

JUDGMENT OF THE COURT

15 May 1986 *

In Case 222/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Industrial Tribunal of Northern Ireland, for a preliminary ruling in the action pending before that court between

Marguerite Johnston

and

Chief Constable of the Royal Ulster Constabulary

on the interpretation of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women (Official Journal 1976, L 39, p. 40) and of Article 224 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling, K. Bahlmann and R. Joliet, Presidents of Chamber, O. Due, Y. Galmot, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: M. Darmon

Registrar: P. Heim

after considering the observations submitted on behalf of

Marguerite Johnston, in writing and orally, by A. Lester, QC, and D. Smyth, Barrister, instructed by Murphy, Kerr & Co., Solicitors,

the United Kingdom, in writing by Mrs S. J. Hay, of the Treasury Solicitor's Department, acting as Agent, assisted by A. Campbell, Senior Crown

* Language of the Case: English.

Counsel, and R. Plender, Barrister, and orally by F. Jacobs, QC, and R. Plender, Barrister,

the Kingdom of Denmark, orally, by L. Mikaelsen,

the Commission of the European Communities, in writing and orally, by A. Toledano Laredo, Principal Legal Adviser, and J. Currall, a member of its Legal Department,

after hearing the Opinion of the Advocate General delivered at the sitting on 28 January 1986,

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

A — *The facts of the case*

1. The Royal Ulster Constabulary ('the RUC') is placed under the authority of its Chief Constable. Under the Police Act (Northern Ireland) 1970 the Chief Constable has the power to appoint reserve constables to the Royal Ulster Constabulary Reserve ('the RUC Reserve'). The appointment and conditions of service of members of the RUC Reserve are governed

by the Royal Ulster Constabulary Reserve (Appointment and Conditions of Service) Regulations (Northern Ireland) 1973 (SR & O 1973 No 83). Regulation 4 provides that such appointments are limited to persons who are of good character, healthy and physically fit. The Chief Constable may appoint reserve constables on a full-time basis; they form 'the RUC full-time Reserve'.

The 1973 Regulations and the conditions of service for RUC full-time reserve constables make no distinction between men and women as regards duties that is relevant in the present case. The first reserve constables were appointed to the RUC Reserve in 1970. Women were first appointed to the RUC Reserve in 1973. The first appointments to the RUC full-time Reserve were made in 1972; women were first appointed to it in 1974.

From 1972 appointments to the RUC full-time Reserve were made on the basis of three-year contracts. Until 1977, as contracts of employment, whether of male or female members, fell due for renewal, further three-year contracts of full-time employment were offered to members if their service had been satisfactory and they remained suitable for employment.

2. Whereas in England and Wales police officers are not generally armed except for specific operations and there is no general policy against the training of women officers in the handling and firing of fire-arms or against their deployment on duties requiring the carrying of fire-arms, a different policy has been adopted in Northern Ireland by the Chief Constable of the RUC owing to the terrorist campaign which has been carried on there for a number of years. The assassination of a substantial number of police officers has made it impossible in Northern Ireland to achieve the aim that police forces should carry out their duties as an unarmed force, as in the rest of the United Kingdom.

Male officers carry fire-arms in the regular course of their duties. However, female members of the RUC are not, save in exceptional cases, and female members of the RUC Reserve are never issued with fire-arms and do not receive training in the handling and firing of fire-arms. The reason for this policy of the Chief Constable that women officers should not carry fire-arms is that he considers that, if female officers were armed, it would increase the risk that they might become targets for assassination. The Chief Constable further considers that armed women officers would be less effective in certain areas for which women are better suited, in particular welfare type work which involves dealing with families and children. Finally, he considers that, if women as well as men were to carry fire-arms in the regular course of their duties, it would be regarded by the public as a much

greater departure from the ideal of an unarmed police force.

The number of male officers of the RUC and RUC Reserve who have died as a result of terrorist activities since 1969 is 180, 59 of whom were individually picked out in advance as targets for assassination. During the same period two women officers were killed. However, in no case was a woman singled out for attack.

3. In 1980 the Chief Constable decided that contracts of women members of the RUC full-time Reserve would be renewed only in cases in which the duties being performed could only be undertaken by a woman member. The reasons for that decision were as follows: At the material time the RUC had a sufficient number of women officers for the duties normally assigned to women members. The only duties for the performance of which recruits for the RUC full-time Reserve were required were general police duties. A substantial part of such general duties consisted of security duties such as guard and escort duties which frequently involve the use of fire-arms. In pursuance of the Chief Constable's policy on the carrying of fire-arms by women members of the RUC, such duties were not to be assigned to women.

Since that decision no further contracts of full-time employment in the RUC full-time Reserve have been offered to women, save in one case. Such contracts have continued to be offered to men, as before, for service in the RUC full-time Reserve.

4. Mrs Marguerite Johnston joined the RUC as a part-time Reserve Constable in March 1974. In November 1974 she became a member of the RUC full-time Reserve on a three-year contract. At the end of that contract she accepted a second contract of employment for three years. That contract expired in November 1980.

Until November 1980 Mrs Johnston was posted to Newcastle RUC station and performed normal duties of uniformed police officers, such as acting as station duty officer, taking part in mobile patrols, driving the police mobile patrol vehicle and assisting in searching persons brought to the station. She was not armed when carrying out those duties but was ordinarily accompanied in duties outside the station by an armed male member of the RUC full-time Reserve.

In November 1980 the Chief Constable refused to offer Mrs Johnston a further contract of full-time employment.

She was subsequently employed on a part-time basis in the RUC Reserve, in which she is at present employed as a communications assistant. Her salary is proportionately lower than that which she received in the RUC full-time Reserve.

It is common ground that Mrs Johnston was an efficient and valued member of the RUC full-time Reserve and had become experienced in police work and procedures, that the reason why her full-time contract of employment was not renewed was the policy decision taken by the Chief Constable in relation to women members of the RUC full-time Reserve and that if she had been a man the Chief Constable would have offered her a new full-time contract.

B — The national provisions on sex discrimination

In Northern Ireland the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976 No 1042 (NI 15)) lays down rules to eliminate sex discrimination and implement the principle of equal treatment for men and

women as regards access to employment, vocational training and promotion and working conditions.

By Article 8 (1) (c) of the Sex Discrimination Order it is unlawful to discriminate against a woman by refusing or deliberately omitting to offer her employment. By Article 8 (2) (a) it is unlawful for a person, in the case of a woman employed by him, to discriminate against her in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services or by refusing or deliberately omitting to afford her access to them.

Article 10 (1) of the Order provides that the above provisions do not apply to any employment where being a man is a genuine occupational qualification for the job. That is the case, according to Article 10 (2), only where 'the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the essential nature of the job would be materially different if carried out by a woman'.

The police are specifically provided for in the Sex Discrimination Order. Article 19 (1) provides that the holding of the office of constable is to be treated as employment and Article 19 (2) provides that regulations made under the Police Act (Northern Ireland) 1970 are not to treat men and women differently except as regards requirements relating to height, uniform or equipment, or allowances in lieu of uniform or equipment.

Article 53 of the Order provides that nothing in Part III of the Order (which Part includes Article 8) shall render unlawful an

act done for the purpose of safeguarding national security or of protecting public safety or public order. Article 53 (2) provides that a certificate signed by the Secretary of State and certifying that an act was done for those purposes shall be conclusive evidence that those conditions are fulfilled.

