OPINION OF ADVOCATE GENERAL MISCHO

delivered on 23 September 1999 *

1. In the present case, the Court of Justice is required to give a ruling on the interpretation of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1] ('the Directive'), in the context of a provision of national law under which a winter fuel payment is granted at different ages to men and women.

The main proceedings

2. Mr Taylor, a former employee of the Post Office, brought proceedings before the High Court of Justice of England and Wales, Queen's Bench Division, in order to obtain the winter fuel payment of GBP 20 which had been introduced in the United Kingdom in 1998. That payment is made to women aged 60 and over while men cannot receive it until they are 65.

3. Mr Taylor, who was aged 62 when he commenced proceedings before the national court, claims to be the victim of unlawful discrimination on the ground of sex.

4. In order to be entitled to the winter fuel payment, Mr Taylor should also be in receipt of the State retirement pension. Throughout his working life, he paid the social security contributions necessary for that purpose, but he will not be able to obtain that pension until the age of 65 while a woman in the same situation would already have been receiving it from the age of 60. Meanwhile, Mr Taylor is in receipt of a Post Office pension which does not give entitlement to the winter fuel payment.

The relevant national legislation

5. The Social Fund Winter Fuel Payment Regulations 1998 ('the Regulations') were

* Original language: French.

1 — OJ 1979 L 6, p. 24.

made in January 1998 pursuant to the Social Security Contributions and Benefits Act 1992 ('the Act').

6. Regulation 2 provides that two categories of persons are entitled to a winter fuel payment. Those two categories are:

(a) under Regulation 2(2), persons in receipt of income support or income-based jobseeker's allowance (both means-tested benefits) who receive one of the premiums listed. All those premiums are payable only to persons who are, or who have partners who are, 60 or over;

(b) under Regulation 2(5), 'men aged 65 or over and women aged 60 or over' who are entitled to any of the benefits or pensions listed in Regulation 2(6). The majority of those payments, according to the applicant, and some, according to the High Court, are not means-tested. That is true of the retirement pension and the war disablement pension.

7. Under Regulation 3(1), persons in the first category are entitled to a winter fuel payment of GBP 50 per year. Those falling into the second category are entitled to a payment of GBP 20, or GBP 10 if they live with another person who is also entitled to a payment.

8. It should be noted that, under Regulation 1, read together with section 44 of the Act and Schedule 4 to the Pensions Act 1995, a 'retirement pension' for the purposes of Regulation 2(6) means a State retirement pension which becomes payable upon a claimant satisfying the relevant contribution conditions and attaining the age of 65 in the case of a man and 60 in the case of a woman.

The relevant provisions of the Directive

9. The purpose of the Directive, according to Article 1 thereof, is 'the progressive implementation, in the field of social security and other elements of social protection

provided for in Article 3, of the principle of equal treatment for men and women in matters of social security'.

10. The Directive applies, under Article 3(1) thereof, to:

'(a) statutory schemes which provide protection against the following risks:

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment;

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

11. The principle of equal treatment is defined in Article 4 as follows:

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

— the scope of the schemes and the conditions of access thereto,

...'.

12. According to Article 7(1)(a) thereof, the Directive is to be without prejudice to the right of Member States to exclude from its scope, *inter alia*, 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

13. However, under Article 7(2), Member States must 'periodically examine matters

excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.'

14. The High Court of Justice decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is a winter fuel payment made under Regulations 2(5), 2(6) and 3(1)(b) of the Social Fund Winter Fuel Payment Regulations 1998 within the scope of Article 3 of Directive 79/7/EEC?

2. If the answer to Question 1 is yes:

(a) Does Article 7(1)(a) of Directive 79/7/EEC apply in the circumstances of this case?

(b) In particular, is the respondent prevented from relying upon Article 7(1)(a) of Directive 79/7/EEC where both the Social Fund Winter Fuel Payment Regulations 1998 and the Social Security Contributions and Benefits Act 1992 under which those Regulations were made came into force after 23 December 1984, the latest date for the said Directive to be given full effect in domestic law?'

