OPINION OF ADVOCATE GENERAL ELMER

delivered on 13 July 1995 *

1. In this preliminary reference the Court is asked how 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') should be interpreted in relation to national regulations according to which women are exempt from prescription charges in connection with the provision of free medicine when they attain the age of 60, whereas men are only exempt from prescription charges when they attain the age of 65.

The relevant national regulations

2. Under Section 77(1)(a) of the National Health Service Act 1977 ('the 1977 Act'), the Secretary of State may adopt regulations for the payment of charges in respect of the supply under the Act of drugs, medicines or appliances. Under Section 83A(i)(a), inserted by the Social Security Act 1988, regulations may be adopted exempting various categories of persons from charges. Those categories of persons may, under Section 83A(2), be prescribed by reference to age, type of medical condition, and financial circumstances.

3. In that connection the Secretary of State made the National Health Service (Charges for Drugs and Appliances) Regulations 1989, Statutory Instrument No 419 ('the 1989 Regulations'). Thereunder a fixed charge is payable on the supply of prescription drugs. Further provisions are laid down regarding prescription charge exemption. Regulation 6(1)(c) states that a man who has attained the age of 65 years or a woman who has attained the age of 60 years do not have to pay charges. Those age limits are, moreover, the same as the ages at which old-age pensions are payable by law. In addition, children and persons who suffer from specified conditions are exempted from prescription charges.

* Original language: Danish.

1 — OJ 1979 L 6, p. 24.

Facts of the case

4. The applicant in the main proceedings, Cyril Richardson, was born on 18 August 1929. On 9 March 1993 Mr Richardson, who was not yet 65 years old and therefore did not satisfy the age requirement for receipt of an old-age pension, wrote to the Secretary of State for Health complaining about the prescription charge, in particular that there was discrimination between men and women since women between the ages of 60 and 64 were exempted from prescription charges, whereas men of the same age were not. The complaint was rejected in a letter of 6 May 1993.

On 2 September 1993 Mr Richardson was asked to pay a prescription charge of UK £4.75 (corresponding to ECU 5.55) at a chemist for the supply of medicine and he subsequently applied to the Divisional Court, Queen's Bench Division of the High Court of Justice, for judicial review, claiming *inter alia* that the relevant provisions of the 1989 Regulations should be quashed for infringing the directive and seeking damages.

The relevant provisions of the directive

5. The directive was adopted on the basis of Article 235 of the Treaty and its purpose, according to Article 1, is the 'progressive implementation of the principle of equal treatment for men and women in matters of social security'.

Under Article 3(1), the directive is to apply 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).'

According to Article 4(1), the principle of equal treatment means

'that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly ..., in particular as concerns:

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

(...)'

Article 7(1)(a) provides that the directive shall 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'.

The questions referred for a preliminary ruling

6. By order of 5 May 1994 the Divisional Court, Queen's Bench Division of the High Court of Justice, referred the following questions to the Court:

'1. Is the exemption from prescription charges for various categories of persons under Regulation 6(1) of the National Health Service (Charges for Drugs and Appliances) Regulations 1989, Statutory Instrument No 419, or for particular old people under Regulation 6(1)(c), within the scope of Article 3 of Directive 79/7/EEC?

2. If the answer to Question 1 is yes, does Article 7(1)(a) of Directive 79/7/EEC apply in the circumstances of this case?

3. If there has been a breach of Directive 79/7/EEC, can the direct effect of that directive be relied on to support a claim for damages for periods prior to the date of the Court's judgment by persons who have not prior to that date brought legal proceedings or made an equivalent claim?'

First question

7. With its first question the national court is seeking clarification as to whether Article 3(1) of the directive covers a scheme such as that contained in Regulation 6(1) of the 1989 Regulations, which exempts various persons from the payment of prescription charges in connection with the supply of medicine obtainable only on prescription. In other words, the question is whether it constitutes a statutory scheme providing protection against sickness, old age and so forth.