C — The proceedings before the national court and the questions referred to the Court of Justice

1. On 27 November 1980 Mrs Johnston complained to the Industrial Tribunal and sought an order declaring her rights and the Chief Constable's rights in relation to:

- (i) her further full-time employment in the RUC full-time Reserve;
- (ii) access to vocational training in the handling and use of fire-arms;
- (iii) the denial of the opportunity to perform public duties in connection with the preservation of public order; and
- (iv) compensation.

The grounds of her application, based on the 1976 Sex Discrimination Order, were that:

- (i) She had been unlawfully discriminated against by the Chief Constable, contrary to Article 8 (1) (c) of the Sex Discrimination Order, in so far as he had refused or deliberately omitted to offer her further full-time employment in the RUC full-time Reserve; and
- (ii) She had been unlawfully discriminated against by the Chief Constable, contrary to Article 8 (2) (a) of the Sex Discrimination Order, in so far as he had denied her access to vocational training in the handling and use of fire-arms and the opportunity to perform duties in connection with the preservation of public order.

2. Before the first hearing of the case the Secretary of State issued a certificate, as provided for in Article 53 of the Sex Discrimination Order, stating that the refusal to offer full-time employment to Mrs Johnston in the RUC Reserve was for the purpose of safeguarding national security and protecting public safety and public order.

Before the Industrial Tribunal it was conceded on behalf of Mrs Johnston that, by virtue of the provisions of the Sex Discrimination Order themselves, when read in isolation, the issue of that certificate deprived her of any remedy. However, she relied on the provisions of Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions.

The Industrial Tribunal decided that questions should be referred to the Court of Justice under Article 177 of the EEC Treaty but deferred the drafting of the questions until a later stage. An appeal lodged by the Chief Constable against that decision was dismissed by Lord Lowry, Lord Chief Justice of Northern Ireland. The Chief Constable then appealed to the Court of Appeal in Northern Ireland.

That appeal was adjourned in order for the substance of the case to be re-argued before the Industrial Tribunal. The Chief Constable conceded that Articles 10 and 19 of the Sex Discrimination Order could not afford him a defence and he relied on Article 224 of the EEC Treaty. The Industrial Tribunal decided that this defence raised further issues of interpretation of Community law which had to be submitted to the Court under Article 177 of the EEC Treaty.

The Chief Constable's appeal against the decision of the Lord Chief Justice of Northern Ireland was dismissed on 13 October 1983.

3. By a decision of 8 August 1984 the Industrial Tribunal submitted the following questions to the Court for a preliminary ruling.

- (1) On the proper construction of Council Directive No 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women ('the Directive') and in the circumstances described in the agreed Statement of Facts in this case, can a Member State exclude from the Directive's field of application acts of sex discrimination as regards access to employment done for the purpose of safeguarding national security or of protecting public safety or public order?
- (2) On the proper construction of the Directive and in the circumstances described in the agreed Statement of Facts in this case, is full-time employment as an armed member of a police reserve force, or training in the handling and use of fire-arms for such employment, capable of constituting one of those occupational activities and, where appropriate, the training leading thereto for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor, within the meaning of Article 2 (2)?
- (3) What are the principles and criteria by which Member States should determine whether 'the sex of a worker constitutes a determining factor' within the meaning of Article 2 (2) in relation to (a) the 'occupational activities' of an armed member of such a force and (b) 'the training leading thereto', whether by reason of their nature or by reason of the context in which they are carried out?
- (4) Is a policy applied by a Chief Constable of Police, charged with a statutory responsibility for the direction and control of a police force, that women members of that force should not carry fire-arms capable in the circumstances set out in the Statement of Facts in this case, of constituting a 'provision concerning the protection of women', within the meaning of Article 2 (3), or an 'administrative provision' inspired by 'concern for protection' within the meaning of Article 3 (2) (c) of the Directive?
- (5) If the answer to Question 4 is affirmative, what are the principles and criteria by which Member States should determine whether the 'concern for protection' is 'well-founded', within the meaning of Article 3 (2) (c)?
- (6) Is the applicant entitled to rely upon the principle of equal treatment contained in the relevant provisions of the Directive before the national courts and tribunals of Member States in the circumstances of the present case?
- (7) If the answer to Question 6 is affirmative:
 - (a) Does Article 224 of the EEC Treaty, on its proper construction, permit Member States when confronted with serious internal disturbances affecting the maintenance of law and order to derogate from any obligations which would otherwise be imposed on them or on employers within their jurisdiction by the Directive?
 - (b) If so, is it open to an individual to rely upon the fact that a Member State did not consult with other Member States for the purpose of preventing the first Member State from relying on Article 224 of the EEC Treaty?

D — *Written procedure before the Court*

The Industrial Tribunal's decision to request a preliminary ruling was registered at the Court on 4 September 1984. In accordance with Article 20 of the Protocol on the Statute on the Court of Justice of the EEC, written observations were submitted by the following: Mrs Johnston, represented by Anthony Lester QC and David Smyth, instructed by Murphy, Kerr & Co.; the United Kingdom, represented by Mrs S. J. Hay, acting as Agent, assisted by Anthony Campbell, Senior Crown Counsel, and Richard Plender; and the Commission of the European Communities, represented by Armando Toledano Laredo, Principal Legal Adviser, and Julian Currall, a member of its Legal Department.

After hearing the report of the Judge Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — *Written observations submitted to the Court*

1. *Observations of Mrs Johnston*

On the *first question*, Mrs Johnston considers that the aims of safeguarding national security or of protecting public safety or public order may justify a derogation from the fundamental principle of equal treatment only in so far as the derogation is covered by the terms of Article 2 (2) of Directive No 76/207/EEC. Only by reference to particular occupational activities is it possible to ascertain whether, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor. A derogation which is general in its scope, rather than being related to particular occupational activities or their nature or the

context in which they are carried out, made on the sole ground that the discriminatory measure in question was adopted for the purpose of safeguarding national security or protecting safety or public order, is not covered by that article. Were this not so, a Member State could determine its scope unilaterally without being subject to control by the Community Institutions (judgment of 4 December 1974 in Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337).

It is not possible to answer the *second question* in the broad terms in which it is formulated. The question whether full-time employment as an armed member of a police reserve force is capable of coming within Article 2 (2) of the directive depends upon the particular occupational activity within the general category of the employment in question. Throughout her particular occupational activities Mrs Johnston performed her duties entirely satisfactorily and sex was not a determining factor. The mere fact that the Chief Constable required members of the RUC Reserve to be armed did not alter the nature of her occupational activities nor did it change the context in which they were carried out. It has never been suggested that she was incapable as a woman of being trained in the use of fire-arms, so it was not a case in which 'the essential nature of the job calls for a man for reasons of physiology', as required by Article 10 of the Sex Discrimination Order. Employment such as that in question in this case is capable of coming within Article 2 (2) of the directive only in so far as particular occupational activities within the category of employment in question are activities for which the sex of the police officer constitutes a determining factor; this has not been demonstrated by the arguments advanced by the Chief Constable, which are only broad generalizations, and it cannot be accepted in

the case of such a broad exclusion as the exclusion of women from the RUC Reserve.

