ORDER OF THE COURT (Third Chamber)

30 April 2004 *

In Case C-172/02,

REFERENCE to the Court under Article 234 EC by the Cour de cassation (Belgium) for a preliminary ruling in the proceedings pending before that court between

Robert Bourgard

and

Institut national d'assurances sociales pour travailleurs indépendants (Inasti)

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),

* Language of the case: French.

THE COURT (Third Chamber),

composed of: A. Rosas (Rapporteur), President of the Chamber, R. Schintgen and N. Colneric, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure,

the parties referred to in Article 23 of the EC Statute of the Court of Justice having been invited to submit any observations which they may wish to make in this regard,

after hearing the Advocate General,

makes the following

Order

1 By order of 29 April 2002, received at the Court on 10 May 2002, the Cour de cassation (Court of Cassation, Belgium) referred to the Court for a preliminary ruling under Article 234 EC a question 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).

2 That question was raised in proceedings between Robert Bourgard and the Institut national d'assurances sociales pour travailleurs indépendants (hereinafter 'the Inasti'), concerning calculation of the pension which the latter paid to him.

Law

Community provisions

3 According to Article 2 of Directive 79/7, the Directive applies to the working population, including self-employed persons.

4 Article 3(1)(a) provides that it shall apply to statutory schemes which provide protection against, amongst other risks, those of old age.

5 Article 4(1) of the Directive prohibits all discrimination on grounds of sex, either directly or indirectly, as concerns the calculation of contributions and benefits.

6 However, Article 7(1)(a) of the Directive, allowing for exceptions to that principle, states:

'1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

Belgian legislation

7 Royal Decree No 72 of 10 November 1967 on retirement and survival pensions for self-employed persons, as amended by Royal Decree No 416 of 16 July 1986 (*Moniteur belge* of 30 July 1986, p. 10699, hereinafter 'Royal Decree No 72') sets the normal retirement age at 65 for men and 60 for women.

8 According to Article 3(1) of that decree, the retirement pension may commence, none the less, for men, at the election and request of the person concerned, within a period of five years preceding the normal pensionable age. In such a case, the pension is reduced by 5% for each year by which the pension is drawn in advance.

9 The information in the case-file indicates that, by virtue of Royal Decree No 72, prior to its amendment by Royal Decree No 416, women could take their pension from the age of 55, subject to a 5% reduction for each year by which it was taken in advance. However, Article 1 of Royal Decree No 416 abolished the option to receive a retirement pension before 60, with effect from 1 January 1987. Men, for their part, retained the right to draw their retirement pension early between the ages of 60 and 65.

10 Article 16a(1) of Royal Decree No 72 provides that the retirement pension of self-employed workers is calculated on the basis of an insurance record expressed as a 45th part or a 40th part, according to whether the worker is a man or a woman.

The main proceedings and the question referred

11 At the age of 60 Mr Bougard, a self-employed worker, applied to the Inasti for his retirement pension. He was applying for his pension early, that is to say, five years before the normal retirement age which Royal Decree No 72 set at 65 for self-employed men and at 60 for self-employed women.

12 By decision of 9 January 1995, the Inasti awarded Mr Bourgard a self-employed person's retirement pension of BEF 182 273 (4 518.43 euros) per annum. That pension was calculated on the basis of 34/45 of the insurance record and was reduced by 25%, that is, 5% for each year by which the pension was drawn in advance of the normal retirement age.

13 Taking the view that he had been discriminated against on the grounds of sex in comparison to self-employed women who did not incur an early retirement reduction if they took their retirement pension from the age of 60, Mr Bourgard appealed against that decision on 1 February 1995 to the Tribunal du travail de Verviers (Labour Court, Verviers), Belgium. He contended, furthermore, that there had been discrimination, in that the pension at issue was calculated on the basis of a normal insurance record of 45 years in the case of self-employed men, whereas the insurance record of self-employed women was based on a normal period of 40 years.

