of 6 May 1985 (GURI No 131a of 5 June 1985), paragraph 3. To the same effect, see the judgment of the House of Lords of 10 April 2003 in *Belinger*, cited at point 20 above, paragraphs 7 to 9 of the speech of Lord Nicholls of Birkenhead.

same gender. For that reason, in the interests of brevity and concision, I shall analyse the question solely from the perspective of transsexuals' right to marry, without dealing with the specific technical obstacles on which that right is contingent.

27. From a legal point of view, the desire of transsexuals to marry on the basis of their acquired gender¹⁷ has been addressed both in the legislation and administrative practice of the Member States and in case-law, in particular the case-law of the European Court of Human Rights. Those factors are of the utmost importance for the purpose of the analysis which the Court of Justice must carry out, since a general principle of Community law may be derived from a constitutional tradition common to the countries of the European Union or from guidance given by international treaties concerning the protection of human rights ratified by all the Member States.

28. A comparative study of the prevailing legal situation shows that the marriage of transsexuals in their acquired gender is generally accepted. Whether it is as a result

17 — Hereinafter I shall assume that marriage is between persons of the opposite sex, taking into account the change of sex of one of the spouses. There is nothing to prevent United Kingdom transsexuals from marrying persons of a different biological sex.

of express action by the legislature (Germany,¹⁸ Greece,¹⁹ Italy,²⁰ the Netherlands,²¹ Sweden²²), administrative practice (Austria,²³ Denmark²⁴) or judicial interpretation (Belgium,²⁵ Spain,²⁶ Finland,²⁷ France,²⁸ Luxembourg,²⁹ Portugal³⁰), registers can be amended following gender reassignment operations, so that transsexuals are able to marry.

Only the Irish and United Kingdom legal systems appear to go against this general trend, which is not a bar to identifying a sufficiently uniform legal tradition capable of being a source of a general principle of Community law.

29. In any event, there is less room for doubt as regards the guidance afforded by the European Convention on Human Rights ('the Convention').

30. Article 8(1) of the Convention provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. In order to be valid, any interference with that right must be prescribed by law, must pursue a legitimate objective and must be necessary in a democratic society (paragraph 2).

Article 12 of the Convention provides that 'men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

31. Faced with a series of claims brought by transsexuals, particularly of British nationality, who invoked Articles 8 and 12 to claim recognition of their right to marry in their reassigned gender, the European Court of Human Rights stated in its judgment of 17 October 1986 *Rees v United Kingdom*³¹ that 'it must for the time being be left to the respondent State to

18 — Paragraphs 8 to 12 of the Law of 10 September 1980 concerning transsexualism (*Gesetz über die Änderung der Vornamen und die Feststellung der Geschlechtszugehörigkeit in besonderen Fällen — Transsexuellengesetz*).

19 — Article 14 of Law No 2503/1977 on civil status (ΦΕΚ 107 Α 1997).

20 — Article 1 of Law No 164 of 14 April 1982 on gender reassignment (*Norme in materia di rettificazione di sesso*).

21 — Articles 28 to 28c of the Civil Code (*Burgerlijk Wetboek*).

22 — Law 1972:119 on the determination of sex (*Lag om fastställande av könstillhörighet*).

23 — Circular from the Minister for the Interior of 27 November 1996 ('*Transsexuellen-Erlass*' des Bundesministeriums für Inneres (36.250/66-IV/4/96)).

24 — Circular No 12003 of 10 November 1976 (*Cirkulæreskrivelse om ændring af fødselstilførseler som følge af kønsskifte*).

25 — See, for example, the judgments of the Tribunal de première instance de Verviers (Court of First Instance, Verviers) of 19 February 1996 and of the Hof van Beroep (Court of Appeal), Amberes, of 27 January 1999.

26 — See, for example, the judgments of the Audiencia Provincial de Barcelona (Provincial Court, Barcelona) of 11 February 1994 and of the Juzgado de primera instancia de Lérida (Court of First Instance, Lérida) of 21 September 1999.

27 — Judgment of the Korkein Hallinto Oikeus (Supreme Administrative Court) 1988-A-46.