As regards the *third question*, Mrs Johnston observes that in determining whether the requirements of Article 2 (2) of the directive are satisfied the Member States must bear in mind that the provision must, as an exception to a fundamental human right, be strictly construed. The national courts must be allowed to decide whether those requirements are satisfied and the Member State or the employer must prove that they are satisfied. A Member State may only exclude a particular occupational activity and only by reason of the nature of the activity or the context in which it is carried out. The derogation must be founded on objective reasons. In the circumstances of the present case, the sex of a police officer will only be a 'determining factor' if the nature of the particular activity would be different if carried out by a woman or if the context in which it is carried out makes it essential for it to be done by a man in order to ensure respect for the fundamental right to respect for privacy, for example, in carrying out body searches. The purposes asserted in the Secretary of State's certificate and the reasons given by the Chief Constable are not sufficient for this purpose.

Article 2 (3) of the directive, to which the *fourth question* refers, on provisions concerning the protection of women, must be strictly construed and the Member State or employer concerned must prove that the conditions for the application of that provision are satisfied. The aim of Article 2 (3) is to ensure that women receive special treatment to protect their health and safety in the case of pregnancy or childbirth; it is not intended to permit women to be discriminated against by excluding them from employment in the guise of protection. It is not even contended by the Chief

Constable that the requirements of the provisions of the Sex Discrimination Order concerning the protection of women are satisfied in this case. The fact that the Secretary of State and the Chief Constable relied on a certificate issued under Article 53 of the Order precludes them from asserting other purposes, such as the protection of women, which in any event was never considered before this case was brought. In any case, the blanket exclusion of women from the RUC Reserve and the denial of training in the use of fire-arms irrespective of the duties performed or of the individual qualities of the particular woman concerned are not proportionately related to the aim asserted. It is not necessary, in order to achieve that aim, to impose a blanket ban; other means, having a less severe impact upon women, for example, training women in the handling and use of fire-arms and deploying only police officers of either sex who are proficient in the handling and use of fire-arms on duties requiring such proficiency, could have been used to achieve that aim.

Since the answer to the fourth question must be in the negative, the *fifth question* does not arise. In the alternative, it is contended that Article 3 (2) (c) must be strictly construed. The Member State or employer concerned must prove that the concern for the protection of women is well founded and that the means employed for the purpose of protecting women are reasonably related to and necessary for that purpose.

As regards the *sixth question*, which asks whether an individual may rely on the directive in question, Article 53 of the 1976 Sex Discrimination Order is contrary to the clear, complete and precise provision of Article 6 of the directive and cannot therefore preclude Mrs Johnston from

relying on the relevant provisions of the directive before the national courts. In the circumstances of this case the Chief Constable and the Secretary of State did not act as private persons but as persons exercising statutory powers or entrusted with public duties and the directive therefore is directly binding upon them. In any event, the relevant provisions of the directive have a horizontal direct effect.

Article 224 of the EEC Treaty, to which the *seventh question* refers, does not allow the Member States to derogate unilaterally and free from judicial control from any of the obligations and rights arising under the Treaties and in particular the fundamental rights guaranteed by Community law. Article 224 must be strictly construed and can only apply if all its conditions are fulfilled. A Member State has a certain margin of appreciation but not an unlimited power removed from all control by the national courts and by the Court of Justice as regards the requirement relating to the maintenance of law and order and serious internal disturbances. The Member State must also prove that it is adopting the derogating measure for the reasons set out in Article 224 and that the means used are proportionate to and necessary for the aim in view. It should have consulted the other Member States and they must have together taken collective steps. In any event, it is open to an aggrieved individual to rely before a national court upon any failure to comply with the requirements of Article 224 so as to ensure 'equality of arms' and observance of the rule of law when the Member State invokes that article.

2. *The United Kingdom's observations*

With regard to the *first question*, the United Kingdom considers that Directive No 76/207/EEC is in principle inapplicable to action taken by the Member States for the purpose of safeguarding national security or for protecting public safety or public order and the Member States are free to exclude such matters from the scope of their legislation on equal treatment. That conclusion follows first of all from the principle of interpreting the directive in conformity with the rules of the Treaty and with general principles of law. The EEC Treaty itself leaves intact the power of the Member States to take such measures as they may consider necessary or expedient for the above-mentioned purposes, as is shown by the 'safeguard' clauses contained in Articles 36, 48, 56, 66, 223 and 224. It is inconceivable that a directive may be interpreted as restricting that power of the Member States which the EEC Treaty itself leaves intact. The interpretation of the directive in accordance with its objects and general scheme leads to the same result because in order to attain the directive's aims, which, as is clear from the preamble thereto, are to avoid difficulties in the operation of the common market owing to the competitive disadvantages that the elimination of discrimination may entail and to achieve the Community's social aims, it is not necessary to restrict that power of the Member States. In circumstances such as those existing in Northern Ireland, a Member State is therefore entitled, for the purpose of safeguarding national security, public safety or public order, to exclude from its legislation on the implementation of the principle of equal treatment of men and women acts of the kind done by the Chief Constable.

As regards the *second question*, the United Kingdom observes that the language of Article 2 (2) of the directive specifically directs attention to the context in which an activity is carried out and the suitability of a person of a particular sex for employment may depend on that context as well as on the nature or inherent requirements of the post. Under Article 2 (2) the Member States are to determine the activities which are to be excluded from the directive's field of application and they have a discretion in this regard. In interpreting the directive and determining its field of application the Court and the Member States must therefore take account of the need to reconcile the principle of equal treatment with other conflicting interests. The question of law submitted to the Court in this case, namely whether employment of the kind in question undertaken in the circumstances described by the national court may be an occupational activity for which the sex of the worker is a determining factor, must be answered in the affirmative, taking into consideration the equally fundamental interests of national security.

The enumeration required by the *third question* of the principles and criteria by which it should be determined whether 'the sex of the worker constitutes a determining factor' within the meaning of Article 2 (2) of the directive is impossible. The definition of the criteria depends on the nature of the activity and the context in which it is carried out. In order to reconcile the principle of equality of treatment with the demands of national security, public safety or public order, the Member State should determine whether, by reason of the physiological differences between the sexes or by reason of the distinctions customarily drawn between the sexes; it is necessary to treat members of the two sexes differently in respect of the employment or training in question. In this regard differences in physical strength may be taken into account

owing to the increased risk of the theft of fire-arms. It is also legitimate to take into account the probable public reaction if armed policewomen appeared on the streets, if they became targets for assassination or if they had to work with families and children. Those were the criteria applied by the Chief Constable.

With regard to the *fourth question*, the term 'provisions concerning the protection of women' in Article 2 (3) of the directive gains colour from the expression 'laws, regulations and administrative provisions' in Article 3 (2) (c) and covers the policy which the Chief Constable applies in the exercise of statutory powers. The aim of that policy is to protect women by preventing them from becoming targets for assassination. The breadth of the phrase 'protection of women' is not reduced by the reference to pregnancy and maternity. This is clear from Article 3 (2) (c) because it is unlikely that provisions governing maternity and pregnancy will cease to be inspired by a well-founded 'concern' to protect women. It is not for the Court to determine whether the Chief Constable was justified in applying his policy. He might have legitimately taken into account the physical strength or social and cultural status of women, which, in time of grave emergency, are capable of warranting the adoption of a provision for the protection of women.

