# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 28 January 1986 *

*Mr President,*
*Members of the Court,*

1. Let me set the scene for this case, which has come before the Court by way of a request for a preliminary ruling. We are in Northern Ireland. Public order and personal safety are threatened by disturbances of exceptional gravity. That situation has been recognized by the European Court of Human Rights, which, in a judgment of 18 January 1978, found that it had started in 1970 and described it as 'the longest, most violent terrorist campaign ever known in the two parts of Ireland'. No-one claims that it is over.

In such circumstances the role of the forces of law and order, above all of the police, is essential. As stated in the Report for the Hearing, to which I expressly refer for a summary of the facts and procedure and for the preliminary questions, the Royal Ulster Constabulary ('the RUC') is placed under the authority of its Chief Constable, who may also appoint full-time or part-time reserve constables to the Royal Ulster Constabulary Reserve ('the RUC Reserve'). As in England and Wales, the instruments governing the organization of the RUC and RUC Reserve make no distinction between men and women as regards the duties to be performed.

From 1973 women have thus been recruited to the RUC Reserve, at first on a part-time basis and then, from 1974, on a full-time basis to what may be called 'the RUC full-time Reserve' under three-year renewable contracts. Mrs Johnston, the applicant in the main proceedings, who was first employed on a part-time basis and then on a full-time basis in 1974, had her contract renewed in 1977.

Although police officers are not generally armed in the United Kingdom, the special situation in Northern Ireland led the competent authorities to equip them with fire-arms in the regular course of their duties. The change of policy applied only to male officers, the reasons being to prevent the risk of attacks on women officers which might enable assailants to steal their fire-arms, to maintain the position of women officers in the community and to maintain, as far as women officers were concerned, the ideal of an unarmed police force. As a consequence of that decision it was decided not to train women in the handling of fire-arms.

In 1980 the Chief Constable took an additional step. In view of the need to assign members of the RUC full-time Reserve mainly to security duties involving the use of fire-arms, he decided not to renew the contracts of women members of the RUC full-time Reserve when their duties could be performed by their counterparts in the RUC. Consequently, as in the case of almost all of her female colleagues, Mrs Johnston's contract was not renewed in 1980.

It is not disputed that the measure taken by the Chief Constable, which had nothing to do with Mrs Johnston's conduct in the

* Translated from the French.

service, was taken solely on the ground of her sex. She therefore argued before the national court that for that reason she had suffered discrimination contrary to the provisions of Council Directive No 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976, L 39, p. 40).

2. That directive was implemented in Northern Ireland by the Sex Discrimination (Northern Ireland) Order 1976 (*Statutory Instruments 1976* No 1042 (NI 15)). I shall not reproduce the résumé of that Order contained in the Report for the Hearing but merely remind the Court that:

(i) Article 10 concerns exceptional cases in which discrimination on grounds of sex is justified;

(ii) as far as employment with the police is concerned, Article 19 (2) prohibits — save in matters irrelevant to this case — any discriminatory treatment on grounds of sex;

(iii) Article 53 provides that an act contravening that prohibition shall not be unlawful if it is done 'for the purpose of safeguarding national security or of protecting public safety or public order' and that a certificate signed by the Secretary of State and certifying that an act was done for such purposes shall be conclusive evidence that it was done for such purposes.

That last provision is at the centre of the argument. On 13 May 1981 the Secretary of State issued a certificate stating that

'the act consisting of the refusal of the Royal Ulster Constabulary to offer further full-time employment to Mrs Marguerite Johnston in the Royal Ulster Constabulary was done for the purpose of:

(a) safeguarding national security; and

(b) protecting public safety and public order'.

As the Industrial Tribunal of Northern Ireland points out in its decision, it is conceded

(i) on behalf of the Chief Constable, that the contested measure does not have any justification under the other provisions of the Sex Discrimination Order (paragraph 40) and

(ii) on behalf of the applicant, that Article 53 does not allow her to challenge the certificate on the basis of national law (paragraph 34).

The seven questions raised by the Industrial Tribunal in the circumstances described above make it clear that in its appraisal of the discrimination in question the Court will have to examine two requirements, namely those of public order and the rule of law; judicial review is to be exercised at the point where those two concepts meet.