28 — Judgment of the Cour de Cassation (Court of Cassation, Full Assembly) of 11 December 1992.

29 — Judgments of the Tribunal administratif (Administrative Court) of 28 January 1987 and 31 May 1989.

30 — See, for example, the judgment of the Tribunal da Relação (Court of Appeal) of 9 November 1993.

31 — Series A No 156.

determine to what extent it can meet the remaining demands of transsexuals.... The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments'.³²

The judgment of 27 September 1990 in *Cossey v United Kingdom*,³³ confirmed that the Court of Human Rights recognised that States had a broad discretion in this area, as did the judgment of 30 July 1998 in *Sheffield and Horsham v United Kingdom*.³⁴ In the latter case, the Court recalled that 'it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States'.³⁵

32. That was the situation when the main proceedings were commenced. It had not changed at the time when this question was referred for a preliminary ruling and remained unchanged until after the public hearing on 23 April 2002.

33. On 11 July 2002, the European Court of Human Rights, sitting as a Grand Chamber, delivered judgment in *Goodwin v United Kingdom*,³⁶ which brought about a fundamental change in the case-law.

34. Unanimously and in particularly forceful terms, the Members of the Court of Human Rights concluded, following an analysis of the earlier case-law and of legal and social developments, that 'the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender reassignment, [the Court] reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention'.³⁷

35. In the sphere of Article 12, the European Court found that it was artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite

32 — Paragraph 47 of *Rees*. Emphasis added.

33 — Series A No 256.

34 — *Reports* 1998-V, p. 2021.

35 — Paragraph 58 of *Sheffield and Horsham*.

36 — No 28957/95, ECHR 2002. See also the judgment of the same date in *I. v United Kingdom* (No 25680/94 ECHR 2002) of similar purport.

37 — Paragraph 93 of the judgment in *Goodwin*.

sex. It recognised that the applicant, who was living as a woman in a relationship with a man whom she wished to marry, had no possibility of doing so.³⁸ It added that, '[w]hile it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender reassignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances'.³⁹ The Court therefore unanimously concluded that there had been a breach of Article 12 of the Convention.

material dependant's benefit to her widower, constitutes sex discrimination in contravention of Article 141 EC and Directive 75/117'.

37. It appears from the order that the Court of Appeal entertains the following doubts:

- (a) The conclusions reached by the Court of Justice in *P. v S.* and *Grant* respectively are clear, but the principle which distinguishes them is not. If the principle is that an inhibition on benefits for homosexual partners is not discriminatory so long as it applies equally to men and women, then the same outcome must apply in the present case in relation to the inhibition on benefits for unmarried partners. If on the other hand the principle is that sex, as a ground of discrimination, includes sexual identity but not sexual orientation, then the exclusion in the present case is based directly on sex and therefore is discriminatory.

The question referred for a preliminary ruling

36. By order of 14 December 2000 the Court of Appeal asked the Court of Justice for a ruling on 'whether the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme, which limits the

- (b) If there is a breach of Article 14, and possibly also Article 8, of the European Convention on Human Rights, the bearing of such a breach on the inter-

³⁸ — Paragraph 101 of *Goodwin*.

³⁹ — Paragraph 103 of *Goodwin*.

pretation of the word 'widower' is uncertain. Given that family life includes the making of provision for surviving dependants by those at work, and if private life includes the avoidance of unnecessary scrutiny of a person's biological character, it is arguable that respect for both family and private life is unjustifiably denied or is enjoyed in diminished form by K.B. because of the exclusion of surviving transsexual partners from pension benefits. If this argument is held to be sound, its impact on Article 141 and the Equal Pay Directive may require consideration.

status to testing solely for indirect discrimination. But if it is applied to men and women alike, it is difficult to see in what circumstances it could ever have a differential impact on one sex or the other. This leads to the question whether marital or family status is intended in the Directive to be treated as equivalent to sex for the purposes of direct discrimination or to be a test not of a gender-neutral requirement but of unequal impact for the purposes of identifying unlawful indirect discrimination.

Analysis of the question

38. The national court takes the view that there is no indirect discrimination, since there is no reason to believe that men and women in relationships with transsexuals are differently affected by the requirement of marriage; and to rely on the unequal impact on transsexuals would be to treat them, wrongly, as a third sex.

