JUDGMENT OF THE COURT

23 May 2000 *

In Case C-196/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Social Security Commissioner (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Regina Virginia Hepple

and

Adjudication Officer,

between

Adjudication Officer

and

Anna Stec,

between

Patrick Vincent Lunn

and

Adjudication Officer,

between

Adjudication Officer

and

Oliver Kimber,

* Language of the case: English.

and between

Adjudication Officer

and

Sybil Spencer

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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, D.A.O. Edward and L. Sevón (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann and H. Ragnemalm (Rapporteur), Judges,

Advocate General: A. Saggio,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Ms Hepple, Ms Stec, Ms Spencer and Mr Lunn, by R. Drabble QC, instructed by R. Poynter, Solicitor,

— Mr Kimber, by H. Mountfield, Barrister, instructed by B. McKenna, Solicitor,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and C. Vajda QC,

— the Commission of the European Communities, by M. Wolfcarius, of its Legal Service, and N. Yerrell, a national civil servant on secondment to that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Hepple, Ms Stec, Ms Spencer, of Mr Lunn and Mr Kimber, of the United Kingdom Government and of the Commission at the hearing on 8 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 12 October 1999,

gives the following

Judgment

1 By decision of 8 May 1998, received at the Court on 22 May 1998, the Social Security Commissioner referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three 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, hereinafter 'the Directive').

2 Those questions were raised in five actions between Ms Hepple and four other persons and the Adjudication Officer concerning the latter's refusal to grant them reduced earnings allowance (hereinafter 'REA').

The Community legislation

3 Article 4(1) of the Directive prohibits all discrimination on grounds of sex, in particular as concerns the calculation of benefits.

4 Such discrimination can be justified only under 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.

5 Article 7(2) of the Directive provides:

'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.'

6 Article 8 of the Directive provides:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification. They shall immediately inform the Commission thereof.

2. Member States shall communicate to the Commission the text of laws, regulations and administrative provisions which they adopt in the field covered by this Directive, including measures adopted pursuant to Article 7(2).

They shall inform the Commission of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date.'

7 Article 9 of the Directive provides:

'Within seven years of notification of this Directive, Member States shall forward all information necessary to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council and to propose such further measures as may be required for the implementation of the principle of equal treatment.'

The national legislation

8 In all five cases the main proceedings relate to the grant to the relevant claimants of REA, a weekly cash benefit payable to employees or former employees who have suffered a reduction in earnings following an accident at work or occupational disease. Its purpose is to compensate for an impairment of earning capacity.

9 The scheme, instituted in 1948 as 'the Industrial Injuries Scheme', provided for a special hardship allowance, which was recast and renamed REA by the Social Security Act 1986. The relevant provisions are now contained in Part V of the Social Security Contributions and Benefits Act 1992.

10 REA is calculated on the basis of a comparison between earnings in the occupation which the claimant has been prevented from continuing as a result of suffering an accident at work or occupational disease and those in any alternative occupation still considered suitable despite the disablement. The maximum amount of the allowance is about UKL 40, including cost-of-living increases added annually.

11 There are no minimum contribution conditions for payment of REA, although employed earners' and employers' national insurance contributions had included a proportion attributable to the cost of the whole scheme of protection in respect of accidents at work and occupational diseases.

12 From 1986, a succession of legislative amendments affecting REA were adopted to reduce the number of persons entitled to receive it. Previously, REA had remained payable notwithstanding attainment of pensionable age and inception of receipt of the statutory old-age pension, so that both benefits had been payable concurrently in full. The succession of legislative amendments adopted after 1986 sought to limit the payment of REA to persons who were still of normal working age.

13 The last significant change consisted in the introduction of a 'retirement allowance' (hereinafter 'RA') to replace REA for persons who had attained pensionable age and had ceased regular employment. The rate of that allowance is 25% of the last weekly amount of REA to which the relevant recipient was entitled. Its purpose is to compensate for the reduction in pension entitlement resulting from a decrease in income following an accident at work or occupational disease.