From that point of view it will be necessary to investigate whether a Member State is entitled, for reasons of public order, to exclude all possibility of judicial review of the legality of a national measure in the light of national or Community law. If it may not do so, it will be necessary to investigate whether, and the conditions under which, the measure in question may, subject to review by the courts, be justified in Community law on the grounds of public order.

**The right to obtain a judicial determination**

3. Although the principle of legality is the cornerstone of the rule of law, it does not exclude consideration of the demands of public order. Indeed, they must be accommodated in order to ensure the survival of the State, whilst at the same time arbitrary action must be prevented. Review by the courts is a fundamental safeguard against such action: the right to challenge a measure before the courts is inherent in the rule of law.

Formed of States based on the rule of law, the European Community is necessarily a Community of law. It was created and works on the understanding that all Member States will show equal respect for the Community legal order.

Consequently, and subject to review by the courts, the Community legal order expressly incorporates the concept of public order so as to reconcile the proper functioning of the common market with the necessity for the Member States to cope with emergencies which threaten their vital interests.

The parties have accordingly referred in particular to Articles 36, 48 and 224 of the EEC Treaty. Each of those provisions provides an illustration of my analysis.

In the case of the provisos regarding public order contained in Articles 36 and 48, the Court, having affirmed the discretion of the Member States to define public order, has, in a creative spirit, established the principle that decisions regarding public order are subject to review by the national courts and has defined the scope of such review.

In the case of the safeguard provision in Article 224, the Court has not yet been required to rule on the conditions for its application. However, the second paragraph of Article 225 expressly provides that, where a Member State makes improper use of its exceptional powers under Article 224, the matter may be brought directly before the Court. That provision does not exclude all possibility of review by the national courts in such cases or, therefore, of a reference to the Court of Justice for a preliminary ruling.

4. The Treaty, like the case-law of the Court of Justice, therefore lays down the fundamental rule — a corollary of the principle of legality — that, whilst the demands of public order may be allowed to modify the scope of judicial review, they cannot override the actual right to obtain a judicial determination.

Therefore, a provision of national law, purportedly based on considerations of public order, which excluded the very possibility of such review, would, in my opinion, be incompatible with the Community legal order. By removing measures taken by the Member States from the ambit of Community law — primary, secondary or such as implemented by national laws — such a provision would in fact allow the national authorities to create a 'no-go area for the law' as and when they saw fit, thus calling in question the very foundations of that legal order.

As far as concerns more particularly the equal treatment of men and women in matters of employment, Article 6 of Directive No 76/207 states that:

'Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider

themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities.'

In its judgment of 10 April 1984 in Case 14/83 (*Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891) the Court held that

'by granting applicants for a post who have been discriminated against recourse to the courts, (Article 6) acknowledges that those candidates have rights of which they may avail themselves before the courts' (paragraph 22, at p. 1908).

The Court went on to conclude that as an authority of a Member State a national court which is confronted by a provision of national legislation compromising the effectiveness of an obligation arising under a directive (in that case Directive No 76/207) and which has a 'duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation' (paragraph 26, at p. 1909) must 'interpret and apply the legislation . . . in conformity with the requirements of Community law' (paragraph 28, at p. 1909).

It follows that a national court cannot, without infringing Article 5 of the Treaty and the directive, hold itself bound by a provision of national law which purports to exclude on the grounds of public order all judicial review of the implementation of Community legislation.

That duty of the national court is even more categorical where, as in this case, it is acting as an ordinary court responsible for applying Community law, in which regard it must be borne in mind that the provisions of Article 6, which are unconditional and sufficiently clear, unquestionably have direct effect. Consequently, the right of recourse to the courts for which Article 6 provides may be invoked by individuals in order to challenge any conflicting provision of national law; in this regard, the authority of the Chief Constable cannot be separated from that of the State which confers it upon him.

That having been stated, I consider that, for reasons similar to those on which the Court based its decision with regard to a regulation at issue in the *Simmenthal* case (judgment of 9 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA* [1978] ECR 629),

'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law' (paragraph 22, at p. 644).

