JUDGMENT OF THE COURT (Sixth Chamber)
1 February 1996 *

In Case C-280/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Centrale Raad van Beroep (Netherlands) for a preliminary ruling in the proceedings pending before that court, on the one hand, between

Y. M. Posthuma-van Damme

and

Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen,

and, on the other hand, between

N. Oztürk

and

Bestuur van de Nieuwe Algemene Bedrijfsvereniging,

* Language of the case: Dutch.

on the interpretation 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 (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. Hirsch, G. F. Mancini, F. A. Schockweiler (Rapporteur) and H. Ragnemalm, Judges,

Advocate General: N. Fennelly,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen, by J. R. van Es-de Vries and J. van Doorn, Legal Advisers,

— Bestuur van de Nieuwe Algemene Bedrijfsvereniging, by C. R. J. A. M. Brent, Head of the Department for Administration and Legal Affairs of the association Gemeenschappelijk Administratiekantoor,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— Commission of the European Communities, by M. Wolfcarius and B. J. Drijber, of the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen, represented by J. van Doorn; Bestuur van de Nieuwe Algemene Bedrijfsvereniging, represented by F. W. M. Keunen, Legal Adviser of the association Gemeenschappelijk Administratiekantoor; the Netherlands Government, represented by J. S. van den Oosterkamp, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by B. J. Drijber, at the hearing on 9 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 14 December 1995,

gives the following

Judgment

1 By order of 7 October 1994, which was received at the Court on 17 October 1994, the Centrale Raad van Beroep (Higher Social Security Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation 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 The questions were raised in the course of two sets of proceedings between, on the one hand, Mrs Posthuma-van Damme and Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen (Board of the Trade Association for Retailers, Craftsmen and Housewives, 'Detam') and, on the other, Mr Oztürk and Bestuur van de Nieuwe Algemene Bedrijfsvereniging (Board of the New General Trades Association, 'NAB') concerning the withdrawal (in the case of Mrs Posthuma-van Damme) and the refusal (in the case of Mr Oztürk) of a benefit

for incapacity for work under the Algemene Arbeidsongeschiktheidswet (General Law on Incapacity for Work, 'the AAW') of 11 December 1975.

3 It is necessary to call to mind the legislation in question, which has already been described in the Court's judgment of 24 February 1994 in Case C-343/92 *De Weerd, née Roks, and Others* [1994] ECR I-571, paragraphs 3 to 8).

4 The AAW, which came into force on 1 October 1976, originally conferred on men and on unmarried women, at the end of one year's incapacity for work, entitlement to benefits for incapacity for work the amount of which did not depend on either any other income or any loss of income of the beneficiary.

5 Entitlement to benefits under the AAW was extended to married women by the Wet Invoering Gelijke Uitkeringsrechten Voor Mannen en Vrouwen (Law introducing equal treatment for men and women as regards entitlement to benefits) of 20 December 1979. At the same time that Law made entitlement to benefits subject for all those insured, except certain categories, to the condition that during the year preceding the commencement of his incapacity for work the beneficiary received from his employment or in connection therewith a certain income which was initially set at no less than HFL 3 423.81 (hereinafter 'the income requirement'). The income requirement applied to all persons whose incapacity for work had commenced after 1 January 1979.

6 By virtue of the transitional provisions contained in the abovementioned Law of 20 December 1979 men and unmarried women whose incapacity for work had commenced before 1 January 1979 continued to be entitled to benefits without having to satisfy the income requirement. Married women whose incapacity had

commenced before 1 October 1975 were not entitled to benefits even if they satisfied the income requirement. As for those whose incapacity had began between 1 October 1975 and 1 January 1979, they were entitled to benefits only if they satisfied the income requirement.

7 By several judgments of 5 January 1988 the Centrale Raad van Beroep held that those transitional provisions constituted discrimination on the ground of sex, contrary to Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966 (Treaty Series, vol. 999, page 171), and that married women whose incapacity for work arose before 1 January 1979 were entitled with effect from 1 January 1980, the date on which the Law of 20 December 1979 came into force, to AAW benefits on the same conditions as men, that is to say, without having to satisfy the income requirement, even if their incapacity had commenced before 1 October 1975.