The first question

15. By this first question, the High Court of Justice seeks to ascertain whether Article 3(1) of the Directive is to be interpreted as meaning that a winter fuel payment such as that provided for in Regulation 2(5) and (6) of the 1998 Regulations falls within its scope. The question relates, therefore, only to payments made to the second category of persons referred to in point 6 above.

16. First, it should be recalled that, according to settled case-law, in order to fall within the scope of the Directive, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the risks specified in Arti-

cle 3(1), or a form of social assistance having the same objective. [2]

17. The Court of Justice has also held that, although the mode of payment is not decisive as regards the identification of a benefit as one which falls within the scope of the Directive, in order to be so identified the benefit must be directly and effectively linked to the protection provided against one of the risks in question. [3]

18. The Regulations establishing the winter fuel payment were made pursuant to an enabling Act. The first condition, according to which there must be a statutory scheme, is thus satisfied. Moreover, no-one is disputing it in this case.

19. It is the second condition, by reason of which the scheme must be 'directly and effectively linked' to the protection provided against one of the risks specified in that provision, which constitutes the nub of the present case. Is the objective of the benefit to provide protection against the risk of old age, or does age constitute one of several criteria for granting a benefit for persons in financial need, a situation which is not mentioned in Article 3 of the Directive? [4] That is the question which the Court is asked to answer.

20. It is that last argument which is relied upon by the United Kingdom Government, supported by the Austrian Government, which submit that the Directive is not applicable because the benefit must be analysed in 'the statutory context of the payment'. In this case, it is a question of the Social Fund, which was itself set up by the Social Security Act 1986. The purpose of the Social Fund is stated in the White Paper which led to the creation of that fund in 1986. As that document explains, the purpose of the Social Fund is to finance payments to meet 'special needs' of those receiving income-related benefits.

21. The United Kingdom and Austrian Governments state that, in *Atkins*, [5] only persons exposed to a risk under Article 3 of the Directive (the disabled and the elderly) were eligible to benefit from concessionary local travel, and yet it was held that the scheme did not come within the scope of Article 3 because of its purpose, as part of a statutory scheme designed to help various classes of persons who are less well-off financially and materially. Similarly, in

2 — Case 150/85 *Drake* v *Chief Adjudication Officer* [1986] ECR 1995, paragraph 21; Case C-243/90 *Smithson* [1992] ECR I-467, paragraph 12; Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, paragraph 15; and Case C-137/94 *R* v *Secretary of State for Health, ex parte Richardson* [1995] ECR I-3407, paragraph 8.

3 — *Smithson*, paragraph 14; and *Jackson and Cresswell*, paragraph 16.

4 — See *Jackson and Cresswell*.

5 — Case C-228/94 *Atkins* v *Wrekin District Council and Department of Transport* [1996] ECR I-3633.

Smithson, the only persons who were eligible to receive the higher pensioner premium were those exposed to a risk under Article 3. However, that did not bring the premium within the scope of Article 3 because the benefit had to be assessed as part of the statutory scheme as a whole, designed to help persons in financial need.

22. As in *Atkins*, the purpose of the Social Fund, and of the Regulations allowing for payment of benefits from that fund, is to help categories of persons who are less well-off financially and materially. The fact that old age is one of the criteria for payment used, and that many of those who benefit are exposed to one of the risks specified in Article 3, does not bring the Regulations within the scope of that article.

23. On the other hand, the applicant and the Commission claim that it is clear from *Richardson* and *Atkins* that the question whether a benefit falls within the scope of Article 3 of the Directive does not depend upon the statutory mechanism under which, or the fund out of which, it is paid, but on the direct connection between the benefit itself and the materialisation of one of the risks specified in that provision. As Advocate General Elmer stated in point 13 of his Opinion in *Richardson*, it is the actual benefit which must be assessed.

24. The applicant in the main proceedings submits that it is indeed *Richardson* which should be relied upon in the present case. In that case, the Court of Justice held that the right to free medicines on prescription for certain categories of persons (the elderly, the young and persons with certain illnesses) fell within the scope of the Directive on the ground that that benefit was always conditional on the materialisation of the risk of sickness.