14 It should also be noted that the pensionable age in the United Kingdom is 65 years for men and 60 for women. Until 1 October 1989 it was not possible to claim a retirement pension unless pensionable age had been attained, the conditions regarding contributions had been fulfilled and the person concerned 'had retired from regular employment'.

15 The rules on eligibility for retirement pensions were changed with effect from 1 October 1989 so that a retirement pension is now paid to persons over pensionable age, even if they have not retired from regular employment.

The main proceedings and the questions referred to the Court

16 Ms Hepple, Ms Stec, Ms Spencer, Mr Kimber and Mr Lunn take exception, for diverse reasons, to the effects on them of the successive legislative amendments made to the scheme concerned.

17 They claim, essentially, that the amount of the allowance received by them since attaining retirement age — REA or RA, as the case may be — is of a lower amount than that received by a person of the opposite sex in comparable circumstances.

18 Entertaining doubts as to the compatibility of the national legislation with the Directive, the Social Security Commissioner stayed proceedings pending a preliminary ruling by the Court of Justice on the following three questions:

'1. Does Article 7 of Council Directive 79/7/EEC permit a Member State to impose unequal age conditions linked to the different pension ages for men and women under its statutory *old-age pension scheme,* on entitlement to a benefit having the characteristics of Reduced Earnings Allowance under a statutory *occupational accident and disease scheme,* so as to produce different weekly cash payments under that scheme for men and women in otherwise similar circumstances, in particular where the inequality:

(a) is not necessary for any financial reason connected with either scheme; and

(b) never having been imposed before, is imposed for the first time many years after the inception of the two schemes and also after 23 December 1984, the latest date for the Directive to be given full effect until Article 8?

2. If the answer to Question 1 is Yes, what are the considerations that determine whether unequal age conditions such as those imposed in Great Britain for Reduced Earnings Allowance from 1988 to 1989 onwards are necessary to ensure coherence between schemes or otherwise fall within the permitted exclusion in Article 7?

3. If those unequal age conditions are *not* within the permitted exclusion in Article 7, then does the doctrine of direct effect require the national court (in the absence of national legislation to comply with the Directive) to rectify the inequality by awarding an additional payment to each individual concerned in *any* week when the payment prescribed under the occupational accident and disease scheme for him or her is lower than for a person of the other sex but in otherwise similar circumstances ("the comparator"), *without regard to*

(a) any converse advantage in *other* weeks when, for the same individual, a higher payment is prescribed than for the comparator; and/or

(b) the existence or exercise of sex-differentiated options under the *pension* scheme to choose the pension starting age, the effect of which in conjunction with the unequal conditions under the *occupational accident and disease scheme* may be to cause altered (and unequal) weekly payments under that scheme: in some weeks to the advantage of the individual, in others to the comparator?

Or, should some account be taken of such matters, and if so what are the principles to be applied in relation to them in giving direct effect to Article 4?'

The first two questions

19 By its first two questions, which it is appropriate to consider together, the national court seeks essentially to ascertain whether the derogation for which Article 7(1)(a) of the Directive provides is to be interpreted as applying to a benefit such as REA, which was introduced into national legislation after expiry of the period prescribed for transposition of the Directive and is subject to age conditions which differ according to sex.

20 First, the benefit at issue in the main proceedings, which consists of an allowance for employees whose pay has decreased following an accident at work or occupational disease, falls within the scope of the Directive. Moreover, that benefit does not constitute an old-age pension but might be classifiable, under Article 7(1)(a) of the Directive, as a benefit for which the determination of retirement age might have repercussions.

21 Accordingly, it is necessary to consider whether the Directive prohibits the introduction by Member States which have determined different retirement ages according to sex of further discriminatory measures after expiry of the period prescribed for transposition of the Directive.

22 Ms Hepple, Ms Stec and Ms Spencer, Mr Lunn and Mr Kimber, and the Commission contend that such use of the derogation for which Article 7(1)(a) of

the Directive provides is contrary to the purpose of the Directive, which is to ensure progressive implementation of the principle of equal treatment for men and women in matters of social security. They further contend that, in paragraph 9 of its judgment in Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247, the Court held that, by virtue of Article 7(1)(a) of the Directive, the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems.