40. All the parties who have expressed a view on the matter concur that the widower's pension at issue forms part of 'pay' for the purpose of Article 141 EC. There is no reason to depart from that conclusion.

39. However, the Court of Appeal harbours some doubt about the meaning of Article 2(1) of the Directive, which prohibits all discrimination 'on grounds of sex either directly or indirectly by reference in particular to marital or family status'. This principle appears to limit the use of marital

It is settled case-law that benefits granted under a pension scheme which relate to the employment of the person concerned form

part of the pay received by that person.⁴⁰ The same is true of widow(er)s' pensions provided for on the same conditions.⁴¹

It appears from the documents before the Court that the pension granted by the NHS scheme is calculated on the basis of the employee's occupational circumstances, in particular, her salary, from which it can be presumed that it relates to her pay.

41. I also agree that there is no justification for assessing differently discrimination consisting of unequal treatment, which is prohibited by Directive 76/207/EEC,⁴² and discrimination based on unequal pay, in respect of which Directive 75/117 applies. It is sensible to adopt a uniform interpretation, given that, for one thing, Article 141 EC does not set up different systems of protection and, for another, the directives are strikingly similar in the way in which they are drafted and in the objectives that they pursue.

42. The appellant in the main proceedings and the national court are not at all at one on what exactly the question is about.

40 — See point 23 above.

41 — See point 24 above.

42 — 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).

43. In K.B.'s submission, the case is not about the right of transsexuals to marry, which is not within the Community's sphere of competence, or about discrimination against same-sex couples on grounds of sexual orientation, since this case is concerned with a relationship which is for all intents and purposes between a man and a woman. For that reason, the Court of Justice should, in the submission of the appellant in the main action, apply the rule in *P. v S.*, the operative part of which stated that Community law⁴³ 'precludes dismissal of a transsexual for a reason related to a gender reassignment',⁴⁴ and it would therefore be sufficient to replace the words 'dismissal of a transsexual' by 'refusal to grant a transsexual a pension'.

As she emphasised at the hearing, the appellant in the main action is not claiming that transsexuals should be entitled to marry but merely that a transsexual who forms part of a couple should be entitled to have that couple treated as a married couple for the purpose of obtaining economic benefits.

44. In its order, the Court of Appeal expressed uncertainty as to the principle which distinguishes the decisions in *P. v S.* and *Grant*: is the principle that treatment

43 — Specifically, Directive 76/207 on equal treatment but, as I have indicated, there is no reason for not applying the rule in relation to the Equal Pay Directive.

44 — Operative part of the judgment in *P. v S.*

applied equally to men and women is not discriminatory? Or is it that discrimination on the ground of sexual identity is unacceptable but discrimination on the ground of sexual orientation is not? It also asks whether the refusal to pay a survivor's pension might be detrimental to the rights of transsexuals deriving from Articles 14 and 8 of the Convention. Finally, the Court entertains some doubts as to whether the term 'marital or family status' in Article 2(1) of the Equal Treatment Directive is to be understood as equivalent to 'sex' or solely as a factor for the purposes of identifying unlawful indirect discrimination.

Furthermore, the Court of Appeal dismisses all arguments relating to indirect discrimination, which would entail accepting the incorrect proposition that transsexuals are a third sex.

45. I am merely concerned to point out that it can, at the least, be inferred from the reasoning of the referring court that it does not exclude the possibility that the correct approach in the present case may be to treat the fact that it is impossible for transsexuals to marry as direct discrimination based on sex.

46. In practical terms, for the purposes of the question as worded, whether the present case entails discrimination contrary to

Article 141 EC and Directive 75/117 depends on whether the rule in *P. v S.* applies to it. Beyond that aspect, it does not seem easy to disregard, as the appellant in the main action would have the Court do, the influence on any solution of the problem concerning the conditions for marriage imposed by national law and, specifically, the obstacle to marriage resulting from the impossibility of amending the relevant entry in the Register of Births pursuant to gender reassignment surgery.