14 On 21 November 1997 the Tribunal du travail dismissed the action as unfounded. That ruling was confirmed on appeal by the judgment of 8 May 2001 of the Cour du travail de Liège (Labour Court, Liège), Belgium.

15 The Cour de Cassation, hearing an appeal brought by Mr Bourgard, decided to stay the proceedings and to refer the following question to this Court for a preliminary ruling:

'Does Article 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 permit a Member State which has set the pensionable age of self-employed men at 65 and that of self-employed women at 60, with the result that the old-age pension for men is calculated on the basis of an insurance record expressed as a fraction with a denominator of 45, whilst the denominator is 40 for women, to impose in the case of men, who alone have the right to request early payment of the old-age pension in the five years prior to normal retirement age, a reduction in the amount of the pension of 5% for each year by which the pension is taken in advance?'

The question

Observations submitted to the Court of Justice

16 Mr Bourgard takes the view that the aspects of the retirement pension scheme for self-employed workers which were described in the order for referral are contrary to Directive 79/7. Inasti, the Belgian and German Governments and the Commission of the European Communities maintain that they are not.

17 Mr Bourgard contends that the reduction in the amount of the pension of 5% for each year by which the pension is taken in advance is incompatible with the principle of equal treatment enshrined in Article 4 of Directive 79/7. Such discrimination cannot be justified under Article 7(1)(a) of the Directive. There is in his view settled case-law that the provision must be interpreted strictly (see, in particular, Case 152/84 *Marshall* [1986] ECR 723, paragraph 36). In the present case there is no evidence on which to conclude that the discrimination at issue is necessarily and objectively linked to the difference in retirement ages (see, to that effect, Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 20).

18 Mr Bourgard submits that, independently of that reduction, calculation of the pension will inevitably differ according to the sex of the self-employed worker, since the denominator for self-employed men is 45, and for self-employed women, 40. He also points out that the early retirement reduction was abolished, in full or in part, for persons entitled to special status under the national scheme.

19 Inasti, the Belgian and German Governments and the Commission maintain that Article 7(1)(a) of Directive 79/7 does justify the features of the retirement pension scheme for self-employed workers described in the order for referral. The reduction in the retirement pension by reason of early retirement for a self-employed man aged between 60 and 65 is, they claim, necessarily and objectively linked to the setting of different retirement ages for men and for women (see, to that effect, Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297, paragraph 20; Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 18, and Joined Cases C-377/96 to C-384/96 *De Vriendt and Others* [1998] ECR I-2105).

20 The same is true, according to those parties, of the method of calculating the insurance record, based on a normal record of 45 years for men and 40 for women (see *De Vriendt*, cited above, and Case C-154/96 *Wolfs* [1998] ECR I-6173).

21 Inasti, the Belgian and German Governments and the Commission emphasise the importance of safeguarding the fragile equilibrium of national pensions systems. In their view, reducing the pension where retirement benefits are drawn early serves to safeguard that equilibrium. According to the Commission, it is for the national court to examine whether the level of reduction applied, namely 5% for each year by which the benefit is drawn early, is strictly necessary in order to preserve that equilibrium.

22 Several parties who submitted observations maintain that Mr Bourgard is not in the category receiving 'less favourable treatment', since only self-employed men are entitled to an early retirement pension.

The Court's reply

23 By its question, the referring court is enquiring, essentially, whether Article 7(1)(a) of Directive 79/7 should be interpreted as meaning that it entitles a Member State to calculate the amount of the retirement pension for self-employed workers differently according to their sex, or to impose in the case of self-employed men, who alone are entitled to take their retirement pension early in the five years before normal pensionable age, a reduction of 5% for each year by which the pension is drawn in advance.

24 It should be observed, as a preliminary point, that an enquiry was made of the Belgian Government, under Article 54a of the Rules of Procedure, as to the reasons for abolishing the early retirement reduction, in full or in part, in other pension arrangements, and as to the basis for using 5% as the reduction for each year by which the pension is drawn in advance in the arrangements for self-employed workers.