25. Although that reasoning may be relevant, I take the view that it cannot necessarily be adopted wholesale in this case. What constitutes a common risk in one case does not necessarily in another. Thus, in *Richardson*, the benefit granted, namely exemption from prescription charges, could, by its very nature, be enjoyed only by those incurring such charges and therefore affected, in one way or another, by sickness. The connection with that risk listed in Article 3 of the Directive was therefore direct and necessary.

26. However, in this case, the very nature of the benefit, namely payment of a sum of

money in certain circumstances, does not lead to an immediate conclusion.

27. There is no doubt that age is one essential condition of obtaining a winter fuel payment. However, the second, concurrent condition, according to which the applicant must be in receipt of one of the benefits listed in Regulation 2(6), some of which make up for the inadequacy of the financial means of the persons concerned, and some of which do not, is also essential.

28. A person who has reached the required age, but is not in receipt of one of the benefits under Regulation 2(6), cannot obtain a fuel payment.

29. It should be borne in mind that the decisive criterion for identifying benefits which fall within the scope of Article 3 of the Directive is their purpose. However, merely examining the criteria for payment does not always demonstrate with certainty the aim of a benefit even if, quite clearly, there is necessarily a connection between the criteria for payment and the aim pursued.

30. It is self-evident that a fuel payment is designed to help certain persons pay their heating expenses. It is therefore implied that those persons have, or are likely to have, financial difficulties which may affect their ability to meet those expenses.

31. That view is confirmed by the fact that the payment is made from the Social Fund whose purpose is to help people in a wide variety of situations of financial need, as the United Kingdom Government has pointed out.

32. Is it necessary to conclude, however, as the United Kingdom Government submits, that this is a situation of the same kind as that at issue in *Atkins*, in which the Court held that old age, which is among the risks listed in Article 3(1), is only one of the criteria applied to define the classes of beneficiaries of such a scheme and that the recipient of a benefit is, only *as a matter of fact*,[6] in one of the situations envisaged by Article 3 of the Directive, which does not suffice to bring that benefit within the scope of that Directive?

33. I do not, however, think that such is the case here. If the purpose of the British authorities had been to help all those who

6 — Author's emphasis.

were unable to meet their heating expenses, they could have extended 'Winter Fuel Payments' to all such persons, whatever their age. However, that is precisely what they did not do, since only those who have reached the age of 60 or 65 are entitled to the payment in question in this case.

34. In addition, it was confirmed at the hearing that the majority of the benefits giving entitlement to the payments at issue are not means-tested, while the condition of pensionable age is in any event essential.

35. The United Kingdom Government does not, however, only rely in a general way on the connection between the payments in question and the fight against financial need, the aim of the Social Fund. It contends that, even if one insisted on isolating the Regulations from their overall statutory context, one could not, in any event, fail to see the connection between the different paragraphs of the Regulations. The benefit at issue in the main proceedings, which is applied for under Regulation 2(5) and 2(6), is comparable in its purpose to that referred to in paragraph 2 of the same Regulation.

36. According to that Government, however, the persons referred to in paragraph 2 are only those in receipt of income support or income-based jobseeker's allowance. That type of person is also included amongst the potential recipients of the payment provided for in Regulation 2(5).

37. It is true that one might hesitate, at first, to attribute different purposes to two paragraphs in the same Regulation. I take the view, however, that the Court must not be led by a formalistic test of that sort to neglect the differences between the benefits under paragraph 2, on the one hand, and those under paragraphs 5 and 6, on the other.

38. Thus, the very wording of the paragraphs in question seems to demonstrate a difference of approach, since paragraph 2 refers to the criterion of age only indirectly and expressly mentions both income support and the jobseeker's allowance, unlike paragraphs 5 and 6 in which the criterion of age occupies a central position in the text. The age conditions are, moreover, not the same in the two cases, at least for men.

39. Furthermore, and above all, the benefit under paragraph 2 can be granted only to those who are also in receipt of benefits directly linked to financial need, namely income support or the jobseeker's allow-

ance, whereas, as stated above, the benefits payable under paragraphs 5 and 6 can, in many cases, be paid without their recipient proving any lack of means.