47. First, however, I wish to examine whether it is possible to conclude from the case-law of the Court of Justice that the refusal to grant a transsexual a widower's pension is contrary to Article 141 EC. I am thus adopting the approach advocated by the appellant in the main proceedings and endorsed, in the main, by the referring court.

48. In *P. v S.* the question for the Court was whether the dismissal of an employee because he had undergone gender reassignment surgery was discrimination of the kind prohibited in the Directive on equal treatment for men and women.

49. The Court of Justice observed that the principle of equal treatment means that

there should be no discrimination whatsoever *on grounds of sex* and therefore gives expression to the fundamental right to equality, whose observance the Court ensures.⁴⁵

by all persons equally and which is guaranteed by Directive 76/207 or 75/117, as the case may be.

The Court concluded from the foregoing that the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex but that it includes discrimination which arises as a result of the gender reassignment of the person concerned. *Such discrimination is based, essentially if not exclusively, on the sex of the person concerned.* Therefore, where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. Such discrimination fails to *respect the dignity and freedom* to which he or she is entitled, and which the Court has a duty to safeguard.⁴⁶

50. The proposition of K.B.'s representatives is based on the assertion that the right which she is claiming for her transsexual partner is to be inferred merely by replacing the words 'when a person is dismissed' with 'when a person is denied entitlement to a widow's or widower's pension', since in each case the right concerned is one which is to be enjoyed

51. I agree with that assertion inasmuch as, for the purposes of the Court of Justice's assessment, it is quite immaterial whether the inequality complained of consists in a dismissal or in a refusal to pay a widower's pension.

52. However, as I see it, an objection could legitimately be made to the interpretation put forward by the appellant in the main proceedings in that refusal of the pension at issue does not arise as a result of the gender reassignment of the person concerned but as a result of his incapacity to fulfil one of the conditions necessary under national law to contract a valid marriage with the person entitled to the primary pension, namely the requirement that the future spouses cannot be of the same sex. If that line of argument is followed, it can be seen that refusal of the form of pay concerned can be explained not by the change of gender but by, precisely, the fact that, in the eyes of the law, the transsexual person has not changed gender, which prevents celebration of a valid marriage.

45 — *P. v S.*, cited at point 7 above, paragraphs 17 and 19.

46 — *Ibid.*, paragraphs 20 to 22.

53. Before pursuing that argument, which digresses from the original approach to the question, it is appropriate to mention other judicial precedents in order to distil the essence of the Court of Justice's case-law in this area. I shall refer first to the judgments of 17 February 1998 in *Grant*, cited above, and of 31 May 2001 in *D v Council*.⁴⁷

54. In *Grant*, a female employee of a railway company claimed that the grant of travel concessions to an employee and his or her spouse or common law opposite-sex partner with whom the employee had sustained a 'meaningful' and stable relationship, and the corresponding refusal of concessions to same-sex couples in similar circumstances infringed the prohibition on discrimination set out in what was then Article 119 of the EC Treaty.

The Court of Justice did not look favourably on that claim and adopted a particular line of argument. First, it answered the question whether a condition such as that in issue in the main proceedings constituted discrimination based directly on the sex of the worker. Then it considered whether Community law required that stable relationships between two persons of the same sex should be regarded by all employers as equivalent to marriages or stable relation-

ships outside marriage between two persons of opposite sex. Finally, it considered whether discrimination based on sexual orientation entailed discrimination based on the sex of the worker.⁴⁸

As regards the first of the questions, the Court of Justice confined itself to stating that the condition applied in the same way to female and male workers, so could not constitute discrimination directly based on sex.⁴⁹

As to the second question, the Court analysed the state of the law in the Community and the Member States and the legal position resulting from the case-law concerning the European Convention on Human Rights. It was persuaded that in the state of the law then prevailing within the Community, stable relationships between two persons of the same sex were not regarded as equivalent to stable relationships outside marriage between persons of opposite sex or to stable relationships between spouses. Consequently, an employer was not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a

⁴⁷ — Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council* [2001] ECR I-4319.

⁴⁸ — *Grant*, paragraph 24.