It is not possible to enumerate exhaustively the criteria to be taken into account for the purposes of Article 3 (2) (c), as requested by the *fifth question*. Nevertheless, in interpreting that provision some assistance might be gained by comparing it with Convention

No 111 of the International Labour Organization concerning discrimination in the matter of employment and professions (25 June 1958, *United Nations Treaty Series*, Vol. 362, p. 31), which permits the retention of special measures for the protection of women in specified circumstances (maternity) or at specified times (night) or in specified kinds of employment (underground), even when that employment is also arduous or dangerous for men. It authorizes a State to maintain in force provisions designed to protect women when it is generally recognized by other States or by the population in question that members of that sex require special protection or assistance. Article 8 (4) (b) of the European Social Charter imposes an obligation to prohibit the employment of women workers on work which is unsuitable for them by reason of its dangerous, unhealthy or arduous nature. A Member State may therefore take account, out of concern to protect women, of the existence and nature of a state of emergency, the arduous or dangerous nature of the employment in question and the general recognition that women require special protection or assistance.

With regard to the *sixth question*, which in its view calls for no answer from the Court, the United Kingdom considers that the relevant provisions of the directive are not sufficiently unconditional and precise to produce direct effect. Article 2 (1) and Article 3 (1), read in the light of the subsequent provisions of the directive and with regard to the circumstances of the present case, are imprecise and conditional provisions since they are subject to the exercise of a Member State's power to exclude certain activities or to revise its existing laws, regulations and administrative provisions in accordance with Article 9 (2) and since the criteria to be applied in the exercise of that power are not articulated in the directive and defy enumeration. In any

case, an individual may not rely on those provisions of the directive as against an employer. In the present case, the Chief Constable is constitutionally independent of the State and is involved as an employer who has to decide whether or not to recruit a particular person. The directive does not have direct effect in such relations. To take the opposite view would mean that there would be unwarranted and illogical discrimination between the public and private sectors and between Member States, depending on the distribution of functions between the public and private sectors in the case of similar activities.

As regards Article 224 of the EEC Treaty, referred to in the *seventh question*, it is for the Member State to determine which measures are to be taken in the event of serious disturbances. The situation in Northern Ireland must clearly be regarded as a serious internal disturbance affecting the maintenance of law and order. The functioning of the common market is not affected by a policy of engaging only men in armed police duties. Furthermore, an individual may not rely on a Member State's failure to consult with other Member States for the purpose of preventing it from relying on Article 224. The remedy which the Treaty makes available for an improper use of Article 224 is set out in Article 225. Article 224 does not confer any rights on individuals enabling them to prevent Member States from exercising their powers under that article.

3. *The Commission's observations*

The Commission observes first of all that the exceptions provided for in Article 2 (2) and (3) of Directive No 76/207/EEC to the prohibition of discriminatory treatment of men and women, which relate to the nature

or the context in which occupational activities or training are carried out and to the protection of women, are not relevant in this case. They do not expressly refer to national security or to the maintenance of law and order. However, in *Article 224* the EEC Treaty does contemplate such cases and one cannot therefore exclude the possibility that such reasons may justify an exception to the principle of equal treatment either on the basis of the provisions of the directive itself or by reason of Article 224 of the EEC Treaty.

The directive must be interpreted in the light of Article 224 of the EEC Treaty. The Commission is prepared to assume that the situation in Northern Ireland at the relevant time, in 1980, could justify the application of Article 224 on the ground of 'serious internal disturbances affecting the maintenance of law and order'. However, for the reasons set out later, the Commission does not think it necessary to consider whether an individual may rely on the fact that the United Kingdom has never consulted the other Member States on this matter. In view of Article 224 of the EEC Treaty, it is not strictly necessary to examine the exceptions provided for in the directive itself. On this point the Commission observes however that, although no exception relating to national security or the protection of public order or safety is expressly provided for, such considerations may nevertheless mean that certain occupational activities can only be carried out by persons of one sex. The Commission is therefore prepared to assume that the policy decision not to arm women and to reserve certain police activities to armed men in the situation prevailing in Northern Ireland is justified and that such a policy may be adopted to protect women police officers.

An exception created by an unchallengeable administrative decision, such as provided for in Article 53 of the 1976 Sex Discrimination Order, to a fundamental principle of Community law is not permissible, however, either under Article 224 of the EEC Treaty or under the directive itself. In any event Article 224 imposes an obligation to consult. Exceptions to the directive must in particular be subject to judicial control, for which Article 6 of the directive provides without any possible exception. It is not therefore possible to exclude judicial control on grounds of national security or public order. It is not enough for a Member State to allege that its action was taken on the basis of an exception referred to in the Treaty or in secondary legislation; it must show that the necessary conditions are met, subject to review by the Court.

In the context of Article 224 of the Treaty it must be shown not only that the decisions taken are the result of the situation which has arisen but also that they are necessary in order to meet it and that the principle of proportionality has been observed. In this regard a parallel can be drawn with the exceptions provided for in Articles 36 and 48 (3) of the EEC Treaty, which do not create an area of reserved competence for the Member States. The fact that an exceptional situation of the type envisaged in Article 224 has arisen is not therefore sufficient for a Member State to be able to derogate, without any form of judicial review, from a fundamental principle of Community law. In the present case it is necessary to determine in the light of the principle of proportionality whether it was necessary and permissible in the conditions prevailing in 1980 not only to exclude women police officers from certain duties but also to dismiss them or to refuse to renew their contracts. It has not yet been

demonstrated in this case that it would not have been sufficient to assign Mrs Johnston to unarmed duties, as had been done during her six years of service in the RUC full-time Reserve.

With regard to the *second question*, the Commission considers that, owing to the context in which the duties described by the national court are carried out but not owing to their nature, full-time employment as an armed member of the police reserve or training in the handling of fire-arms may be covered by Article 2 (2) of the directive. It refers in this regard to the fact that elsewhere in the United Kingdom sex is not considered a determining factor. The difference therefore lies in the context in which the duties and training of police officers are carried out.

As regards the *third question*, it is sufficient to make the following points without giving an exhaustive list: An exception may be justified not in relation to a post as a whole but in relation to particular duties attaching to the post. Thus, Mrs Johnston could have been assigned to specific police duties which could be performed unarmed. Such a solution might be imposed by the principle of proportionality. The same applies to the exclusion from certain forms of training for particular duties.

The answer to the *fourth question* must be in the affirmative in the circumstances of this case, at least as far as concerns Article 3 (2) (c) of the directive, which specifically refers to administrative provisions.

As regards the *fifth question*, the Commission observes, without giving an

exhaustive list of the criteria to be taken into consideration for the purposes of Article 3 (2) (c) of the directive, that the necessity for a prohibition or restriction on the employment of women in a given activity may cease to be justified if the social or technical circumstances which justified it change. In the present case the concern for protection is likely to be founded for as long as the task of maintaining public order in Northern Ireland remains significantly more difficult than in the rest of the United Kingdom.

With regard to the *sixth question*, the Commission states that the Chief Constable cannot rely on the certificate issued by the Secretary of State. It is not compatible with Article 6 of the directive for a Member State to rely on a provision of its own legislation in order to deny individuals the right to invoke before the national courts the national provisions implementing the directive. The certificate should therefore be set aside. The national court may then deal with the matter entirely under national law. This would enable the case to be resolved without its being necessary to consider whether any other provision of the directive may be directly relied upon by an individual before a national court.

Question 7 (a) does not arise since the only provision which it is necessary to rely upon in the present case is Article 6 of the directive. The obligation of the Member State concerned to subject its action to control by the Community institutions and the right of individuals to bring actions before the national courts cannot be excluded on the basis of Article 224 of the EEC Treaty. Similarly, the answer to *Question 7 (b)* is negative since the Secretary of State's certificate cannot be relied upon and the merits of the case must be dealt with by the national court.