8 The transitional provisions held to discriminate against married women were repealed by a Law of 3 May 1989. Article III of that Law, however, provided that persons whose incapacity for work arose before 1 January 1979 and who applied for AAW benefits after 3 May 1989 had to satisfy the income requirement, and Article IV provided that AAW benefits were to be withdrawn from persons whose incapacity for work arose before 1 January 1979 if they did not satisfy the income requirement. That withdrawal of benefits, which was originally to have been made on 1 January 1990, was postponed to 1 July 1991 by subsequent legislation.

9 By a judgment of 23 June 1992 the Centrale Raad van Beroep ruled that the amount of income required, which in 1988 was HFL 4 403.52 a year, constituted indirect discrimination against women, contrary to Article 26 of the International Covenant referred to above, and to Article 4(1) of Directive 79/7, and that the income requirement must be regarded as being satisfied if during the year proceeding the commencement of his incapacity for work the beneficiary had received 'some income'.

10 Mrs Posthuma-van Damme, who worked as a self-employed person together with her husband in a service station, stopped working towards the end of 1974 on health grounds and was recognized as suffering from incapacity for work as from 1 October 1976. Following the aforementioned judgments of the Centrale Raad van Beroep of 5 January 1988, Detam decided on 25 July 1989 to grant her benefit for incapacity for work under the AAW with effect from 14 April 1985. By decision of 26 March 1991, however, Detam withdrew the benefit with effect from 1 July 1991 pursuant to Article IV of the Law of 3 May 1989, as amended, on the ground that in the year prior to the commencement of her incapacity for work Mrs Posthuma-van Damme had not satisfied the income requirement.

11 Mr Oztürk worked in various capacities for different employers until 1988. He then received a pension until 17 April 1990 under the Rijksgroepregeling Werkloze Werknemers (National Unemployment Rules, 'the RWW'). He was subsequently found to have been unfit for work since 1 April 1989. Pursuant to Article 6 of the AAW, as amended by the Law of 20 December 1979, the NAB refused, by decision of 23 October 1992, to grant him an AAW benefit on the ground that in the year prior to the commencement of his incapacity for work Mr Oztürk had not satisfied the income requirement.

12 When actions brought by Mrs Posthuma-van Damme and Mr Oztürk in the Arrondissementsrechtbank (District Court), Rotterdam, against the decisions respectively withdrawing and refusing to grant AAW benefits were dismissed as unfounded, they appealed to the Centrale Raad van Beroep, which decided to refer the following questions to the Court for a preliminary ruling:

'If it is established that an income requirement imposed by legislation on incapacity for work affects more women than men:

1. (as regards the first case) Is the applicable Community law to be interpreted as meaning that it prohibits termination of benefits for incapacity for work under the AAW, acquired by virtue of incapacity for work which commenced before

1 January 1979, as a result of the application of Article IV of the Law of 3 May 1979, which makes retention of entitlement to benefits after 1 July 1991 subject to the requirement that prior to the commencement of the incapacity for work income from or in connection with work has been received?

2. (as regards the second case) Is the applicable Community law to be interpreted as meaning that it prohibits refusal to grant benefits for incapacity for work under the AAW on the basis of Article 6 of the AAW (as that provision reads following the entry into force of the Law of 20 December 1979 and taking into account the judgment of the Centrale Raad van Beroep of 23 June 1992), according to which the grant of benefits is subject to the requirement that in the year prior to the commencement of the incapacity for work, in this case 1 April 1989, income from or in connection with work was received?'