⁴⁹ — *Ibid.*, paragraph 28.

person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.⁵⁰ That way of proceeding can greatly assist in answering the question referred, as I shall explain below.

based on sex. For these purposes, it makes no difference whether the obstacle is that the employee has a same-sex partner or a transsexual partner or is some other reason.

Finally, with regard to the third issue, the Court of Justice stated that discrimination based on sex did not cover discrimination based on sexual orientation. It also found that the rule in *P. v S.* was limited to the case of a worker's gender reassignment.

The second also lends support to the United Kingdom Government's position, since it refers to the fact that Article 12 of the European Convention on Human Rights protects only traditional marriage between two persons of opposite biological sex (see Eur. Court H.R., *Rees v United Kingdom*, judgment of 17 October 1986, and *Cossey v United Kingdom*, judgment of 27 September 1990).⁵¹ Those judgments encapsulate European law on the matter.

55. The judgment in *Grant* lends support to the United Kingdom Government's argument that this case does not involve unlawful discrimination. To that end it applies the tripartite reasoning outlined above.

The United Kingdom Government submits that the third part of the reasoning in *Grant* is not relevant for K.B.

The first point, in its submission, is wholly applicable to the present case: all unmarried persons are excluded from the widow(er)'s pension, whether they are male or female, and there are therefore no grounds for invoking direct discrimination

56. The judgment in *Grant* does not support the arguments of the appellant in the main proceedings, since the Court did not find that there was a violation of the right

⁵⁰ — *Ibid.*, paragraph 35.

⁵¹ — See point 31 above.

to equal treatment for men and women. However, it is worthy of note that the United Kingdom Government seems to appreciate that the answer to the question referred is inextricably linked to the Court's assessment of the lawfulness of preventing the marriage of a transsexual in his or her acquired gender.

57. In *D v Council* a male official of the European Communities, of Swedish nationality, who had a registered partnership under Swedish law with another man, had claimed that he was entitled to the household allowance which the staff regulations confined to married persons. D claimed that terms such as 'spouse' or 'married official' must be interpreted by reference to the law of the Member States and not be given an independent definition, and that the refusal to pay the allowance therefore amounted to discrimination based on sex.

For that reason, the United Kingdom Government, whilst continuing to assert that the United Kingdom rules are compatible with Articles 8 and 14 of the Convention on Human Rights, submits that any such incompatibility would not make the rule at issue infringe Article 141 EC.

It refers to paragraphs 45 to 47 of the judgment in *Grant*, in which it was stated that although respect for the fundamental rights which form an integral part of the general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competence inherent in it. The scope of any provision of Community law is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context.

58. On appeal, the Court of Justice found that the word 'marriage', according to the definition generally accepted by the Member States, meant a union between two persons of the opposite sex and, although it was true that in an increasing number of cases, statutory arrangements had been introduced, alongside marriage, which granted recognition to various forms of union between partners of the same sex or of the opposite sex and conferred on such unions certain effects which, both between the partners and as regards third parties, were the same as or comparable to those of marriage, such arrangements were, in the Member States which had introduced them, distinct from marriage *per se*. Consequently, the Community Courts could not interpret the Staff Regulations of Officials of the European Community in such a way that legal situations distinct from marriage were treated in the same way as marriage.⁵²

52 — *D v Council*, paragraphs 34 to 37.

The Court of Justice pointed out, first, that the alleged discrimination based on sex did not exist, since it was irrelevant whether the applicant was a man or a woman: nor was there any unequal treatment on ground of sexual orientation given that it was not the sex of the partner which determined whether the household allowance was granted, but the legal nature of the ties between the official and the partner.⁵³ That statement appears to mean that the Community judicature is not competent to determine whether the conditions on which persons may marry under national law are compatible with fundamental rights. However, the Court of Justice went on to consider the views prevailing within the Community as a whole, from which it concluded that there was a diversity of laws and an absence of any general assimilation of marriage and other forms of statutory union.⁵⁴

59. The judgment in *D v Council* does not lend support to K.B.'s claims either. As in *Grant*, the Court of Justice found that there had been no discrimination based on sex.

60. In my opinion, the judgment in *Safet*

*Eyüp*⁵⁵ is of more marginal interest to the present case. The appellant in the main action submits that the judgment entailed the recognition by the Community judicature that marriage was equivalent to a stable relationship between unmarried persons.