III — Oral procedure

At the sitting on 9 October 1985 oral argument was presented by the following: A. Lester, QC, and D. Smyth, Barrister, for Mrs Johnston; F. Jacobs, QC, and R. Plender, Barrister, for the United Kingdom; L. Mikaelsen, for the Danish Government; and A. Toledano Laredo and J. Currall, for the Commission of the European Communities.

The Danish Government's representative confined his observations to the interpret-

ation of Article 224 of the EEC Treaty. He stated that that article makes it possible to neutralize any rule of Community law and leaves the Member States a very wide margin of appraisal. A Member State's exercise of its discretion in that regard is not subject to judicial review, save in the case of abuse. The powers which that article confers on Member States are to be understood in a broad sense.

The Advocate General delivered his Opinion on 28 January 1986.

Decision

- 1 By a decision dated 8 August 1984, which was received at the Court on 4 September 1984, the Industrial Tribunal of Northern Ireland, Belfast, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women (Official Journal 1976, L 39, p. 40) and of Article 224 of the EEC Treaty.
- 2 Those questions were raised in a dispute between Mrs Marguerite I. Johnston and the Chief Constable of the Royal Ulster Constabulary (the 'RUC'). The Chief Constable is the competent authority for appointing reserve constables to the RUC Reserve in Northern Ireland and to full-time posts in the RUC full-time Reserve under three-year renewable contracts. The dispute concerns the Chief Constable's refusal to renew Mrs Johnston's contract as a member of the RUC full-time Reserve and to allow her to be given training in the handling and use of fire-arms.

3 According to the decision making the reference for a preliminary ruling, the provisions of the Royal Ulster Constabulary Reserve (Appointment and Conditions of Service) Regulations (Northern Ireland) 1973, which govern the appointment and conditions of service of members of the reserve police force, do not make any distinction between men and women which is of importance in this case. It is also clear from Articles 10 and 19 of the Sex Discrimination (Northern Ireland) Order 1976 (SI 1976 No 1042 (NI 15)), which lays down rules to eliminate sex discrimination and implements the principle of equal treatment as regards access to employment, vocational training and promotion and working conditions, that the ban on discrimination applies to employment with the police and that men and women are not to be treated differently in this respect, except as regards requirements relating to height, uniform or equipment, or allowances in lieu of uniform or equipment. Article 53 (1) of the Sex Discrimination Order provides that none of its provisions prohibiting discrimination

‘shall render unlawful an act done for the purpose of safeguarding national security or of protecting public safety or public order’

whilst Article 53 (2) provides that

‘a certificate signed by or on behalf of the Secretary of State and certifying that an act specified in the certificate was done for a purpose mentioned in paragraph (1) shall be conclusive evidence that it was done for that purpose’.

4 In the United Kingdom police officers do not as a general rule carry fire-arms in the performance of their duties except for special operations and no distinction is made in this regard between men and women. Because of the high number of police officers assassinated in Northern Ireland over a number of years, the Chief Constable of the RUC considered that he could not maintain that practice. He decided that, in the RUC and the RUC Reserve, men should carry fire-arms in the regular course of their duties but that women would not be equipped with them and would not receive training in the handling and use of fire-arms.

- 5 In those circumstances, the Chief Constable decided in 1980 that the number of women in the RUC was sufficient for the particular tasks generally assigned to women officers. He took the view that general police duties, frequently involving operations requiring the carrying of fire-arms, should no longer be assigned to women and decided not to offer or renew any more contracts for women in the RUC full-time Reserve except where they had to perform duties assigned only to women officers. Since that decision, no woman in the RUC full-time Reserve has been offered a contract or had her contract renewed, save in one case.

- 6 According to the decision making the reference for a preliminary ruling, Mrs Johnston had been a member of the RUC full-time Reserve from 1974 to 1980. She had efficiently performed the general duties of a uniformed police officer, such as acting as station-duty officer, taking part in mobile patrols, driving the patrol vehicle and assisting in searching persons brought to the police station. She was not armed when carrying out those duties and was ordinarily accompanied in duties outside the police station by an armed male officer of the RUC full-time Reserve. In 1980 the Chief Constable refused to renew her contract because of his new policy, mentioned above, with regard to female members of the RUC full-time Reserve.

- 7 Mrs Johnston lodged an application with the Industrial Tribunal challenging the decision, taken pursuant to that new policy, to refuse to renew her contract and to give her training in the handling of fire-arms. She contended that she had suffered unlawful discrimination prohibited by the Sex Discrimination Order.

- 8 In the proceedings before the Industrial Tribunal the Chief Constable produced a certificate issued by the Secretary of State in which that Minister of the United Kingdom Government certified in accordance with Article 53 of the Sex Discrimination Order, cited above, that 'the act consisting of the refusal of the Royal Ulster Constabulary to offer further full-time employment to Mrs Marguerite I. Johnston in the Royal Ulster Constabulary Reserve was done for the purpose of (a) safeguarding national security; and (b) protecting public safety and public order'.

9 Mrs Johnston referred to Directive No 76/207. The purpose of that directive, according to Article 1 thereof, is to put into effect 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. According to Article 2 (1), the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex, subject, however, to the exceptions allowed by Article 2 (2) and (3). For the purposes of the application of that principle in different spheres, Articles 3 to 5 require the Member States in particular to abolish any laws, regulations or administrative provisions contrary to the principle of equal treatment and to revise laws, regulations and administrative provisions where the concern for protection which originally inspired them is no longer well founded. Article 6 provides that all persons who consider themselves wronged by discrimination must be able to pursue their claims by judicial process.

10 In order to be able to rule on that dispute, the Industrial Tribunal referred the following questions to the Court for a preliminary ruling:

- (1) On the proper construction of Council Directive No 76/207 and in the circumstances of this case, can a Member State exclude from the directive's field of application acts of sex discrimination as regards access to employment done for the purpose of safeguarding national security or of protecting public safety or public order?
- (2) On the proper construction of the directive and in the circumstances of this case, is full-time employment as an armed member of a police reserve force, or training in the handling and use of fire-arms for such employment, capable of constituting one of those occupational activities and, where appropriate, the training leading thereto for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor, within the meaning of Article 2 (2)?
- (3) What are the principles and criteria by which Member States should determine whether 'the sex of a worker constitutes a determining factor' within the meaning of Article 2 (2) in relation to (a) 'the occupational activities' of an armed member of such a force and (b) 'the training leading thereto', whether by reason of their nature or by reason of the context in which they are carried out?

- (4) Is a policy applied by a chief constable of police, charged with a statutory responsibility for the direction and control of a police force, that women members of that force should not carry fire-arms capable, in the circumstances of this case, of constituting a 'provision concerning the protection of women', within the meaning of Article 2 (3), or an 'administrative provision' inspired by 'concern for protection' within the meaning of Article 3 (2) (c) of the directive?
- (5) If the answer to question 4 is affirmative, what are the principles and criteria by which Member States should determine whether the 'concern for protection' is 'well founded', within the meaning of Article 3 (2) (c)?
- (6) Is the applicant entitled to rely upon the principle of equal treatment contained in the relevant provisions of the directive before the national courts and tribunals of Member States in the circumstances of the present case?
- (7) If the answer to question 6 is affirmative:
- (a) Does Article 224 of the EEC Treaty, on its proper construction, permit Member States when confronted with serious internal disturbances affecting the maintenance of law and order to derogate from any obligations which would otherwise be imposed on them or on employers within their jurisdiction by the directive?
- (b) If so, is it open to an individual to rely upon the fact that a Member State did not consult with other Member States for the purpose of preventing the first Member State from relying on Article 224 of the EEC Treaty?
- 11 To enable answers to be given which will be of assistance in resolving the dispute in the main proceedings, it is necessary to explain the situation in which the Industrial Tribunal is required to adjudicate. As is clear from the decision by which the case was referred to the Court, the Chief Constable acknowledged before the Industrial Tribunal that, of all the provisions in the Sex Discrimination Order, only Article 53 could justify his position. Mrs Johnston, for her part, conceded that the certificate issued by the Secretary of State would deprive her of any remedy if national law was applied on its own; she relied on the provisions of the directive in order to have the effects of Article 53 of the Sex Discrimination Order set aside.