I therefore consider that a Member State may not be allowed for reasons of public order to exclude all review by the courts of the legality of a national measure with regard to the provisions of Community law. Consequently, in such a situation a national court must

'give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation' (operative part of the *Simmenthal* judgment).

**The scope of judicial review**

5. If the demands of public order may not justify the abandonment of judicial review, can they, subject to such review, justify measures of the kind taken by the Chief Constable — relating to the carrying of fire-arms, training in their handling and use and, ultimately, access to employment — the discriminatory character of which is not disputed? That is the outstanding issue before the Industrial Tribunal.

Since such a justification would derogate from Community law as normally applicable, it may only be based on Community law.

Neither Article 36 nor Article 48 (3) is relevant to this question. As far as concerns Article 224, on which the United Kingdom relies and to which the second question refers, the issue is more complex. That article provides that:

'Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.'

In contrast to the other two provisions, which constitute exceptions to specific rules, Article 224 is in effect a 'safeguard clause' of general scope. Like any general rule, it applies only in the absence of special rules. As a safeguard clause, it is the *ultima ratio* to which recourse may be had only in the absence of any Community provision enabling the demands of public order in question to be met.

In my view, the concerns of the United Kingdom can be taken into consideration, to the full extent required by the demands of public order, within the framework of Directive No 76/207. Consequently, the possibility of invoking Article 224 will not need to be examined.

6. The Industrial Tribunal is asking the Court whether, having regard to the special circumstances prevailing in Northern Ireland, measures allowing only men to be

(i) employed as armed members of a reserve police force and

(ii) trained in the handling and use of fire-arms

may constitute permitted derogations under the directive.

In other words, the Court is being asked whether reasons of public order may justify such measures either:

(i) because, owing to the nature of the activities involved and the context in which they are carried out, the employment in question can only be given to a man, the sex of the person employed constituting a determining factor within the meaning of Article 2 (2),

or

(ii) because the protection of women requires them and, if so, whether Article 2 (3) or Article 3 (2) (c) may be applied.

7. A distinction must be made here between discriminatory measures adopted before the enactment of the directive and those adopted after its enactment.

Article 3 (2) (c) applies to discriminatory measures adopted before its enactment, that is to say, in the case now before the Court, the decision taken by the Chief Constable to arm only male members of the RUC full-time Reserve and to exclude women from training in fire-arms.

Of the grounds of justification provided by the competent authority in this regard, only the aim of preventing the risk of attacks on women could be categorized as concern for the protection of women in the wide sense of that phrase. It will be noted that the questions raised by the Industrial Tribunal on this point (Questions 4 and 5) essentially concern the point whether the circumstances stated are of such a nature as to justify the ban on the carrying of fire-arms by women police officers out of concern to protect them.

This possibility cannot be ruled out *a priori.* Being measures which were in force at the time of the notification of the directive, they must, of course, be reviewed by the Member States pursuant to the second subparagraph of Article 9 (1). The exercise of the national court's powers of review is not dependent on the performance of that obligation. If such measures are still part of positive law, it is for the national court, deriving its authority from Article 6, to state whether the circumstances on which they were originally based still necessitate their maintenance and in particular to investigate whether they have become disproportionate with regard to the aim in view.

8. The last measure, consisting in the exclusion of women from access to the employment in question, was taken by the Chief Constable after the directive had been enacted. As such, it cannot be covered by Article 3 (2) (c) but only by the other two provisions referred to by the Industrial Tribunal.

Can that measure be justified by concern for 'the protection of women' referred to in Article 2 (3)? This second concern (the first being the maintenance of public order) applies specifically to women police officers and not to the female population in general.

It is undeniable that the tasks of maintaining and re-establishing law and order expose the persons engaged in them to danger. Is that danger greater for women than for men for biological reasons relating to their sex?

If indeed Article 2 (3) may be invoked to reduce the rights of women, there can be no question of taking into consideration, on the basis of that provision, a need for protection — no matter how well founded — whose origin is socio-cultural or even political. In other words, it does not appear that a national authority may bar women from access to employment as armed police officers because it adopts Hamlet's rebuke: 'Frailty, thy name is woman'. That is, moreover, the interpretation to be placed on the Court's judgment in Case 184/83 (*Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047 paragraph 25) in which it affirmed that the directive recognized the legitimacy of measures protecting the 'biological condition' of women during pregnancy and childbirth and

their continued application in the period of the 'special relationship' formed between mother and child immediately after its birth.

