JUDGMENT OF THE COURT (Sixth Chamber)
11 August 1995 *

In Case C-92/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Court of Appeal (Civil Division), London, for a preliminary ruling in the proceedings pending before that court between

(1) Secretary of State for Social Security

(2) Chief Adjudication Officer

and

(1) Rose Graham

(2) Mary Connell

(3) Margaret Nicholas

on the interpretation of Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle

* Language of the case: English.

of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24),

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler (Rapporteur), President of the Chamber, P. J. G. Kapteyn, C. N. Kakouris, J. L. Murray and H. Ragnemalm, Judges,

Advocate General: C. O. Lenz,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mrs Graham, respondent in the main proceedings, by R. Drabble, Barrister, instructed by P. Shiner, Solicitor,

— the United Kingdom, by S. L. Hudson, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Pannick, QC, and M. Shaw, Barrister,

— the Commission of the European Communities, by M. Wolfcarius and N. Khan, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Graham, the United Kingdom, represented by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by D. Pannick and M. Shaw, and the Commission at the hearing on 6 April 1995,

after hearing the Opinion of the Advocate General at the sitting on 15 June 1995,

gives the following

Judgment

1 By order of 18 January 1994, received at the Court on 17 March 1994, the Court of Appeal (Civil Division) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a number of questions on the interpretation of Article 7(1)(a) 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 (OJ 1979 L 6, p. 24, hereafter 'Directive 79/7').

2 Those questions were raised in proceedings between Mrs Graham, Mrs Connell and Mrs Nicholas and the Chief Adjudication Officer concerning the limitation applied to the rate of their invalidity pension upon their reaching the age of retirement (hereafter 'pensionable age') and, in the case of Mrs Graham, a refusal to grant her an invalidity allowance.

3 In the United Kingdom, section 33 of the Social Security Contributions and Benefits Act 1992 (hereafter 'the 1992 Act') provides, in essence, that where a person

has received sickness benefit for a period of 168 days due to incapacity for work, or has received maternity allowance, or has received statutory sick pay throughout the same period whilst satisfying the contribution conditions for sickness benefit, that person is to be entitled to invalidity pension for each subsequent day of incapacity for work if he or she is under pensionable age, set at 65 for men and 60 for women, or is not more than 5 years over pensionable age and would have been entitled to a retirement pension but for deferral of its payment or election for other benefits.

4 For those under pensionable age, the rate of invalidity pension is the same as that of a full State retirement pension. For those over pensionable age who have opted to defer payment of their retirement pension, invalidity pension is paid at the actual retirement pension rate for the person concerned, calculated according to the number of years of working life for which that person has paid the requisite contributions.

5 Under section 34 of the 1992 Act, invalidity allowance is paid in addition to invalidity pension throughout the period of interruption of employment to a person who was more than five years below pensionable age on the first day of incapacity for work. The lower the age of the claimant at that date, the higher the rate of invalidity allowance.

6 Mrs Graham, Mrs Connell and Mrs Nicholas were all obliged, because of ill health, to cease working before reaching pensionable age. They initially received sickness benefit, and thereafter invalidity pension at the full retirement pension rate. Upon reaching pensionable age, they all opted to continue receiving their invalidity pension rather than a retirement pension, which, unlike an invalidity pension, is taxable. As none of them fulfilled the contribution conditions for the

grant of a full retirement pension, the amount of their invalidity pensions was reduced to the rate of the retirement pension which would have been paid to them but for their election not to receive it. Mrs Graham, who was aged over 55 when she became incapacitated for work, was in fact refused invalidity allowance on that ground.

7 The Court of Appeal, before which the proceedings were ultimately brought, considered that the legality of the decisions reducing the rate of the invalidity pensions and, in the case of Mrs Graham, refusing invalidity allowance was dependent on the interpretation of Article 7(1)(a) of Directive 79/7 and on the compatibility with that provision of sections 33 and 34 of the 1992 Act; it consequently decided to stay the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

'Under the relevant provisions of the Social Security Contributions and Benefits Act 1992:

(a) Invalidity pension and invalidity allowance are long-term social security benefits for the disabled.

(b) They are contributory social security benefits paid only to those who have satisfied the relevant contribution conditions.

(c) Invalidity pension is paid to men and women under pensionable age (65 for men and 60 for women) and to men and women not more than 5 years over that age who have deferred their State pension or elected not to receive it.

(d) For those under pension age, the rate of invalidity pension is the same rate as the basic rate of retirement pension. Entitlement to invalidity pension in most cases follows on from entitlement or deemed entitlement to sickness benefit, a short term benefit. However, the contribution conditions for sickness benefit and retirement pension are different.

(e) For those over pensionable age, but not more than 5 years over pensionable age, who receive invalidity pension, the amount of that benefit is limited to the amount of the State pension which they would have received (by reason of their contributions) but for the deferral or election.

(f) Invalidity allowance is paid only to those who were more than 5 years below pensionable age (that is under 60 if male, and under 55 if female) on the qualifying date, that is when their period of incapacitation began.

In those circumstances,

(1) What criteria should the national court adopt in order to decide whether the differences in treatment of men and women outlined above are lawful pursuant to Article 7(1)(a) of Directive 79/7/EEC?

(2) In the circumstances of the present case, are the relevant criteria satisfied in the case of

(a) the difference in the rate of invalidity pension payable to men and women aged between 60 and 65; and

(b) the difference in the qualifying dates for invalidity allowance?'