13 In the order for reference, the national court states that by its questions it seeks to establish whether an income requirement laid down in legislation on insurance against incapacity for work is compatible with Community law and to ascertain the exact scope of the answers given by the Court in the judgment in *De Weerd, née Roks, and Others*. It considers that, in view of parts of its wording, that judgment may give rise to several interpretations, and asks in particular whether the reply to the third question does not go beyond the question referred, namely whether a provision such as Article IV of the Law of 3 May 1989, which makes continuance of entitlement to benefits depend on a supplementary condition relating to the loss of income from employment in the year preceding the onset of incapacity, can be justified on budgetary grounds.

14 In the light of those questions, it should be recalled in the first place that in *De Weerd, née Roks, and Others* the Court ruled, in reply to the questions referred by the Raad van Beroep te 's-Hertogenbosch, that Community law does not preclude the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in

future rights which they derive from the direct effect of Article 4(1) of Directive 79/7 (point 2 of the operative part).

15 The Court also ruled that Article 4(1) of Directive 79/7 precludes the application of national legislation which makes the grant of benefits for incapacity for work subject to the condition of having received some income during the year preceding the commencement of the incapacity, a condition which, although it does not distinguish on grounds of sex, affects far more women than men, even if the adoption of that national legislation is justified on budgetary grounds (point 3 of the operative part).

16 Next it should be observed that, when the Court examined whether Community law precluded the introduction of national legislation which, by making continuance of entitlement to benefits for incapacity for work subject to a condition applicable henceforth to men and women alike, has the effect of withdrawing from women in future rights which they derive from the direct effect of Article 4(1) of Directive 79/7, it expressly reserved consideration of the question whether, as such, an income requirement of the kind at issue in the main proceedings complied with the principle of equal treatment between men and women (*De Weerd, née Roks, and Others*, paragraph 29 *in fine*).

17 Lastly, it should be made clear that the third question in *De Weerd, née Roks, and Others* was concerned solely with the point as to whether indirect discrimination on grounds of sex resulting from the application of an income requirement of the kind at issue in the main proceedings, which the national court described as proven, could be justified on budgetary grounds, and hence the Court's reply in the negative to that question cannot prejudge how other possible justifications should be assessed.

18 In view of the foregoing, the questions referred for a preliminary ruling by the Centrale Raad van Beroep should be construed as seeking to establish whether Article 4(1) of Directive 79/7 precludes the application of national legislation

which makes receipt of a benefit for incapacity for work subject to the requirement of having received a certain income from or in connection with work in the year preceding the commencement of incapacity where it is established that that requirement affects more women than men.

19 Since, at the hearing, the Commission questioned whether persons not fulfilling that income requirement, that is to say, persons who did not receive a certain income from or in connection with work in the year preceding the commencement of incapacity, fall within the scope *ratione personae* of Directive 79/7, it should be recalled *in limine* that, according to Article 2, the directive 'applies to the working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and to retired or invalided workers and self-employed persons'.

20 As the Court further held in the judgments in Case C-317/93 *Nolte* [1995] ECR I-4625, paragraph 17, and Case C-444/93 *Megner and Scheffel* [1995] ECR I-4741, paragraph 16, it follows from that provision that the definition of the working population is very broad, since it covers any worker, including persons who are merely seeking employment, but it does not apply to persons who have never been available for employment or who have ceased to be available for a reason other than the materialization of one of the risks referred to by the directive (see also to this effect Joined Cases 48/88, 106/88 and 107/88 *Achterberg-te Riele and Others* v *Sociale Verzekeringsbank* [1989] ECR 1963, paragraph 11).

21 It follows from the foregoing that a person who, in the year preceding the commencement of incapacity for work, did not receive a certain income from or in connection with work does not necessarily fall outside the scope *ratione personae* of Directive 79/7.

22 It should also be observed that, in the order for reference, the national court, which has sole jurisdiction to assess the facts of the main proceedings and to determine, in the light of those facts, whether the appellants in those proceedings fall within the scope *ratione personae* of Directive 79/7, expressly stated, on the one hand, that Mrs Posthuma-van Damme had to regarded as having stopped working either on account of incapacity for work or because she became unemployed and, on the other, that Mr Oztürk stopped working before April 1989, the date on which he became unfit for work, because he became unemployed.