8. In support of their contention that Article 3(1) covers such a scheme, Mr Richardson and the Commission have stated that in the present case there is the necessary factual and direct link between the benefit and one of the risks listed in Article 3(1), since it is a statutory scheme the purpose of which is to afford protection against sickness. According to Mr Richardson, it is at the same time a scheme which protects old people from the financial consequences linked to old age.

9. The United Kingdom submits that the national regulations fall outside the purview of the directive, since the scheme is aimed at protecting health, not at providing social security. Furthermore, the necessary link between the benefit and protection against one of the risks listed in Article 3(1) of the directive is lacking, since what is involved is a benefit granted to a wide range of persons suffering from ill health and not a special scheme for old people.

10. According to the Court's 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 Article 3(1) or a form of social assistance having the same objective. [2]

11. The exemption from prescription charges in the 1989 Regulations has its basis in the 1977 Act and the benefit is granted on a statutory basis with no individual and discretionary assessment of the recipient's needs. The requirement that the scheme be statutory is therefore satisfied.

12. The next issue is the term 'scheme'. In my view no special requirements can be implied into that term. It is presumably

2 — See the judgments in Case 150/85 *Drake* [1986] ECR 1995, at paragraph 21, Case C-243/90 *Smithson* [1992] ECR I-467, at paragraph 12, and Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, at paragraph 15.

difficult to find a more neutral expression. In particular it cannot be assumed that the expression means that the benefit should form part of a larger complex of laws having social security as their objective. The formal inclusion of a benefit by the Member States in one or another type of law should not affect the individual citizen's rights under Community law. [3] That can depend on technical legal questions or political or other considerations and it can sometimes be quite arbitrary whether a legal provision giving citizens a certain advantage is contained in one type of law or another. Hence not much can be concluded without more as to the detailed content of the provision which must in fact depend on a closer analysis of the provision in question. [4]

13. In my view it should suffice that the statutory benefit in itself ensures protection against one of the risks referred to in the provision, hence assessment under Article 3(1) must proceed on the basis of the actual benefit. Only when the benefit in question constitutes an integral part of a category of benefit is it that category of benefit as a whole which falls to be assessed. Exemption from prescription charges such as that contained in Regulation 6(1) of the 1989 Regulations does not in my opinion appear to be a component of a benefit which constitutes an integral part of a category of benefit but on the contrary implies an independent and clearly delimited benefit for the old, the young, and persons suffering from specifically listed conditions who obtain medicine on prescription and would otherwise have to pay prescription charges.

14. The Court has interpreted Article 3(1) as including any benefit which in a broad sense protects against one of the risks specified, [5] including sickness and old age. The mode of payment is not decisive but the scheme must be directly and effectively linked to the protection provided against one of the risks specified. [6]

15. In its judgment in Case C-243/90 *Smithson* the Court held that that condition is not satisfied by a scheme providing housing benefit to persons whose actual income is lower than a notional income. [7] Furthermore,

3 — In this connection I would refer to the judgments in Case 249/83 *Hoeckx* [1985] ECR 973, at paragraph 11, and Case 122/84 *Scrivner* [1985] ECR 1027, at paragraph 18, which both concern the interpretation of Article 4(1) of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 II, p. 416).

4 — If significance were attached to the formal context in the present case that would, moreover, suggest that it was a social security regulation within the meaning of the directive, since the prescription charge exemption has its basis in the Social Security Act 1988.

5 — See the judgment in Case 150/85 *Drake* [1986] ECR 1995, at paragraph 23.

6 — See the judgments in Case C-243/90 *Smithson* [1992] ECR 467, at paragraph 14, and Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, at paragraph 16.

7 — [1992] ECR I-467.

following the judgment in Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* a benefit forming part of a general income and needs-related supplementary allowance scheme falls outside the directive. [8] In those cases what was involved were general income-related schemes rather than schemes specifically directed to protection against the consequences of, for example, sickness or old age. [9]

16. The benefit dealt with in Regulation 6(1) is aimed, however, at exempting various categories of persons who require prescription medicines from payment of the prescription charge for that medicine. Prescription medicine is generally only obtained for the purpose of treating, relieving or preventing illness. Illness is thus a *conditio sine qua non* for prescription charge exemption. The scheme must therefore be regarded as protecting against the risk of sickness and thus be covered by the directive.

17. It is irrelevant that the scheme is confined to covering only certain categories of persons suffering from illness, namely the young, the old and persons with specifically listed conditions, since the details of the mode of payment of a benefit are, as mentioned, not decisive as to how it is identified in relation to the directive. [10] It must also be irrelevant that what is involved is an exemption from payment rather than a cash benefit since in both cases the citizen obtains a financial benefit.

18. In summary, I take the view that the answer to the Divisional Court's first question should be that Article 3(1) of the directive must be interpreted to the effect that a scheme such as that set out in Regulation 6(1) of the 1989 Regulations which entitles various persons, including old people, to exemption from prescription charges is covered by the directive.

Second question

19. In the second question the national court is in fact asking the Court to elaborate on its interpretation of Article 7(1)(a) of the directive, according to which the directive is

8 — [1992] ECR I-4737.

9 — In Case 150/85 *Drake* [1986] ECR 1995, at paragraph 24, the Court emphasized that invalidity was a *conditio sine qua non* for the payment of the benefit.

10 — See the judgment in Case C-243/90 *Smithson* [1992] ECR 467, at paragraph 14.

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.

20. Mr Richardson has submitted that Article 7(1)(a) is not applicable to a scheme such as that contained in Regulation 6(1) of the 1989 Regulations since there is no necessary and objective link between the benefit and the statutory pensionable age.

21. The Commission takes the view that the Court has already given the necessary interpretation and therefore suggests that the Court simply maintain its position.

22. The United Kingdom contends that application of Article 7(1)(a) does not presuppose a necessary connection between pensionable age and another benefit in the strict sense, but must merely require a reasonable and proportionate link. In this connection the United Kingdom has emphasized that prescription charges make a substantial contribution to the financing by the State of the costs of drugs. The cost of drugs for Family Health Services amounted to over UK £2.3 billion (equivalent to ECU 2.7 billion) in 1991/92, whilst receipts from prescription charges amounted to about UK £278 million (corresponding to ECU 325 million) in 1993/94.

23. The Court has already had the opportunity of setting out its view of the content of the derogating provision in Article 7(1)(a). [11] From that case-law it is clear that the provision, as an exception to a basic Community law principle, should be interpreted strictly. [12] The Court has further stated that the second phrase of Article 7(1)(a) covers only discrimination which is objectively and necessarily linked to a difference in pensionable ages. [13] Discrimination must therefore be objectively necessary in order to maintain financial equilibrium in the old-age pensions system or the social security system as a whole, or in order to ensure consistency between the old-age pensions system and other benefit schemes. [14]

24. As far as the point concerning the financial equilibrium of the pensions system

11 — See in particular the judgments in Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297 and Case C-328/91 *Thomas* [1993] ECR I-1247.

12 — See the judgment in Case C-328/91 *Thomas* [1993] ECR I-1247, at paragraph 8.

13 — See Case C-328/91 *Thomas*, cited above.

14 — Ibid., at paragraphs 12, 15 and 16.

is concerned, the Court specified in the *Thomas* judgment [15] that there is not a sufficiently direct influence on financial equilibrium in the case of the grant of a non-contributory benefit to persons in whom certain risks have materialized, regardless of the entitlement of such persons to an old-age pension by virtue of contributions.

25. The prescription charge exemption under Regulation 6(1) has no connection with the extent of entitlement to an old-age pension nor with the financing of that pensions system. To remove the discrimination would not therefore, in my opinion, affect the financial equilibrium of the pensions system.

