OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA delivered on 4 June 1987 *

Mr President,
Members of the Court,

1. As in a number of previous cases, the Court of Justice is once again being asked to define the scope of the principle of equal treatment for men and women in matters of social security, laid down in Article 4 (1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment in matters of social security. [1]

2. Let us consider the context in which this problem now comes before the Court.

I — 3. Jean Borrie Clarke, who is a citizen of the United Kingdom and resides with her husband, has not been gainfully employed since January 1983 as a result of an illness which incapacitated her for work.

4. In April 1983 she made a claim for a non-contributory invalidity pension (NCIP) under Section 36 of the Social Security Act 1975.

5. Her claim was rejected on the ground that she had not furnished proof that she was subject to an enduring disability preventing her from performing her normal household duties for a sufficient period to claim entitlement, as a married woman living with her husband, to a pension under the Social Security Act.

6. The claimant then appealed to the Social Security Commissioner. Meanwhile, Article 11 of the Health and Social Security Act 1984 abolished non-contributory invalidity pensions with effect from 29 November 1984 and at the same time made substantial amendments to Section 36 (a) of the Social Security Act 1975, introducing a new benefit known as the 'severe disablement allowance' (SDA).

7. The conditions for entitlement to that benefit were, in general, stricter than those laid down by the Social Security Act although they were the same for claimants of either sex.

8. Although the effect of the new provisions was to discontinue payment of non-contributory invalidity pensions as from 29 November 1984, a severe disablement allowance was payable from that date only to certain categories of persons, excluding Mrs Borrie Clarke.

9. As regards the population as a whole, the date fixed for the entry into force of the new provisions was 28 November 1985 or, if earlier, the date on which the claimant reached the age of 50.

10. However, it was considered necessary to adopt a transitional provision covering persons who had acquired entitlement to a non-contributory invalidity pension before 29 November 1984, so as to safeguard their right to a severe disablement allowance even though they did not satisfy all the

* Translated from the Portugese.

1 — Official Journal 1979, L 6, p. 24.

requirements of the Health and Social Security Act 1984 as regards the definition of disablement or age.

11. The provision adopted for that purpose was Regulation 20 (1) of the Social Security (Severe Disablement Allowance) Regulations 1984.

12. However, the aforesaid provision excluded persons who, like the appellant in the main proceedings, had not acquired entitlement to a non-contributory invalidity pension as a result of the discriminatory conditions applicable only to women.

13. That is why the Social Security Commissioner requested the Court of Justice to give a preliminary ruling on the question (set out in the Report for the Hearing) whether Article 4 (1) of Council Directive 79/7/EEC of 19 December 1978 has direct effect in the sense that it may be relied upon by individuals in their relations with the State and may affect the applicability of discriminatory provisions, thus enabling a woman in the appellant's position to obtain an invalidity pension from the date on which the Member States should have completed the process of implementing the directive, which, as far as the United Kingdom is concerned, was 22 December 1984, that is to say six years after its notification.

14. According to Article 4 (1), the principle of equal treatment for men and women in matters of social security, which the directive is designed to implement in stages (Article 1), '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 . . . '.

15. According to Article 3, the principle applies to statutory schemes which provide protection against the risks of invalidity and to social assistance in so far as it is intended to supplement or replace those schemes. Accordingly, it covers the benefits with which these proceedings are concerned.

16. In view of the complexity of national social security schemes, the directive laid down that the Member States were to have a fairly long period within which to adopt the necessary implementing provisions, namely six years from the date of its notification (Article 8); within that period the Member States were, in particular, to adopt 'the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished' (Article 5).

II — 17. There is no doubt, nor is it disputed, that the provisions of the Social Security Act which imposed on married women an additional condition (incapacity for normal household duties) in order to qualify for a non-contributory invalidity pension were discriminatory.

18. As the United Kingdom explains in its observations, the abolition of non-contributory invalidity pensions was one of the steps taken to comply with the obligations imposed by Directive 79/7/EEC, having regard specifically to the discriminatory nature of that additional condition.

19. The transitional provisions contained in Regulation 20 (1) of the Social Security

(Severe Disablement Allowance) Regulations 1984 had the effect of perpetuating the resultant discriminatory situation.

20. In fact, as from 24 November 1984, any person who, immediately before both 10 September 1984 and 29 November 1984 was entitled to a non-contributory invalidity pension was to be automatically entitled to severe disablement allowance, even if that person did not satisfy all the conditions for entitlement laid down in the Health and Social Security Act 1984. The purpose of Regulation 20 (1) was thus to prevent the new conditions laid down in the 1984 Act from depriving a claimant of a benefit acquired under the legislation previously in force.

21. That possibility applied to any men who were disabled for the purposes of the Social Security Act and who were in receipt of a non-contributory invalidity pension, irrespective of any requirements concerning their ability to perform household duties.

22. However, Regulation 20 (1) excluded married women who, whilst being subject to the same conditions and complying with all the other requirements of the Social Security Act, were ineligible for a non-contributory invalidity pension solely because they were unable to furnish proof that they satisfied the additional — discriminatory — condition that they were incapable of performing normal household duties.

23. Accordingly, the effect of the transitional provision — Regulation 20 (1) of the Social Security (Severe Disablement Allowance) Regulations 1984 — is to maintain, in relation to the new pension, the pre-existing discrimination in relation to the previous pension, and to perpetuate it indefinitely in relation to any person who fails to satisfy all the requirements laid down by the Health and Social Security Act 1984 in order to qualify for a severe disablement allowance, even after 28 November 1985.

III — 24. In those circumstances, the answer to the question is straightforward enough and must unequivocally be in the affirmative.