23 In order to reply to the national court's questions, as reformulated in paragraph 18, it should be recalled that Article 4(1) of Directive 79/7 prohibits in social security matters all discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns the scope of the social security schemes and the conditions of access thereto.

24 As the Court has consistently held, Article 4(1) of the directive precludes the application of a national measure which, although formulated in neutral terms, works to the disadvantage of far more women than men, unless that measure is based on objective factors unrelated to any discrimination on grounds of sex. That is the case where the measures chosen reflect a legitimate social policy aim of the Member State whose legislation is at issue, are appropriate to achieve that aim and are necessary in order to do so (see, most recently, the judgments in *Nolte*, paragraph 28, and *Megner and Scheffel*, paragraph 24).

25 Detam, NAB and the Netherlands Government essentially argue that, by introducing the income requirement in the AAW, the Law of 20 December 1979 caused the Netherlands scheme relating to incapacity for work to shift from being pure national insurance to insurance against loss of income guaranteeing a minimum income to insured persons and that, by providing that the income requirement was henceforward to apply to all insured persons, whether male or female, married or

unmarried, who became unfit for work before or after 1 January 1979, the Law of 3 May 1989 accentuated the nature of that scheme as one providing insurance against loss of income. They consider that, in so doing, the Netherlands legislature pursued a legitimate social policy aim, inherent in numerous social security schemes, of restricting eligibility for a given benefit to persons who have lost income following the materialization of the risk which the benefit is intended to cover.

26 As the Court has held in *De Weerd, née Roks, and Others* at paragraph 28, Directive 79/7 leaves intact the powers reserved by Articles 117 and 118 of the EC Treaty to the Member States to define their social policy within the framework of close cooperation organized by the Commission, and consequently the nature and extent of measures of social protection, including those relating to social security, and the way in which they are implemented. In exercising that competence, the Member States have a broad margin of discretion (*Nolte*, paragraph 33, and *Megner and Scheffel*, paragraph 29).

27 It must be held that guaranteeing the benefit of a minimum income to persons who were in receipt of income from or in connection with work which they had to abandon owing to incapacity for work satisfies a legitimate aim of social policy and that to make the benefit of that minimum income subject to the requirement that the person concerned must have been in receipt of such an income in the year prior to the commencement of incapacity for work constitutes a measure appropriate to achieve that aim which the national legislature, in the exercise of its competence, was reasonably entitled to consider necessary in order to do so.

28 The fact that that scheme replaced a scheme of pure national insurance and that the number of persons eligible to benefit from it was further reduced to those who had

actually lost income from or in connection with work at the time when the risk materialized cannot affect that finding.

29 It appears from the case-law of the Court (*De Weerd, née Roks, and Others*, at paragraph 29, confirmed in Case C-137/94 *Richardson* [1995] ECR I-3407, paragraph 24) that Community law does not prevent Member States from taking measures which have the effect of withdrawing social security benefits from certain categories of persons, provided that those measures are compatible with the principle of equal treatment between men and women as defined in Article 4(1) of Directive 79/7. Subject to that proviso, Member States are also free to lay down, as part of their social policy, new rules which have the effect of reducing the number of persons eligible for a social security benefit.

30 The reply to the national court's questions must therefore be that Article 4(1) of Directive 79/7 does not preclude the application of national legislation which makes receipt of a benefit for incapacity for work subject to the requirement of having received a certain income from or in connection with work in the year preceding the commencement of incapacity, even if it is established that that requirement affects more women than men.

Costs

31 The costs incurred by the Netherlands Government 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 Centrale Raad van Beroep, by order of 7 October 1994, hereby rules:

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 does not preclude the application of national legislation which makes receipt of a benefit for incapacity for work subject to the requirement of having received a certain income from or in connection with work in the year preceding the commencement of incapacity, even if it is established that that requirement affects more women than men.

Kakouris Hirsch

Mancini Schockweiler Ragnemalm

Delivered in open court in Luxembourg on 1 February 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber