Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

18 October 2017*

(Reference for a preliminary ruling — Social policy — Directive 76/207/EEC — Equal treatment of men and women in matters of employment and occupation — Discrimination on the ground of sex — Competition for entry to the police school of a Member State — Law of that state imposing a minimum physical height requirement on all candidates for admission to that competition)

In Case C-409/16

REQUEST for a preliminary ruling under Article 267 TFEU from the Symvoulio tis Epikrateias (Council of State, Greece), made by decision of 15 July 2016, received at the Court on 22 July 2016, in the proceedings

Ypourgos Esoterikon,

Ypourgos Ethnikis Pedias kai Thriskevmaton

v

Maria-Eleni Kalliri,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, C.G. Fernlund, J.-C. Bonichot, S. Rodin and E. Regan, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ms Kalliri, by P. Aggelakis, dikigoros,

– the Greek Government, by K. Georgiadis and D. Katopodis and by E. Zisi, acting as Agents,

– the European Commission, by M. Patakia and C. Valero, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Greek.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 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 (OJ 1976 L 39, p. 40), as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 269, p. 15) ('Directive 76/207'), and of **Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23)**.

2 The request has been made in proceedings between Ypourgos Esoterikon (Minister for the Interior, Greece) and Ypourgos Ethnikis paideias kai Thriskevmaton (Minister for Education and Religous Affairs, Greece), the appellants, and Maria-Eleni Kalliri, the respondent, concerning an action for annulment brought by the latter against administrative measures adopted on the basis of a national law making the admission of candidates for the competition for entry into the Greek police school subject to a minimum height requirement.

Legal context

European Union law

3 Article 1(1) of Directive 76/207 provides as follows:

'The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment".'

4 Article 2 of that directive provides:

'1. For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. For the purposes of this Directive, the following definitions apply:

– direct discrimination: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation,

– indirect discrimination: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

…'

5 Article 3(1) of that directive provides:

‘Application of the principle of equal treatment means that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…’

Greek law

6 In accordance with Article 1(2)(a) of Law 2226/1994 on training and further training at the Schools of the Police Academy and at the Junior Officers’ Division of the Firefighting Academy, and laying down other related provisions (FEK A’ 122) as amended by Article 12(1) of Law 2713/1999 (A’ 89), then by Article 20 of Law 3103/2003 (FEK A’ 23), men and women are admitted to those schools. Pursuant to that provision, the conditions applicable to candidates and the preselection tests to which they are subject are the same for both sexes.

7 Article 2(1)(f) of Presidential Decree 4/1995 on admission to the Officers’ School and the School for Policemen under the system of general examinations (FEK A’ 1), as amended by Article 1(1) of Presidential Decree 90/2003 (FEK A’ 82), provides that civilian candidates (men and women) for the Officers’ School and the School for Policemen of the Police Academy must be of a height of at least 1.70m, without shoes.

The dispute in the main proceedings and the question referred for a preliminary ruling

8 In accordance with the provisions of the Presidential Decree 4/1995, as amended by those of Presidential Decree 90/2003, by decision of the Chief of the Greek Police, a competition notice for enrolment in the Greek police schools for the academic year 2007-2008 was published.

9 Pursuant to clause II.6 of that competition notice, the candidates in that competition were required to be of a height of 1.70m, without shoes.

10 Ms Kalliri made an application to participate in the competition, accompanied by the required supporting documents, to the police station of Vrachti (Greece). That police station returned those documents to her on the ground that she was not of the minimum height of 1.70m required under Article 2(1)(f) of Presidential Decree 4/1995, as amended by Article 1(1) of Presidential Decree 90/2003, since she was only 1.68m tall.

11 On the basis of that act of restitution by the Vrachati police station, the administration refused to allow Ms Kalliri to participate in the competition in question.

12 Ms Kalliri disputed that refusal before the Dioikitiko Efeteio Athinon (Administrative Court of Appeal, Athens, Greece), which upheld her claim holding that Article 2(1)(f) of Presidential Decree 4/1995, as amended by Article 1(1) of Presidential Decree 90/2003, is contrary to the constitutional principle of equality of the sexes and annulling those provisions.