12 It therefore appears that the questions raised by the Industrial Tribunal are intended to ascertain first of all whether it is compatible with Community law and Directive No 76/207 for a national court or tribunal to be prevented by a rule such as that laid down in Article 53 (2) of the Sex Discrimination Order from fully exercising its powers of judicial review (part of question 6). The next object of the questions submitted by the Industrial Tribunal is to enable it to decide whether and under what conditions the provisions of the directive, in a situation such as that which exists in the present case, allow men and women employed with the police to be treated differently on grounds of the protection of public safety mentioned in Article 53 (1) of the Sex Discrimination Order (questions 1 to 5). The questions submitted are also intended to enable the Industrial Tribunal to ascertain whether or not the provisions of the directive may, in an appropriate case, be relied upon as against a conflicting rule of national law (remainder of question 6). Finally, depending on the answers to be given to those questions, the question might arise whether a Member State may avail itself of Article 224 of the EEC Treaty in order to derogate from obligations which the directive imposes on it in a case such as this (question 7).

The right to an effective judicial remedy

13 It is therefore necessary to examine in the first place the part of the sixth question which raises the point whether Community law, and more particularly Directive No 76/207, requires the Member States to ensure that their national courts and tribunals exercise effective control over compliance with the provisions of the directive and with the national legislation intended to put it into effect.

14 In *Mrs Johnston's* view, a provision such as Article 53 (2) of the Sex Discrimination Order is contrary to Article 6 of the directive inasmuch as it prevents the competent national court or tribunal from exercising any judicial control.

15 The *United Kingdom* observes that Article 6 of the directive does not require the Member States to submit to judicial review every question which may arise in the application of the directive, even where national security and public safety are involved. Rules of evidence such as the rule laid down in Article 53 (2) of the Sex Discrimination Order are quite common in national procedural law. Their justification is that matters of national security and public safety can be satisfactorily assessed only by the competent political authority, namely the minister who issues the certificate in question.

- 16 The *Commission* takes the view that to treat the certificate of a minister as having an effect such as that provided for in Article 53 (2) of the Sex Discrimination Order is tantamount to refusing all judicial control or review and is therefore contrary to a fundamental principle of Community law and to Article 6 of the directive.
- 17 As far as this issue is concerned, it must be borne in mind first of all that Article 6 of the directive requires Member States to introduce into their internal legal systems such measures as are needed to enable all persons who consider themselves wronged by discrimination 'to pursue their claims by judicial process'. It follows from that provision that the Member States must take measures which are sufficiently effective to achieve the aim of the directive and that they must ensure that the rights thus conferred may be effectively relied upon before the national courts by the persons concerned.
- 18 The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 (Official Journal C 103, p. 1) and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.
- 19 By virtue of Article 6 of Directive No 76/207, interpreted in the light of the general principle stated above, all persons have the right to obtain an effective remedy in a competent court against measures which they consider to be contrary to the principle of equal treatment for men and women laid down in the directive. It is for the Member States to ensure effective judicial control as regards compliance with the applicable provisions of Community law and of national legislation intended to give effect to the rights for which the directive provides.
- 20 A provision which, like Article 53 (2) of the Sex Discrimination Order, requires a certificate such as the one in question in the present case to be treated as conclusive evidence that the conditions for derogating from the principle of equal

treatment are fulfilled allows the competent authority to deprive an individual of the possibility of asserting by judicial process the rights conferred by the directive. Such a provision is therefore contrary to the principle of effective judicial control laid down in Article 6 of the directive.

- 21 The answer to this part of the sixth question put by the Industrial Tribunal must therefore be that the principle of effective judicial control laid down in Article 6 of Council Directive No 76/207 of 9 February 1976 does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purpose of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts.

The applicability of Directive No 76/207 to measures taken to protect public safety

- 22 It is necessary to examine next the Industrial Tribunal's first question by which it seeks to ascertain whether, having regard to the fact that Directive No 76/207 contains no express provision concerning measures taken for the purpose of safeguarding national security or of protecting public order, and more particularly public safety, the directive is applicable to such measures.

- 23 In *Mrs Johnston's* view, no general derogation from the fundamental principle of equal treatment unrelated to particular occupational activities, their nature and the context in which they are carried out, exists for such purposes. By being based on the sole ground that a discriminatory act is done for purposes such as the protection of public safety, such a derogation would enable the Member States unilaterally to avoid the obligations which the directive imposes on them.

- 24 The *United Kingdom* takes the view that the safeguard clauses contained in Articles 36, 48, 56, 66, 223 and 224 of the EEC Treaty show that neither the Treaty nor, therefore, the law derived from it apply to the fields mentioned in the Industrial Tribunal's question and do not restrict the Member States' power to take measures which they can consider expedient or necessary for those purposes. The measures referred to in the first question do not therefore fall within the scope of the directive.

25 The *Commission* suggests that the directive should be interpreted with reference to Article 224 of the EEC Treaty so that considerations of public safety could, in the special conditions envisaged by that article and subject to judicial review, justify derogations from the principle of equal treatment even where the strict conditions laid down in Article 2 (2) and (3) of the directive are not fulfilled.

26 It must be observed in this regard that the only articles in which the Treaty provides for derogations applicable in situations which may involve public safety are Articles 36, 48, 56, 223 and 224 which deal with exceptional and clearly defined cases. Because of their limited character those articles do not lend themselves to a wide interpretation and it is not possible to infer from them that there is inherent in the Treaty a general proviso covering all measures taken for reasons of public safety. If every provision of Community law were held to be subject to a general proviso, regardless of the specific requirements laid down by the provisions of the Treaty, this might impair the binding nature of Community law and its uniform application.

27 It follows that the application of the principle of equal treatment for men and women is not subject to any general reservation as regards measures taken on grounds of the protection of public safety, apart from the possible application of Article 224 of the Treaty which concerns a wholly exceptional situation and is the subject-matter of the seventh question. The facts which induced the competent authority to invoke the need to protect public safety must therefore if necessary be taken into consideration, in the first place, in the context of the application of the specific provisions of the directive.

28 The answer to the first question must therefore be that acts of sex discrimination done for reasons related to the protection of public safety must be examined in the light of the exceptions to the principle of equal treatment for men and women laid down in Directive No 76/207.

The derogations allowed on account of the context in which the occupational activity is carried out

29 The Industrial Tribunal's second and third questions are concerned with the interpretation of the derogation, provided for in Article 2 (2) of the directive, from the principle of equal treatment and are designed to enable the Tribunal to decide

whether a difference in treatment, such as that in question, is covered by that derogation. It asks to be informed of the criteria and principles to be applied for determining whether an activity such as that in question in the present case is one of the activities for which 'by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'.