23 In that connection, it should be made clear that the temporary maintenance of different retirement ages according to sex may necessitate the subsequent adoption, after expiry of the period prescribed for transposition of the Directive, of measures indissociable from that derogation and also amendments to such measures.

24 To prohibit a Member State which has set different retirement ages for men and women from adopting or subsequently amending, after expiry of the period prescribed for transposition of the Directive, measures linked to that age difference would be tantamount to depriving the derogation for which Article 7(1)(a) of the Directive provides of its practical effect.

25 According to settled case-law, where, pursuant to Article 7(1)(a) of the Directive, 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 other benefit schemes which are necessarily and objectively linked to the difference in pensionable age (see, in particular, *Thomas and Others*, cited above, paragraph 20, Case C-92/94 *Secretary of State for Social Security and Chief Adjudication Officer* v *Graham and Others* [1995] ECR I-2521, paragraph 11, and Case C-139/95 *Balestra* v *INPS* [1997] ECR I-549, paragraph 33).

26 That will be 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 (see *Thomas and Others*, paragraph 12, *Graham and Others*, paragraph 12, and *Balestra*, paragraph 35).

27 As regards, first, the requirement of preserving financial equilibrium of the social-security system, it must be borne in mind that the Court has already held that the grant of benefits under non-contributory schemes to persons in respect of whom certain risks have materialised, regardless of the entitlement of such persons to an old-age pension by virtue of contribution periods completed by them, has no direct influence on the financial equilibrium of contributory pension schemes (see *Thomas and Others*, paragraph 14).

28 It must also be noted that in none of the observations submitted to the Court has it been argued that considerations of financial equilibrium might be applicable to non-contributory benefits, such as those at issue in this case, and the United Kingdom has even expressly excluded that possibility.

29 In those circumstances, it must be held that removal of the discrimination at issue in the main proceedings would have no effect on the financial equilibrium of the social-security system of the United Kingdom as a whole.

30 As regards, second, coherence between the retirement-pension scheme and other benefit schemes, it must be considered whether it is objectively necessary for different age conditions based on sex to apply to the benefit at issue in this case.

31 In that respect, the principal aim of the successive legislative amendments mentioned in paragraphs 12 and 13 of this judgment was to discontinue payment of REA — an allowance designed to compensate for an impairment of earning capacity following an accident at work or occupational disease — to persons no longer of working age by imposing conditions based on the statutory retirement age.

32 Thus, as a result of those legislative amendments, there is coherence between REA, which is designed to compensate for a decrease in earnings, and the old-age pension scheme. It follows that maintenance of the rules at issue in the main proceedings is objectively necessary to preserve such coherence.

33 That conclusion is not invalidated by the fact that REA is replaced, when the beneficiary reaches retirement age and stops working, by RA, the rate of which is 25% of REA, since RA is designed to compensate for the reduction in pension entitlement resulting from a decrease in earnings following an accident at work or occupational disease.

34 It follows that discrimination of the kind at issue in the main proceedings is objectively and necessarily linked to the difference between the retirement age for men and that for women, so that it is covered by the derogation for which Article 7(1)(a) of the Directive provides.

35 The answer to the first two questions must therefore be that the derogation for which Article 7(1)(a) of the Directive provides is to be interpreted as applying to a benefit, such as REA, which was introduced into national legislation after expiry of the period prescribed for transposition of the Directive and is subject to age conditions which differ according to sex.

The third question

36 In view of the answer given to the first two questions, it is unnecessary to answer the third.

Costs

37 The costs incurred by the United Kingdom Government 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 a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Social Security Commissioner by decision of 8 May 1998, hereby rules:

The derogation provided for in 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 must be interpreted as applying to a benefit, such as the reduced earnings allowance at issue in the main proceedings, which was introduced into national legislation after expiry of the period prescribed for transposition of the Directive and is subject to age conditions which differ according to sex.

Rodríguez Iglesias	Edward	Sevón
Kapteyn	Gulmann	Puissochet
Hirsch	Jann	Ragnemalm

Delivered in open court in Luxembourg on 23 May 2000.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President