8 Before those questions are answered, it should be noted that, according to the national court, legislation such as that at issue in the main proceedings is discriminatory inasmuch as, first, the rate of invalidity pension for women is limited to the rate of the retirement pension to which they would have been entitled had they not opted to defer payment of that pension from the age of 60, whereas that is not the position for men until they reach the age of 65, and, second, women are not entitled to invalidity allowance in addition to invalidity pension if their incapacity commenced after they reached the age of 55, whereas, in the case of men, that is the position only if their incapacity commenced after they reached the age of 60.

9 It must also be remembered that Article 7(1)(a) of Directive 79/7 allows Member States to exclude from its scope not only the setting of pensionable age for the purposes of granting old-age and retirement pensions but also the possible consequences thereof for other benefits.

10 In those circumstances, the questions referred for a preliminary ruling must be understood as seeking to ascertain whether, in the event that a Member State, pursuant to Article 7(1)(a) of Directive 79/7, has set the pensionable age for women at 60 and that for men at 65, that provision also allows it, first, to provide that the rate of invalidity pension payable to persons becoming incapacitated for work before they reach pensionable age is to be limited to the actual rate of retirement pension from the age of 60 in the case of women and from the age of 65 in the case of men and, second, to reserve entitlement to invalidity allowance, paid in addition

to invalidity pension, to those persons who are aged under 55, in the case of women, and under 60, in the case of men, at the time when they first become incapacitated for work.

11 In its judgment in Case C-328/91 *Thomas and Others* [1993] ECR I-1247, the Court ruled that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a), is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in pensionable age.

12 That is the position where such forms of discrimination are objectively necessary in order to avoid disturbing the financial equilibrium of the social security system or to ensure coherence between the retirement pension scheme and other benefit schemes (paragraph 12 of the judgment in *Thomas and Others*, cited above).

13 As regards the forms of discrimination at issue in the main proceedings, the Court finds that they are objectively linked to the setting of different pensionable ages for women and men, inasmuch as they arise directly from the fact that that age is fixed at 60 for women and 65 for men.

14 As to the question whether the forms of discrimination are also necessarily linked to the difference in pensionable age for men and women, it should be noted, first, that since invalidity benefit is designed to replace income from occupational activ-

ity, there is nothing to prevent a Member State from providing for its cessation and replacement by a retirement pension at the time when the recipients would in any case stop working because they have reached pensionable age.

15 Further, to prohibit a Member State which has set different pensionable ages from limiting, in the case of persons becoming incapacitated for work before reaching pensionable age, the rate of invalidity benefit payable to them from that age to the actual rate of the retirement pension to which they are entitled under the retirement pension scheme would mean restricting to that extent the very right which a Member State has under Article 7(1)(a) of Directive 79/7 to set different pensionable ages.

16 Such a prohibition would also undermine the coherence between the retirement pension scheme and the invalidity benefit scheme in at least two respects.

17 First, the Member State in question would be prevented from granting to men who become incapacitated for work before reaching pensionable age invalidity benefits greater than the retirement pensions which would actually have been payable to them if they had continued to work until reaching pensionable age unless it granted to women over pensionable age retirement pensions greater than those actually payable to them.

18 Second, if women did not have their invalidity pension reduced to the level of their retirement pension until they reached the age of 65, as in the case of men, women

aged between 60 and 65, thus over pensionable age, would receive an invalidity pension at the rate of a full retirement pension if their incapacity for work commenced before they reached pensionable age and a retirement pension corresponding to the rate actually payable if it did not.

19 Having regard to the foregoing, it must be concluded that the derogation provided for in Article 7(1)(a) of Directive 79/7 also extends to differences between the rates of invalidity pension payable to men and women from the time when they reach pensionable age.

20 Owing to the link between invalidity pension and invalidity allowance, which is paid in addition to invalidity pension and thus only to persons entitled to that pension, that conclusion must also apply with regard to the difference between the qualifying dates for the grant of invalidity allowance.

21 Accordingly, the answer to be given to the questions from the Court of Appeal should be that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State has set the pensionable age for women at 60 and that for men at 65, that provision also allows it, first, to provide that the rate of invalidity pension payable to persons becoming incapacitated for work before they reach pensionable age is to be limited to the actual rate of retirement pension from the age of 60 in the case of women and from the age of 65 in the case of men and, second, to reserve entitlement to invalidity allowance, paid in addition to invalidity pension, to those persons who

are aged under 55, in the case of women, and under 60, in the case of men, at the time when they first become incapacitated for work.

Costs

22 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Court of Appeal (Civil Division) by order of 18 January 1994, hereby rules:

Where, pursuant to Article 7(1)(a) 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, a Member State has set the pensionable age for women at 60 and that for men at 65, that provision also allows it, first, to provide that the rate of invalidity pension payable to persons becoming incapacitated for work before they reach pensionable age is to be limited to the actual rate of retirement pension from the age of 60 in the case of

women and from the age of 65 in the case of men and, second, to reserve entitlement to invalidity allowance, paid in addition to invalidity pension, to those persons who are aged under 55, in the case of women, and under 60, in the case of men, at the time when they first become incapacitated for work.

Schockweiler Kapteyn Kakouris

Murray Ragnemalm

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass
Registrar

F. A. Schockweiler
President of the Sixth Chamber