9. It remains to examine whether Article 2 (2) may provide a justification which I have not been able to find in Article 2 (3).

Article 2 (2) reads as follows:

'This directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.'

There is not the slightest reference to be found in that provision to the protection of women. Nor does it mention public order. However, such silence does not mean that those matters are excluded.

In fact, Article 2 (2) contains no enumeration of the reasons justifying a derogation from the principle of equal treatment. It covers a class of occupational activities whose nature or the context in which they are carried out determine the sex of the persons called upon to perform them. No-one doubts that in some circumstances the demands of public order may constitute a legitimate ground for the authorities of a Member State to permit only individuals of one sex to do certain work relating to the maintenance of law and order. The same applies to requirements concerning the protection of women other than those covered by Article 2 (3) — here I have in mind those of social nature (cultural, political and so on) — which are themselves subject to periodic review under Article 9 (2) of the directive.

Public order and the protection of women may be closely linked, as the present case shows. The national court will therefore be induced to investigate whether women are more exposed to danger than men when carrying out the occupational activities of armed police officers and whether the employment of women in such activities may create a greater danger to public order, in order words, whether the sex of the person employed must be taken into consideration for the purposes of the activity in question. If so, it will then be for the national court to consider the contested measure in the light of the principle of proportionality in order to establish whether 'the sex of the worker constitutes a determining factor', that is to say, it will be for that court to determine whether another measure could have been taken to achieve the same purpose but without excluding women from access to employment.

Let me be blunt: a derogation from a human right as fundamental as that of equal treatment must be appraised in a restrictive manner, having regard in particular to the exceptional circumstances characterizing the situation in Northern Ireland in the relevant period.

10. In view of the generality of the sixth question I think that one last point must be made as regards the direct effect of the provisions of the directive other than those contained in Article 6, on which I have already given my opinion. This point only arises if the national court should decide that the circumstances relied upon cannot justify the contested measures under Articles 2 (2) or 3 (2) (c). In such a case, the principle laid down in Article 2 (1) of the directive will recover all its force. The sixth question could prompt an examination of the question whether Article 2 (1) has direct effect. However, I do not consider such an examination necessary, since it is not disputed that the principle contained in that provision has been accurately transposed into the national legislation.

Consequently, I suggest that the Court should rule that:

(1) A Member State may not be allowed to exclude, for reasons of public order, all judicial review of the legality of a national measure with regard to the provisions of Community law. Where a case is brought by an individual pursuant to Article 6 of Directive No 76/207 'on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions,' the national court trying the case must give full effect to those provisions, if necessary refusing to apply any conflicting provision of national legislation.

(2) The ban on the carrying of fire-arms by women police officers and on the training of women police officers in the handling and use of fire-arms

(i) cannot be regarded as a provision concerning the protection of women within the meaning of Article 2 (3) of Directive No 76/207 and

(ii) may come within the category of measures referred to in Article 3 (2) (c) if it was in force at the time when the directive was notified.

(3) The decision to exclude women from access to full-time employment as armed members of a police reserve force may, in view of exceptional circumstances relating to public order and requirements concerning the protection of those concerned, be regarded as a derogation provided for in Article 2 (2) of the directive.

(4) As far as concerns the application of the relevant provisions of the directive to the measures concerned, it is for the national court to:

(i) investigate pursuant to Article 3 (2) (c) whether the concern for protection which originally inspired the measures is well founded, if the different treatment already existed at the time when the directive was notified;

(ii) investigate pursuant to Article 2 (2) whether the sex of the person employed constitutes a determining factor for the performance of the activity in question, if the different treatment was not introduced until after notification of the directive;

(iii) if the answer to those inquiries is in the affirmative, to examine in both cases whether the measures adopted are proportionate to the aims pursued.

(5) Since the safeguard clause in Article 224 of the EEC Treaty cannot be relied upon by a Member State except in the absence of any other rule of Community law containing a derogating provision based on public order, there is no need to answer the last question referred to the Court.