30 *Mrs Johnston* takes the view that a reply to this question is not possible in terms so general. She states that she has always worked satisfactorily in performing her duties with the police and maintains that women are quite capable of being trained in the handling of fire-arms. It is for the Industrial Tribunal to determine whether a derogation is possible under Article 2 (2) of the directive, having regard to the specific duties which she is required to carry out. That provision does not make it possible for her to be completely excluded from any employment in the RUC full-time Reserve.

31 The *United Kingdom* submits that the Member States have a discretion in deciding whether, owing to requirements of national security and public safety or public order, the context in which an occupational activity in the police is carried out prevents that activity from being carried out by an armed policewoman. In determining that question the Member States may take into consideration criteria such as the difference in physical strength between the sexes, the probable reaction of the public to the appearance of armed policewomen and the risk of their being assassinated. Since the decision taken by the Chief Constable was taken on the application of such criteria, it is covered by Article 2 (2) of the directive.

32 The *Commission* takes the view that, owing to the context in which it is carried out but not to its nature, the occupational activity of an armed police officer could be considered an activity for which the sex of the officer is a determining factor. A derogation must, however, be justified in relation to specific duties and not in relation to an employment considered in its entirety. In particular, the principle of proportionality must be observed. The national court must look at the discrimination in question from that point of view.

33 In this regard it must be stated first of all that, in so far as the competent police authorities in Northern Ireland have decided, because of the requirements of public safety, to depart from the principle, generally applied in other parts of the

United Kingdom, of not arming the police in the ordinary course of their duties, that decision does not in itself involve any discrimination between men and women and is therefore outside the scope of the principle of equal treatment. It is only in so far as the Chief Constable decided that women would not be armed or trained in the use of fire-arms, that general policing duties would in future be carried out only by armed male officers and that contracts of women in the RUC full-time Reserve who, like Mrs Johnston, had previously been entrusted with general policing duties, would not be renewed, that an appraisal of those measures in the light of the provisions of the directive is relevant.

34 Since, as is clear from the Industrial Tribunal's decision, it is expressly provided that the Sex Discrimination Order is to apply to employment in the police and since in this regard no distinction is made between men and women in the specific provisions that are applicable, the nature of the occupational activity in the police force is not a relevant ground of justification for the discrimination in question. What must be examined, however, is the question whether, owing to the specific context in which the activity described in the Industrial Tribunal's decision is carried out, the sex of the person carrying out that activity constitutes a determining factor.

35 As is clear from the Industrial Tribunal's decision, the policy towards women in the RUC full-time Reserve was adopted by the Chief Constable because he considered that if women were armed they might become a more frequent target for assassination and their fire-arms could fall into the hands of their assailants, that the public would not welcome the carrying of fire-arms by women, which would conflict too much with the ideal of an unarmed police force, and that armed policewomen would be less effective in police work in the social field with families and children in which the services of policewomen are particularly appreciated. The reasons which the Chief Constable thus gave for his policy were related to the special conditions in which the police must work in the situation existing in Northern Ireland, having regard to the requirements of the protection of public safety in a context of serious internal disturbances.

36 As regards the question whether such reasons may be covered by Article 2 (2) of the directive, it should first be observed that that provision, being a derogation from an individual right laid down in the directive, must be interpreted strictly. However, it must be recognized that the context in which the occupational activity of members of an armed police force are carried out is determined by the environment in which that activity is carried out. In this regard, the possibility cannot

be excluded that in a situation characterized by serious internal disturbances the carrying of fire-arms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety.

37 In such circumstances, the context of certain policing activities may be such that the sex of police officers constitutes a determining factor for carrying them out. If that is so, a Member State may therefore restrict such tasks, and the training leading thereto, to men. In such a case, as is clear from Article 9 (2) of the directive, the Member States have a duty to assess periodically the activities concerned in order to decide whether, in the light of social developments, the derogation from the general scheme of the directive may still be maintained.

38 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 and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitute the decisive factor as regards the context of the activity in question.

39 By reason of the division of jurisdiction provided for in Article 177 of the EEC Treaty, it is for the national court to say whether the reasons on which the Chief constable based his decision are in fact well founded and justify the specific measure taken in Mrs Johnston's case. It is also for the national court to ensure that the principle of proportionality is observed and to determine whether the refusal to renew Mrs Johnston's contract could not be avoided by allocating to women duties which, without jeopardizing the aims pursued, can be performed without fire-arms.

40 The answer to the Industrial Tribunal's second and third questions should therefore be that Article 2 (2) of Directive No 76/207 must be interpreted as meaning that in deciding whether, by reason of the context in which the activities of a police officer are carried out, the sex of the officer constitutes a determining factor for that occupational activity, a Member State may take into consideration

requirements of public safety in order to restrict general policing duties, in an internal situation characterized by frequent assassinations, to men equipped with fire-arms.

The derogations allowed on the ground of a concern to protect women

- 41 In its fourth and fifth question the Industrial Tribunal then asks the Court for an interpretation of the expressions 'protection of women' in Article 2 (3) of the directive and 'concern for protection' in Article 3 (2) (c), which inspired certain provisions of national law, so that it can decide whether the difference in treatment in question may fall within the scope of the derogations from the principle of equal treatment laid down for those purposes.
- 42 In *Mrs Johnston's* view, those provisions must be interpreted strictly. Their sole purpose is to assure women special treatment in order to protect their health and safety in the case of pregnancy or maternity. That is not the case where women are completely excluded from service in an armed police force.
- 43 The *United Kingdom* states that the aim of the policy with regard to women in the RUC full-time Reserve is to protect women by preventing them from becoming targets for assassination. The expression 'protection of women' may cover such an aim in a period of serious disturbances. The *Commission* also takes the view that an exceptional situation such as exists in Northern Ireland and the resultant dangers for armed women police officers may be taken into consideration from the viewpoint of the protection of women.
- 44 It must be observed in this regard that, like Article 2 (2) of the directive, Article 2 (3), which also determines the scope of Article 3 (2) (c), must be interpreted strictly. It is clear from the express reference to pregnancy and maternity that the directive is intended to protect a woman's biological condition and the special relationship which exists between a woman and her child. That provision of the directive does not therefore allow women to be excluded from a certain type of employment on the ground that public opinion demands that women be given

greater protection than men against risks which affect men and women in the same way and which are distinct from women's specific needs of protection, such as those expressly mentioned.

45 It does not appear that the risks and dangers to which women are exposed when performing their duties in the police force in a situation such as exists in Northern Ireland are different from those to which any man is also exposed when performing the same duties. A total exclusion of women from such an occupational activity which, owing to a general risk not specific to women, is imposed for reasons of public safety is not one of the differences in treatment that Article 2 (3) of the directive allows out of a concern to protect women.

46 The answer to the Industrial Tribunal's fourth and fifth questions must therefore be that the differences in treatment between men and women that Article 2 (3) of Directive No 76/207 allows out of a concern to protect women do not include risks and dangers, such as those to which any armed police officer is exposed when performing his duties in a given situation, that do not specifically affect women as such.

The effects of Directive No 76/207

47 By its sixth question the Industrial Tribunal also seeks to ascertain whether an individual may rely upon the provisions of the directive in proceedings brought before a national court. In view of the foregoing, this question arises more particularly with regard to Articles 2 and 6 of the directive.

48 *Mrs Johnston* considers that Article 2 (1) of the directive is unconditional and sufficiently clear and precise to have direct effect. It may be relied upon as against the Chief Constable acting as a public authority. In any event, the directive has horizontal direct effect even in regard to private persons.