26. As far as maintaining equilibrium in the social security system as a whole is concerned, the Court concentrated in the said *Thomas* judgment on the extent to which grant of the benefit would cause overlapping of benefits. [16]

27. In view of the foregoing, I consider that it does not suffice, for the possibility of the derogation to apply, that removal of the discrimination would lead to an increase in the total cost of non-contributory schemes. What is decisive, however, is whether the fact that the derogation was not available would mean that the beneficiary was entitled to receive several benefits which in fact covered the same needs. In the present case no evidence has been submitted to suggest that removal of the discrimination would cause such overlapping of benefits.

28. As far as the question of the link between the old-age pensions system and other benefits is concerned, it is worth noting here that Article 7(1)(a), *qua* exception to a basic principle of Community law, should be interpreted restrictively. The requirement of a necessary and objective link [17] must thus be interpreted to the effect that it is not enough that persons who have reached normal pensionable age will generally suffer a fall in income and consequently have an increased need for additional benefits. There is no necessary link between normal pensionable age and a person's actual withdrawal from the labour market. [18] There is thus no objectively necessary link between normal pensionable age and a person's actual financial means, still less with that person's need for medicine. However, the exception

15 — Ibid., at paragraph 14. The case concerned the rejection of applications for severe disablement allowance and invalid care allowance by persons who continued to work after they reached the normal pensionable age for women.

16 — Ibid., at paragraph 15.

17 — Ibid., paragraph 20.

18 — See the judgment in Case 152/84 *Marshall* [1986] ECR 723, at paragraph 38.

does allow Member States, in my view, to provide that the *de facto* receipt of an old-age pension leads to another benefit being paid out or ceasing. The transition in itself to receipt of an old-age pension involves an objective change in circumstances of the person concerned which may justifiably be taken into account when awarding social security benefits.

29. In this case the prescription charge exemption is made conditional on the attainment of a certain age corresponding, moreover, to normal pensionable age, and not on the applicant's *de facto* receipt of an old-age pension. Significance may also be attached to the fact that the exemption also benefits other groups besides pensioners. The objective and necessary link required under Article 7(1)(a) between the prescription charge exemption and the statutory pensionable age is therefore, in my view, absent.

30. To summarize, I would propose that the Court answer the second question to the effect that the second part of Article 7(1)(a) of the directive should be interpreted as meaning that the derogation therein does not apply to a scheme such as that contained in Regulation 6(1) of the 1989 Regulations.

Third question

31. In the third question the Court is asked in substance to decide where there is a basis for restricting the direct effect of the directive as from the date of the Court's ruling. [19]

32. The United Kingdom has urged the Court to restrict the judgment's temporal effects inasmuch as it justifiably relied in good faith on the fact that the Commission did not react to a letter of 11 June 1985 in which the Secretary of State gave notification of the prescription charge exemption scheme in accordance with Article 8(2) of the directive. Furthermore, it would be administratively very difficult to check the facts on which a claim for repayment would be based.

33. Cyril Richardson and the Commission submit that there is no basis for so doing, since the Court's ruling in this case will not involve any development as far as Community law is concerned and there was no conduct on the part of a Community institution which could have justified reliance thereon on the part of the United Kingdom; the

19 — According to the judgment in Case 286/85 *McDermott and Cotter* [1987] ECR 1453, at paragraph 16, Article 4(1) of the directive which prohibits discrimination on the ground of sex has direct effect.

possible lack of reaction by the Commission does not constitute such conduct. The financial consequences cannot *per se* found a restriction on the temporal effect of a judgment.