25 In its reply of 13 November 2003, that Government explained why it is not in its view possible to compare the social security arrangements for employed workers and those for self-employed workers. Using calculations to support its statements, it explained the differences between the two systems in terms of their scope and the resources available to each. These differences, it argued, inevitably have consequences on the methods of calculating the amounts allocated to pensions. As regards the level of the early retirement reduction, actuarial studies show that in order to neutralise in full the budgetary impact of the pension being drawn early, the annual reduction should, in fact, be more than 5%.

26 Since it considered that the answer to the question raised by the referring court can be clearly deduced from its existing case-law and that it leaves no room for reasonable doubt, the Court informed the referring court that it intended to give its decision by reasoned order in accordance with Article 104(3) of the Rules of Procedure and invited the persons referred to in Article 23 of the EC Statute of the Court of Justice to submit any observations which they might wish to make in that regard.

27 The Belgian and German Governments and the Commission made no objection to the Court's proposal to rule by reasoned order. Mr Bourgard submitted no observations on the matter.

28 According to settled case-law, the derogation available under Article 7(1)(a) of Directive 79/7 must be interpreted strictly (see, in particular *Thomas*, paragraph 8). Consequently, where, under that article, a Member State establishes different retirement ages for men and women for the grant of old-age and retirement pensions, the extent of the permitted derogation is confined to those forms of discrimination which are necessarily and objectively linked to the difference in retirement ages (*Thomas*, paragraphs 10 and 20, and *Richardson*, paragraph 18).

29 It is apparent from the nature of the exceptions contained in Article 7(1) of Directive 79/7 that the Community legislature intended to permit Member States temporarily to retain the advantages afforded to women in relation to retirement pensions, so that States could progressively modify their pension systems in that regard without disturbing their complex financial equilibrium (*Equal Opportunities Commission*, paragraph 15).

30 It is common ground that the legislation at issue in the main proceedings retained a difference in pensionable ages as between self-employed men and women. The documents in the case-file, and in particular the report of the King on Royal Decree No 416, indicate that keeping that difference reflects the intention of the Belgian legislature progressively to achieve full equal treatment for men and women. The Commission referred to that aim in its report of 16 December 1988 on application of Directive 79/7, prepared under Article 9 of the Directive.

31 According to the information in the case-file, the difference in pensionable age as between men and women was retained, in the arrangements for self-employed workers, until the adoption of the Royal Decree of 30 January 1997 setting out the final stages in the process intended to achieve full equality on pensions between men and women. In the context of that process, it is envisaged that full equality will be achieved on 1 January 2009, because the normal retirement age for men and women will be set at 65, the option to take a retirement pension early between the ages of 60 and 65 will be available to men and women and because for both sexes there will be a reduction in the amount of the pension of 5% for each year it is drawn in advance.

32 With regard, first, to the method of calculating the retirement pension, it should be noted that it is calculated on the basis of an insurance record expressed as a 45th or 40th part, according to whether the self-employed worker is a man or a woman.

33 It is necessary to determine whether the retention of that difference is necessarily and objectively linked to the national provisions setting the retirement ages differently according to sex.

34 In that connection, this Court has already had occasion to rule on the interdependence between, on the one hand, the specification of the normal retirement age and, on the other, the method of calculating the retirement pension, as regards the arrangements for employed workers, in Case C-154/92 *Van Cant* [1993] ECR I-3811 and in *De Vriendt* and *Wolfs*, cited above.

35 The Court drew attention, in paragraph 28 of the judgment in *Wolfs*, to the fact that the age specified for grant of the retirement pension effectively dictates the period for which the persons concerned can contribute to the pensions system.

36 It concluded, in paragraph 29, that in such a case discrimination in the method of calculating pensions such as that arising from the national legislation at issue is necessarily and objectively linked to the difference maintained in relation to specification of the pensionable age.