In that case, the issue to be decided was whether the foreign, cohabiting partner of a Turkish worker lawfully established in a Member State should be regarded as a 'family member' for the purposes of the first paragraph of Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association between the European Economic Community and Turkey. The facts which gave rise to the question referred are particular: in 1983, Mrs Eyüp married a Turkish worker who had been part of the legal Austrian labour force since 1975. They were divorced in 1985 but remarried in 1993. In the interim they had continued to live together in Austria, during which time four of the couple's seven children were born. The Court had to determine whether that period should be included for the purposes of calculating the five years of legal residence, which under Decision No 1/80 is a condition of the members of the family of a Turkish worker having access to the host country's labour market.

53 — Ibid., paragraphs 46 and 47.

54 — Ibid., paragraphs 49 and 50.

55 — Case C-65/98 *Safet Eyüp* [2000] ECR I-4747.

The Court of Justice took account of the objective underlying Decision No 1/80 and stated that 'having regard to the particular facts of the case before the national court, and in particular the fact that the Eyüps' period of extra-marital cohabitation took place between their two marriages', there was no interruption of their joint family life, so that the period had to be taken into account for the purposes of calculating the period of legal residence.⁵⁶

put forward by the appellant in the main proceedings. It is appropriate to point out, first, the tendency shown by the Court of Justice to interpret family-law concepts in accordance with the spirit and purpose of the legislation with which the reference is concerned and, second, the assessment of the particular features of the specific case which means that an equitable solution is reached (*ex aequo et bono*). Those considerations, however, need not be decisive for the purpose of replying to the Court of Appeal.

From the detailed terms employed by the Court of Justice, a clear inference may be drawn that it was not maintaining that, in Community law, a stable relationship between two people may be equated to marriage. Moreover, Decision No 1/80 refers, in general terms, to the 'members of the family' of a Turkish worker, a looser term than 'widower' or 'widow', used in the United Kingdom pension scheme.

In any event, the judgment in *Eyüp* can shed some light on the question before the Court but for reasons distinct from those

61. As I understand it, the foregoing analysis of the case-law indicates that neither the Equal Pay Directive nor Article 141 EC suggests that the unmarried partner of a female worker should be awarded a benefit, such as a pension, which is restricted to the surviving spouse. The fact that such a person is transsexual is not, in principle, a determining factor, since the same outcome would apply in relation to various other impediments to marriage. Thus, it would apply in the case of same-sex partners, but also where the persons concerned had not reached marriageable age, did not have legal capacity, were already married or were in a relationship of consanguinity. In none of those cases would it be possible, if the situation were to arise, to claim a widow(er)'s pension, unless the impediments were an expression of discrimination based on sex.

⁵⁶ — *Eyüp*, paragraph 36.

62. That same analysis raises a question, as I have already indicated, about the substance of the relevant dispute: the fact that it is impossible for transsexuals in the United Kingdom to marry persons of the same biological sex, irrespective of the physiological change undergone. K.B.'s representatives have stressed that she is not seeking recognition of that right before the Court of Justice. However, leaving aside the fact that such an argument was perhaps dictated by a specific legal strategy in the light of the legal situation prevailing at the time when the main proceedings were instigated, the Court of Justice has enough latitude to select the appropriate interpretative approach when providing the referring court with a useful answer.

over form, is in practice becoming more prevalent. Thus, on the one hand it is permissible to question whether a marriage is genuine in the sphere of, for example, immigration law,⁵⁷ whilst, on grounds of fairness, cases of genuine cohabitation having no official recognition are equated to marriage.⁵⁸

63. The Court of Justice may also take another interpretative approach to the problem. It may be discerned in some of the arguments put forward by the parties.

I am convinced that the law must follow that course as it evolves but it is perhaps premature to do so in the present case, particularly since other, less audacious, solutions exist.