49 In the view of the *United Kingdom*, Article 2 (1) of the directive is a conditional provision inasmuch as it is subject to derogations which the Member State may determine in a discretionary manner. The Chief Constable is constitutionally independent of the State and in the present case is involved only as an employer; the directive has no direct effect in such relationships.

- 50 The *Commission* takes the view that the case may be dealt with within the scope of national law and that a ruling on the direct effect of Articles 2 and 3 of the directive is not necessary.
- 51 On this point it must be observed first of all that in all cases in which a directive has been properly implemented its effects reach individuals through the implementing measures adopted by the Member States concerned. The question whether Article 2 (1) may be relied upon before a national court therefore has no purpose since it is established that the provision has been put into effect in national law.
- 52 The derogation from the principle of equal treatment which, as stated above, is allowed by Article 2 (2) constitutes only an option for the Member States. It is for the competent national court to see whether that option has been exercised in provisions of national law and to construe the content of those provisions. The question whether an individual may rely upon a provision of the directive in order to have a derogation laid down by national legislation set aside arises only if that derogation went beyond the limits of the exceptions permitted by Article 2 (2) of the directive.
- 53 In this context it should be observed first of all that, as the Court has already stated in its judgments of 10 April 1984 (Case 14/83 *von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891 and Case 79/83 *Harz v Deutsche Tradax GmbH* [1984] ECR 1921) the Member States' obligation under a directive to achieve the result envisaged by that directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, and in particular the provisions of national legislation specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the EEC Treaty. It is therefore for the Industrial Tribunal to interpret the provisions of the Sex Discrimination Order, and in particular Article 53 (1) thereof, in the light of the provisions of the directive, as interpreted above, in order to give it its full effect.
- 54 In the event that, having regard to the foregoing, the question should still arise whether an individual may rely on the directive as against a derogation laid down

by national legislation, reference should be made to the established case-law of the Court (see in particular its judgment of 19 January 1982 in Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53). More particularly, the Court recently held in its judgment delivered on 26 February 1986 in Case 152/84 (*Marshall v Southampton and South West Hampshire Area Health Authority* [1986] ECR 723) that certain provisions of Directive No 76/207 are, as far as their subject-matter is concerned, unconditional and sufficiently precise and that they may be relied upon by individuals as against a Member State where it fails to implement it correctly.

55 That statement was made, in the aforesaid judgment of 26 February 1986, with regard to the application of the principle of equal treatment laid down in Article 2 (1) of the directive to the conditions governing dismissal referred to in Article 5 (1). The same applies as regards the application of the principle contained in Article 2 (1) to the conditions governing access to jobs and access to vocational training and advanced vocational training referred to in Articles 3 (1) and 4 which are in question in this case.

56 The Court also held in the aforesaid judgment that individuals may rely on the directive as against an organ of the State whether it acts *qua* employer or *qua* public authority. As regards an authority like the Chief Constable, it must be observed that, according to the Industrial Tribunal's decision, the Chief Constable is an official responsible for the direction of the police service. Whatever its relations may be with other organs of the State, such a public authority, charged by the State with the maintenance of public order and safety, does not act as a private individual. It may not take advantage of the failure of the State, of which it is an emanation, to comply with Community law.

57 The answer to the sixth question should therefore be that individuals may claim the application, as against a State authority charged with the maintenance of public order and safety acting in its capacity of an employer, of the principle of equal treatment for men and women laid down in Article 2 (1) of Directive No 76/207 to the matters referred to in Articles 3 (1) and 4 concerning the conditions for access to posts and to vocational training and advanced vocational training in order to have a derogation from that principle under national legislation set aside in so far as it exceeds the limits of the exceptions permitted by Article 2 (2).

58 As regards Article 6 of the directive which, as explained above, is also applicable in this case, the Court has already held in its judgments of 10 April 1984, cited above, that that article does not contain, as far as sanctions for any discrimination are concerned, any unconditional and sufficiently precise obligation which may be relied upon by an individual. On the other hand, in so far as it follows from that article, construed in the light of a general principle which it expresses, that all persons who consider themselves wronged by sex discrimination must have an effective judicial remedy, that provision is sufficiently precise and unconditional to be capable of being relied upon as against a Member State which has not ensured that it is fully implemented in its internal legal order.

59 The answer to this part of the sixth question must therefore be that the provision contained in Article 6 to the effect that all persons who consider themselves wronged by discrimination between men and women must have an effective judicial remedy may be relied upon by individuals as against a Member State which has not ensured that it is fully implemented in its internal legal order.

Article 224 of the EEC Treaty

60 As far as concerns the seventh question, on the interpretation of Article 224, it follows from the foregoing that Article 2 (2) of Directive No 76/207 allows a Member State to take into consideration the requirements of the protection of public safety in a case such as the one before the Court. As regards the requirement that the question whether the rules laid down by the directive have been complied with must be amenable to judicial review, none of the facts before the Court and none of the observations submitted to it suggest that the serious internal disturbances in Northern Ireland make judicial review impossible or that measures needed to protect public safety would be deprived of their effectiveness because of such review by the national courts. In those circumstances, the question whether Article 224 of the EEC Treaty may be relied upon by a Member State in order to avoid compliance with the obligations imposed on it by Community law and in particular by the directive does not arise in this case.

61 The seventh question therefore has no purpose in view of the answers to the other questions.

Costs

62 The costs incurred by the United Kingdom, the Government of Denmark and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Industrial Tribunal of Northern Ireland by decision of 8 August 1984, hereby rules:

- (1) The principle of effective judicial control laid down in Article 6 of Council Directive No 76/207 of 9 February 1976 does not allow a certificate issued by a national authority stating that the conditions for derogating from the principle of equal treatment for men and women for the purposes of protecting public safety are satisfied to be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts. The provision contained in Article 6 to the effect that all persons who consider themselves wronged by discrimination between men and women must have an effective judicial remedy may be relied upon by individuals as against a Member State which has not ensured that it is fully implemented in its internal legal order.
- (2) Acts of sex discrimination done for reasons related to the protection of public safety must be examined in the light of the derogations from the principle of equal treatment for men and women which are laid down in Directive No 76/207.

- (3) Article 2 (2) of Directive No 76/207 must be interpreted as meaning that in deciding whether, by reason of the context in which the activities of a police officer are carried out, the sex of the officer constitutes a determining factor for that occupational activity, a Member State may take into consideration requirements of public safety in order to restrict general policing duties, in an internal situation characterized by frequent assassinations, to men equipped with fire-arms.
- (4) The differences in treatment between men and women that Article 2 (3) of Directive No 76/207 allows out of a concern to protect women do not include risks and dangers, such as those to which any armed police officer is exposed in the performance of his duties in a given situation, that do not specifically affect women as such.
- (5) Individuals may claim the application, as against a State authority charged with the maintenance of public order and safety acting in its capacity as employer, of the principle of equal treatment for men and women laid down in Article 2 (1) of Directive No 76/207 to the matters referred to in Articles 3 (1) and 4 concerning the conditions for access to posts and to vocational training and advanced vocational training in order to have a derogation from that principle contained in national legislation set aside in so far as it exceeds the limits of the exceptions permitted by Article 2 (2).

Mackenzie Stuart

Koopmans

Everling

Bahlmann

Joliet

Due

Galmot

Kakouris

O'Higgins

Delivered in open court in Luxembourg on 15 May 1986.

P. Heim

Registrar

A. J. Mackenzie Stuart

President