37 That finding in relation to the pension arrangements for employed workers is equally applicable to those for self-employed workers.

38 As regards, secondly, the 5% reduction for each year by which the pension is taken in advance, one should note that it is applied only for men. The right to apply for an early retirement pension is only available to that category of workers between the ages of 60 and 65, there being no such option for self-employed women, whose normal retirement age is 60.

39 It must be determined whether that reduction is necessarily and objectively linked to retention of national provisions specifying different retirement ages according to sex.

40 It is apparent from the order for reference, and from several observations submitted to this Court, that the option to take a retirement pension before the age of 60 was abolished, with effect from 1 January 1987, by Article 1 of Royal Decree No 416. As a result of that amendment, women could no longer take early retirement between the ages of 55 and 60. The removal of that option related to the legislature's desire ultimately to achieve a uniform retirement age of 65 for both men and women who are self-employed.

41 There is, therefore, a relationship of interdependence between the fact that men can choose to retire early and the associated early retirement reduction and the fact that a difference in retirement ages according to sex has been retained.

42 It is undeniable that the early drawing of retirement benefits has financial repercussions on the pension system concerned as a result of the reduction in the income received from social security contributions and the increase in the expenditure incurred by way of the additional pensions payable. An arrangement consisting of an early retirement reduction would seem conducive to offsetting that financial impact. The calculations and other information provided by the Belgian Government indicate that the arrangement could not be abolished without compromising the financial equilibrium of the pensions system in issue.

43 As regards more specifically the amount of the early retirement reduction applied in the main proceedings, that is, 5% for each year by which the pension is drawn in advance, attention should be drawn to the fact that the Member States have a wide discretion in the implementation of measures intended to preserve the financial equilibrium of social security systems, and of pensions systems in particular. One cannot establish from the evidence in the case-file that in this case the amount of the reduction was set at an unreasonable level.

44 Furthermore, as the Commission rightly points out in paragraph 26 of its observations, it is normal that the option to take early retirement should involve financial consequences.

45 Those considerations are not undermined by the fact that the early retirement reduction has been abolished, in full or in part, in other Belgian pensions arrangements, in particular in the arrangements for employed workers. As is apparent from the response of the Belgian Government, referred to in paragraph 25 of this order, differences between the two systems in terms of their extent and the resources available to them account for the differences in the reduction provisions.

46 In those circumstances, an early retirement reduction such as that at issue in the main proceedings is objectively linked to maintenance of national provisions setting the retirement age differently according to sex.

47 Accordingly, the answer to the question referred should be that Article 4(1) of Directive 79/7, read in conjunction with Article 7(1)(a) of the Directive, must be interpreted as meaning that where the national regulations of a Member State

have retained a difference in retirement ages between men and women, it does not preclude that Member State, in circumstances such as those of the main proceedings, from calculating the amount of the retirement pension differently according to the sex of the worker or from applying in the case of men, who alone are entitled to claim a retirement pension in advance in the five years before the normal retirement age, a reduction of 5% for each year by which the pension is drawn early.

Costs

48 The costs incurred by the Belgian and German Governments and by the Commission, 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 action pending before the national court, the decision on costs is matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the question referred to it by the Cour de cassation by judgment of 29 April 2002, hereby rules:

Article 4(1) of Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security

of 19 December 1978, read in conjunction with Article 7(1)(a) of the Directive, must be interpreted as meaning that where the national regulations of a Member State have retained a difference in retirement ages between men and women, it does not preclude that Member State, in circumstances such as those of the main proceedings, from calculating the amount of the retirement pension differently according to the sex of the worker or from applying in the case of men, who alone are entitled to claim a retirement pension in advance in the five years before the normal retirement age, a reduction of 5% for each year by which the pension is drawn early.

Luxembourg, 30 April 2004.

R. Grass — A. Rosas

Registrar — President of the Third Chamber