34. According to settled case-law, the effects of the Court's interpretation of a legal measure are not restricted as from delivery of the judgment. The Court's interpretation of a legal measure establishes simply how the measure must be or ought to have been understood. It is for the Court alone to decide on a restriction of a judgment's temporal effect, [20] but it is only exceptionally, in application of the general principle of legal certainty, that there is reason for it to do so. [21] In examining the cases the Court has given decisive weight to whether the decision represents a development in Community law, [22] to whether a Community institution's conduct or attitude has given rise to a reasonably founded assumption that there was no conflict with Community law, [23] and, finally, on the actual consequences of not restricting the judgment's temporal effect. [24]

35. The financial consequences of a judgment for a Member State cannot *per se* found such a limitation. [25]

36. Nor does the fact that the Commission did not react after the United Kingdom authorities had given notification under Article 8(2) provide a sufficient basis for such a limitation. [26] The citizen's rights under Community law are based on the content of the rules of law, not on the manner in which the Commission might conduct itself. The Commission's discretion as to whether to bring an action under Article 169 of the Treaty [27] must, moreover, also extend to a notification procedure such as that contained in the directive.

20 — See, for example, the judgments in Case 24/86 *Blaizot* [1988] ECR 379; Case C-262/88 *Barber* [1990] ECR I-1889; and Case C-228/92 *Roquette Frères* [1994] ECR I-1445.

21 — See, for example, the judgment in Case 24/86 *Blaizot*, at paragraph 28, and Case C-262/88 *Barber*, at paragraph 41, both cited above.

22 — See, for example, the judgment in Case 24/86 *Blaizot*, at paragraph 31.

23 — See, for example, the judgments in Case 43/75 *Defrenne* [1976] ECR 455, at paragraphs 72 and 73; Case 24/86 *Blaizot* [1988] ECR 379, at paragraphs 32 and 33; Case C-262/88 *Barber* [1990] ECR I-1889, at paragraph 43; and Case C-163/90 *Legros* [1992] ECR I-4625, at paragraphs 31, 32 and 33.

24 — See, for instance, the judgments in Case 43/75 *Defrenne*, at paragraph 74, and Case 24/86 *Blaizot*, at paragraph 34.

25 — See, for example, the judgment in Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, at paragraphs 20, 21 and 22.

26 — The notification at most gives an indication of the United Kingdom authorities' view of the scope of Directive 79/7.

27 — See, for example, the judgment in Case C-87/89 *Sonito* [1990] ECR I-1981, at paragraph 6.

37. Finally, the Court's subsequent case-law concerning the interpretation of Article 7(1) of the directive must, in the circumstances, have removed any basis that the Member State may have had for relying in good faith on such a lack of reaction on the part of the Commission. [28]

38. There is thus no reason to restrict the judgment's temporal effects, and I would therefore propose that the answer to the third question should be that there is no reason to restrict the judgment's temporal effects, so that the direct effect of Directive 79/7/EEC may also be relied on to support a claim for damages for periods prior to the Court's judgment by persons who have not before that date brought legal proceedings or made an equivalent claim.

Conclusion

In view of the foregoing, I would suggest that the Court reply to the questions referred to it by the Divisional Court, Queen's Bench Division of the High Court of Justice, by order of 5 May 1994 as follows:

(1) Article 3(1) of Directive 79/7/EEC must be interpreted to the effect that a scheme such as that set out in Regulation 6(1) of the National Health Service (Charges for Drugs and Appliances) Regulations 1989, Statutory Instrument No 419, which entitles various persons, including old people, to exemption from prescription charges, is covered by the directive.

28 — For the relevance of subsequent case-law reference should be made to the judgments in Case 69/80 *Worringham and Humphreys* [1981] ECR 767, at paragraph 33; Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, at paragraph 34; and Case C-200/90 *Dansk Denkavit and Poulsen Trading* [1992] ECR I-2217, at paragraph 21.

(2) Article 7(1)(a) of Directive 79/7/EEC must be interpreted as not applying to a scheme such as that contained in Regulation 6(1) of the National Health Service (Charges for Drugs and Appliances) Regulations 1989, Statutory Instrument No 419.

(3) There is no reason to restrict the judgment's effects in time, so that the direct effect of Directive 79/7/EEC may also be relied on to support a claim for damages for periods prior to the Court's judgment by persons who have not before that date brought legal proceedings or made an equivalent claim.