It might be asked whether it is reasonable to select marriage as the relationship upon which the grant, in relevant circumstances, of a widow(er)'s pension is conditional. Consideration of that issue would require consideration to be given to the objective pursued by a pension of that kind and, in parallel, to the suitability of a purely formal contract to symbolise a community based on solidarity: consideration should at least be given to the possibility that relations of another kind merit like protection. That type of analysis, which is appropriate in a mature society in which substance prevails

64. The question referred, as reformulated, would thus concern the compatibility with Community law of a national rule which, by not recognising marriage between transsexuals, denies them access to a widow's or widower's pension.

57 — See, to that effect, Council Regulation of 4 December 1997 on measures to be adopted on the combating of marriages of convenience (OJ 1997 C 382, p. 1).

58 — See the judgment in *Eyüp*, cited above.

65. If the underlying claim is to receive a positive response, a twofold test must be passed:

- (a) the national rule must be contrary to Community law;

and

- (b) the Court of Justice must be competent to make a ruling, i.e. the dispute must concern a matter covered by the Treaty.

66. There is no doubt that the fact that it is impossible for United Kingdom transsexuals to marry in their new physiological sex is contrary to a general principle of Community law.

It is well established in the case-law of the Court of Justice that in the matter of fundamental rights the general principles of Community law must be derived from the constitutional traditions common to the Member States,⁵⁹ in the light of the guidance afforded by international treaties for

the protection of human rights which have been ratified by the Member States.⁶⁰ The European Convention on Human Rights is also of particular relevance in that regard.⁶¹

67. It may be concluded from points 28 and 29 above, first, that the right of transsexuals to marry persons of the same biological sex is incorporated into the laws of the vast majority of the Member States. At the present time, 13 of the 15 countries of the Union acknowledge that right, either by express legislative provision or through administrative or judicial practice. That fact must, of itself, be sufficient for the right to form part of the common legal tradition, since if the general principles are to be determined only when there is complete concordance in all the Member States, this line of inquiry would be rendered nugatory.

68. Second, since the Court of Human Rights delivered its judgments on 11 July 2002,⁶² that right has formed an integral part of Article 12 of the Convention. All that the Court of Human Rights allows the State is a degree of discretion in relation to

60 — Case 4/73 *Nold v Commission* [1974] ECR 491, paragraph 13.

61 — See Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41.

62 — See point 36 above.

59 — See Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 4.

the conditions which must be fulfilled for gender reassignment to be valid, to the consequences for previous marriages and to the obligation to inform an intended spouse about the gender change.⁶³

nation based on sex as regards workers' pay.

69. Consequently, both methods employed by the Court of Justice to give substance to the general principles of Community law lead to the same conclusion: transsexuals have a fundamental right to marry on conditions which take account of their acquired sex.

70. However, that conclusion is not sufficient. As the United Kingdom Government points out, merely because a national rule is incompatible with a fundamental right recognised in the Community sphere, that sphere cannot be extended beyond the competences attributed by the Treaty.

71. Therefore it is necessary to ascertain whether the incompatibility affects any of the rights safeguarded by Community law, in this case by the prohibition on discrimi-

72. Clearly it is beyond dispute that the entitlement to a widow(er)'s pension, in the circumstances of the present case, falls within the scope of Article 141 EC and Directive 75/117 as a benefit linked to pay.⁶⁴

73. Nor can there be much doubt that the unequal treatment to which transsexuals are subject amounts to sexual discrimination. That can be seen from the judgment in *P. v S.*, where it was held that sex discrimination cannot be confined 'to discrimination based on the fact that a person is of one or other sex, but that it includes discrimination which arises as a result of the gender reassignment of the person concerned. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned.'⁶⁵

That approach confirms, moreover, that problems relating to transsexualism are not to be confused with those relating to sexual orientation.⁶⁶ If the discrimination to which transsexuals are subject were not regarded as based on sex, the paradoxical situation would arise in which this particularly vulnerable group of persons would

63 — Paragraph 103 *in fine* of the judgment in *Goodwin*, cited at point 33 above.

64 — See points 23 to 24 and 40 above.

65 — *P. v S.*, cited at point 7 above, paragraphs 20 and 21.