25. Article 4 (1) of the directive exhibits all the characteristics which are required, according to the case-law of the Court, to ensure that provisions of a directive are recognized as having direct effect, on the basis of Article 189 of the EEC Treaty, in cases where a Member State has failed to adopt appropriate measures for the implementation of the directive. [2]

26. It is a provision which 'embodies the aim of the directive, set out in Article 1, that is to say the implementation, in the field of social security and between men and women, of the principle of equal treatment, a principle which the Court has frequently described as fundamental'. [3] It prohibits discrimination in terms which are clear, general, precise and unequivocal and, moreover, unconditional, since Articles 5 to 8 of the directive do not impose any precondition for the application of the principle of equal treatment. Article 7 permits derogations to be made, in the matter of invalidity benefits, only as regards a married woman's *derived* rights, an issue which does not arise in this case. In addition, as is clear, in particular from recent decisions of the Court, [4] exceptions to the principle of equal

2 — See, for instance, judgments of 6 October 1970 in Case 9/70 *Grad* [1970] ECR 825 at p. 839; of 4 December 1974 in Case 41/74 *Van Duyn* [1974] ECR 1337 at p. 1349; of 5 April 1979 in Case 148/78 *Ratti* [1979] ECR 1629; of 19 January 1982 in Case 8/81 *Becker* [1982] ECR 53; and of 26 February 1986 in Case 152/84 *Marshall* [1986] ECR 723 at p. 737.

3 — Judgment of 24 June 1986 in Case 150/85 *Drake* [1986] ECR 1995 at p. 2002, paragraph 32 of the decision.

4 — Judgments of 26 February 1986 in Case 151/84 *Roberts* [1986] ECR 703 at p. 712; Case 152/84 *Marshall* [1986] ECR 723 at p. 737; and Case 262/84 *Beets-Proper* [1986] ECR 773 at p. 782.

treatment must be given a restrictive interpretation.

27. For that reason, the Court has recently held,[5] in cases which were also concerned with the temporal effects of discriminatory provisions that had in the meantime been repealed, that Article 4 (1) of the directive 'in no way permits Member States to restrict or place conditions on the application of the principle of equal treatment in its particular area of application' and that that provision 'is sufficiently precise and unconditional to allow individuals, in the absence of implementing measures, to rely upon it before the national courts as from 23 December 1984, in order to preclude the application of any national provision inconsistent with that article' (paragraph 21 of the decision in *FNV*; paragraphs 14 and 16 of the decision in *McDermott and Cotter*).

28. It follows that 'until such time as the national government adopts the necessary implementing measures, women are entitled to be treated in the same way, and to have the same rules applied to them, as men who are in the same situation, since, where the directive has not been implemented, those rules remain the only valid point of reference' (paragraph 22 of the decision in *FNV* and paragraph 17 of the decision in *McDermott and Cotter*).

29. It should be stated, in that regard, that the incomplete or incorrect transposition of the provisions of a directive into national law must be treated in the same way as a total failure to implement a directive (in the sense of a total failure to act on the part of the State to whom it is addressed), as is clear, moreover, from the two last-mentioned judgments.

30. As the Commission points out in its observations, no exception is made for the continuing discriminatory effects of national provisions previously in force, since to maintain those effects is as much contrary to the provisions of the directive as it would be to maintain those national provisions themselves.

31. Nor can the alleged complexity of social security schemes be relied upon to suspend the application of the principle of equal treatment. It was precisely in view of the complexity of the statutory schemes that the directive provided for an implementing period of sufficient duration (six years), and the Member States are not entitled either to rely on difficulties of that kind to justify a failure to implement a directive correctly and in full within the prescribed period, or to prevent individuals, owing to the failure to implement the directive, from deriving advantages from its directly applicable provisions, thereby passing on to those individuals the consequences of the Member States' wrongful conduct.[6]

32. Furthermore, it is for the national legislature to select the methods for attaining the principles and the objectives of the directive which are best suited to avoiding difficulties of that kind.

33. In any event, as the Court has repeatedly held,[7] a Member State may not

5 — Judgment of 4 December 1986 in Case 71/85 *FNV* [1986] ECR 3855 at p. 3870; judgment of 24 March 1987 in Case 286/85 *McDermott and Cotter* [1987] ECR 1453; see also Opinion of Mr Advocate General Mancini in those cases.

6 — See the *Becker* judgment, cited above, paragraph 47 of the decision.

7 — See, for instance, the judgments of 2 February 1982 in Cases 68 to 73/81 *Commission* v *Belgium* [1982] ECR 153, 163, 169, 175, 183 and 189.

plead 'provisions, practices or circumstances in its internal legal system to justify failure to comply with obligations under Community directives'. The Court has also stated very clearly that 'the complexity of given situations in a State cannot alter the legal nature of a directly applicable Community provision, especially as the Community rule must be applied with the same force in all Member States'. [8]

IV — 34. I therefore suggest that the Court answer the question referred to it by the Social Security Commissioner, London, in the following terms:

'(1) Article 4 (1) 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 has direct effect and may be relied upon as from 23 December 1984 in order to prevent the application of any national provision inconsistent with that article.

(2) In the absence of measures implementing Article 4 (1), women are entitled to be treated in the same way, and to have the same rules applied to them, as men who are in the same situation, since, where the directive has not been implemented, those rules remain the only valid point of reference. Hence Article 4 (1) may be relied upon in particular by a married woman who is denied the right to an invalidity pension on the ground that she was not previously entitled to another social security benefit because she did not satisfy a condition imposed only on married women.'

8 — Judgment of 3 April 1968 in Case 28/67 *Molkerei-Zentrale* [1968] ECR 143 at p. 154.