40. Finally, the sum provided for in paragraph 2 is greater than that payable under paragraphs 5 and 6.

41. The United Kingdom also contends that the fact that age is an essential criterion for granting the contested benefits is not enough to bring that benefit within the scope of the Directive. It relies, in that respect, on the judgment of the Court in *Smithson*.

42. It must, however, be recalled that in that case the criterion of a minimum age had to be satisfied not for the contested benefit itself, namely housing benefit, but only for obtaining a higher premium for housing benefit. However, in the present case, we are not dealing with a scheme including a basic benefit available to other classes of recipients and a higher premium reserved for the elderly. As we have seen, the payment of the contested benefit requires in any event that the criterion of minimum age be satisfied.

43. It is clear, in addition, from the documents submitted to the national court that both in a statement of 25 November 1997 by the Chancellor of the Exchequer to Parliament and in a press release by the Department of Social Security (DSS), the national authorities expressly presented the purpose of the measures in question as being to come to the assistance of retired people, considered as a special category, and not persons in need in general. (Accordingly, in the Chancellor's statement, which is six paragraphs long, the words 'pensioners' or 'pensioner households' appear twelve times.)

44. It must therefore be concluded that the measure in question is indeed connected 'directly and effectively' to the risk of old age listed in Article 3 of the Directive. I propose, accordingly, that the Court answer the first question as follows:

'Article 3 of the Directive must be interpreted as meaning that a winter fuel payment such as that made under Regula-

tions 2(5) and (6) and 3(1)(b) falls within its scope.'

The second question

45. The national court asks, in substance, whether the United Kingdom Government may rely in this case on the derogation from the principle of equal treatment for men and women in matters of social security laid down in Article 7(1)(a) of the Directive, which provides that the Directive is to be without prejudice to the right of Member States to exclude from its scope 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

46. Mr Taylor, the Commission and the United Kingdom and Austrian Governments all consider that it is clear from the case-law of the Court that Article 7 must be interpreted strictly and that the unequal age conditions laid down in the Regulations can be justified under the derogation only if they are objectively necessary to avoid disrupting the financial equilibrium of the social security system or to ensure coherence with the retirement pension scheme and the other benefits linked to it. [7]

47. They are also unanimous in submitting that, since this case concerns non-contributory benefits, arguments relating to financial equilibrium cannot apply in the present context. [8]

48. On the other hand, there is disagreement as to the possibility of justifying the discrimination by reference to the need for the coherence of the social security system.

49. According to Mr Taylor, numerous examples show that the discrimination is not necessary. The Commission also contends that it is not. The winter fuel payment has no close structural relationship with the retirement pension and no opposing argument put forward demonstrates that the discrimination is necessary.

50. The United Kingdom Government contends, first, that the link between the benefit under the Regulations and pensionable age is objective inasmuch as the ages of

7 — Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247; and Case C-92/94 *Secretary of State for Social Security and Chief Adjudication Officer* v *Graham and Others* [1995] ECR I-2521.

8 — Contrary to what had been the case in Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297.

entitlement to that benefit arise directly from the fact that pensionable age, for State retirement pensions, is 60 for women and 65 for men.

51. I do not share that view. It is clear from the wording of Regulation 2(5) and (6) that the State retirement pension is only one of the benefits whose recipients are entitled to 'Winter Fuel Payments'. It is thus perfectly possible to be granted those payments without receiving such a pension. Accordingly, a person will be able to receive a disablement pension well before the age of 60, but will be entitled to 'Winter Fuel Payments' only from the age of 65, if a man, while a woman will be entitled to them from the age of 60.

52. In addition, those paragraphs, unlike paragraph 2, moreover, expressly lay down the minimum age condition, which would be pointless if it already necessarily followed from the fact that all the benefits listed in paragraph 6 are available only to persons fulfilling that condition.

53. It must therefore be concluded that the link between pensionable age and the benefit at issue does not result objectively, necessarily and automatically from the age of entitlement to the benefits listed in paragraph 6.

54. How, therefore, is it possible to justify the necessity of that discrimination which is directly provided for by the Regulations themselves and does not result from the conditions for obtaining the majority of the benefits giving rise to entitlement to the payment provided for in the Regulations?