66 — See point 25 above.

not have specific protection at Community level. It will be recalled that neither Article 13 EC nor Article 21 of the Charter of Fundamental Rights of the European Union makes express reference to transsexuals.⁶⁷

74. The unusual feature which distinguishes this case from *P. v S.* is that *the discrimination at issue does not directly affect enjoyment of a right protected by the Treaty but rather one of the preconditions of such enjoyment.* The discrimination is not focused on the award of a widow(er)'s pension; it arises merely by virtue of a necessary precondition: the capacity to marry.

75. That difference cannot in itself lead to a different solution from the one adopted in *P. v S.*. The Court of Justice must ensure that the exercise of rights protected by the Treaty remains free of any prohibited discrimination and also that those rights are not made conditional on requirements which are contrary to European public policy.

⁶⁷ — Article 13 EC refers to 'discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Article 21 of the Charter covers cases of 'discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'.

76. It is not a question of developing 'European matrimonial law' but of ensuring that the principle that there should be no discrimination based on sex is fully effective. Take, for example, a hypothetical national rule which excludes women from entering into a particular legal arrangement or from obtaining a qualification which is a necessary precondition for earning money. Such a limitation, unless it could be explained as a proportionate response based on objective criteria, would amount to direct discrimination contrary to Article 141 EC.

The same is true of the present case: although the unequal treatment operates mediately, the discrimination is still direct. Discrimination may be described as indirect only where it makes use of criteria distinct from sex, but the impediment to marriage in this case is based on, and is solely accounted for by, the gender reassignment of the person concerned, which is covered by Article 141 EC, following the interpretation of the Court of Justice referred to above.

77. In addition to equality at work, there is also an issue — as the judgment in *P. v S.* recognises — of respect for the dignity and freedom to which transsexuals are entitled. 'Human dignity and the fundamental right to free personal development make it imperative that an individual's status should be adapted to the sex to which he or she belongs in accordance with his or her psychological and physical make-up... For

reasons of legal certainty, the legislature should regulate issues relating to civil status associated with gender reassignment and its consequences. But, until such time as the necessary legislation has been adopted, it is for the courts to apply the principle of non-discrimination between men and women until legislation treating them equally enters into force.’⁶⁸

79. Transsexuals suffer the anguish of being convinced that they are victims of an error on the part of nature. Many have chosen suicide. At the end of a long and painful process, in which hormone treatment is followed by delicate surgery, medical science can offer them partial relief by making their external physical features correspond as far as possible to those of the sex to which they feel they belong.⁷⁰ To my mind it is wrong that the law should take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won.

78. I am aware that such an interpretation entails certain technical problems as regards implementation. Until the United Kingdom adopts the necessary legislation enabling transsexuals to marry, the national court — which is also a Community court — must ensure, in accordance with national law, that the discrimination to which transsexuals are subject does not have any repercussions for the rights which they derive from the Treaty. Possible solutions range from interpreting the terms ‘man’ and ‘woman’ in such a way that transsexuals are entitled to marry,⁶⁹ to creating a notional marriage there and then or to establishing a separate, more flexible link, which would enable transsexuals to have access to a pension following the death of the person who would have been their spouse had that not been prohibited by unfair rules.

80. I shall finish in the same way as Advocate General Tesaro in his Opinion in *P. v S.* when he paraphrased the words of Advocate General Trabucchi in an Opinion dating from almost 30 years ago: If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot fail to live up to what is expected of us.⁷¹

68 — Order of the Bundesverfassungsgericht (Constitutional Court, Germany) of 11 October 1978 (BVerfGE 49, p. 286).

69 — Although the House of Lords has recently refused to do this, allowing difficulties of how to implement the right in practice to prevail over the fundamental right, an approach diametrically opposed to that taken by the German Constitutional Court.

70 — See the dissenting opinion of Judge Martens in the judgment of the Court of Human Rights in *Cossey v United Kingdom*, cited above.

71 — Opinion of Advocate General Trabucchi in Case 7/75 *Mr and Mrs F. v Belgium* [1975] ECR 679, point 6.

Conclusion

81. I therefore propose that the Court should answer the Court of Appeal's question as follows:

The prohibition on discrimination based on sex, laid down in Article 141 EC, precludes national rules which, by not recognising the right of transsexuals to marry in their acquired sex, denies them entitlement to a widow(er)'s pension.