55. The United Kingdom Government contends that the coherence of the social security system provides the required justification.

56. If the benefit in question were covered by the Directive, it would be because of its link with the risk of old age. It would therefore be inconsistent to choose an age other than that applicable to the payment of a State retirement pension which relates specifically to the risk of old age.

57. It is clear, however, from the foregoing that, contrary to what had been the case in *Graham and Others*,[9] there is no structural

9 — See paragraph 8.

relationship between the benefit in question and the retirement pension.

58. In other words, the State pension scheme would not be disrupted in any way if a man affected by a recognised disability or in receipt of a pension of a particular type, such as that paid by the Post Office, were able, from the age of 60, to claim a winter fuel payment.

59. Accordingly, the plea based on the coherence of the system is ineffective. In the absence of a structural link between the State retirement pension and the payment provided for in the Regulations, the argument invoking coherence amounts, in my opinion, to claiming that, at a theoretical, or indeed aesthetic, level, the choice of two different pensionable ages as a condition for granting the payment was the most satisfactory, even if there was no objective necessity to maintain that distinction rather than a single age of entitlement, such as that of 60 which is applicable in the context of Regulation 2(2), or another.

60. The coherence argument is even less convincing since it is a question of justifying, as Mr Taylor and the Commission rightly point out, the application in this case of a provision which derogates from the general rule of non-discrimination, a provision which must therefore, by definition, be interpreted strictly.

61. Since the contested Regulations cannot come within the scope of Article 7(1)(a) of the Directive, there is no need to answer the question whether that provision is also applicable to discrimination introduced after the Directive entered into force.

62. It is, therefore, hardly necessary for me to make the following remarks.

63. The Commission does not accept that a Member State can enact, after the period allowed for implementation of the Directive has expired, any measure linked to the different pensionable ages which are still in force in that Member State.

64. It bases its argument, in particular, on the wording of Article 7(2) which provides that 'Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned'.

65. The use of the expression 'maintaining' automatically rules out, according to the

Commission, the introduction of any new measure.

66. It is important, however, to note that Article 7(1) of the Directive includes, in addition to the determination of pensionable age, four more 'excluded matters'. Each of them must be periodically examined.

67. If, in connection with that examination, a Member State reaches the conclusion that, as far as the first of those 'excluded matters' is concerned, namely that of the determination of pensionable age, the time has not yet come for it to abolish the discrimination, as it is authorised to do under Article 2, it can, clearly, also maintain 'the possible consequences thereof for other benefits'. Likewise, if it finds it necessary to introduce, after the Directive has been implemented, a new type of benefit which, for convincing reasons of coherence (unlike in this case), must be linked to the different pensionable ages, it is, in my opinion, equally entitled to do that.

68. Otherwise, the freedom to determine pensionable age, which Article 7(1)(a) of the Directive is designed to leave to the Member States — with all the consequences which that implies —, could be undermined.

69. Article 7(1)(a) can therefore attain its objective (or be 'effective') only if, also in the future, it allows Member States to take the measures which necessarily result from such a determination.

70. The rationale of Article 7(1)(a) thus necessarily leads, in my opinion, to its not being seen as a 'standstill' clause.

71. In the light of the foregoing, I propose that the Court answer the second question referred by the national court as follows:

'(a) Article 7(1)(a) of the Directive must be interpreted as meaning that it does not apply to a fuel payment such as that referred to in the questions from the High Court;

(b) In view of the answer given to (a), it is not necessary to answer Question 2(b).'

Conclusion

72. I propose, therefore, that the Court give the following answers to the questions referred by the High Court of Justice:

(1) Article 3 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that a winter fuel payment such as that made under Regulations 2(5) and (6) and 3(1)(b) of the Social Fund Winter Fuel Payment Regulations 1998 falls within its scope.

(2) (a) Article 7(1)(a) of Directive 79/7 must be interpreted as meaning that it does not apply to a winter fuel payment such as that referred to in the questions from the High Court.

(b) In view of the answer given to (a), it is not necessary to answer Question 2(b).