13 The Interior Minister and the Minister for Education and Religious Affairs appealed against that decision of the Dioikitiko Efeteio Athinon (Administrative Court of Appeal, Athens, Greece) before the referring court.

14 In those circumstances the Symvoulio tis Epikratias (Council of State) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 1(1) of Presidential Decree 90/2003, which amended Article 2(1) of Presidential Decree 4/1995 and provides that civilian candidates for the Officers' School and the School for Policemen of the Police Academy must, amongst other qualifications, "be of a height (in the case of men and women) of at least 1.70m", compatible with Directives 76/207/EEC, 2002/73/EC and 2006/54/EC, which prohibit any indirect discrimination on grounds of sex as regards access to employment, vocational training and promotion, and working conditions, in the public sector (unless that ultimate different treatment is attributable to factors which are objectively justified and are unrelated to any discrimination on grounds of sex, and does not go beyond what is appropriate and necessary in order to serve the objective pursued by the measure)?'

Consideration of the question referred

15 By its question the referring court asks, in essence, whether the provisions of Directives 76/207 and 2006/54 must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70m.

16 It must, first, be determined whether the legislation at issue in the main proceedings falls within the scope of application of those provisions.

17 In that regard, it must be observed that the dispute concerns administrative acts adopted in 2007, following the submission, by Ms Kalliri, of an application for admission to the competition for entry to the Greek Officers' School and School for Policemen for the academic year 2007-2008.

18 In accordance with Article 33(1) of Directive 2006/54, the period for the transposition of that directive expired on 15 August 2008.

19 In addition, pursuant to Article 34(1) of that directive, Directive 76/207 was repealed with effect from 15 August 2009.

20 Therefore, the provisions applicable, *ratione temporis*, to the facts of the main proceedings are not those of Directive 2006/54 but those of Directive 76/207.

21 According to Article 1(1) of the Directive 76/207, the purpose of that directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training.

22 Article 3(1)(a) of the directive prohibits all direct and indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to conditions for access to employment, self-employment or to occupation, including selection criteria and recruitment conditions.

23 It follows that Directive 76/207 applies to a person seeking employment, and also in regard to the selection criteria and recruitment conditions of that employment (see, by analogy, the judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 34).

24 That is the case for a person who, in the same way as Ms Kalliri, submits an application seeking to participate in an examination for entry to the police school of a Member State.

25 By providing that persons who are of a height of less than 1.70m cannot be admitted to the examination for entry to the Greek police school, the law at issue in the main proceedings affects those workers' recruitment conditions and must, therefore, be regarded as laying down rules relating to access to employment in the public sector within the meaning of Article 3(1)(a) of Directive 76/207 (see, by analogy, the judgments of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 30, and of 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, paragraph 25).

26 It follows that a dispute such as that before the referring court falls within the material scope of Directive 76/207.

27 It is therefore necessary to examine whether the law at issue in the main proceedings constitutes discrimination prohibited by that directive.

28 In that regard, it must be noted that the law treats persons submitting applications to the competition for entry to the police school identically, whatever their sex.

29 Consequently, that law does not constitute direct discrimination, within the meaning of the first indent of Article 2(2) of Directive 76/207.

30 Nevertheless, such a law may constitute indirect discrimination within the meaning of the second indent of Article 2(2).

31 The Court has consistently held that indirect discrimination arises where a national measure, albeit formulated in neutral terms, works to the disadvantage of far more women than men (see, in particular, the judgments of 2 October 1997, *Kording*, C-100/95, EU:C:1997:453, paragraph 16, and of 20 June 2013, *Riežniece*, C-7/12, EU:C:2013:410, paragraph 39).

32 In the present case, the referring court itself found in its decision that a much larger number of women than men are of a height of less than 1.70m, such that, by the application of that law, women are very clearly at a disadvantage compared with men as regards admission to the competition for entry to the Greek Officers' School and School for Policemen. It follows that the law at issue in the main proceedings constitutes indirect discrimination.

33 However the second indent of Article 2(2) of Directive 76/207 provides that such a law does not constitute indirect discrimination prohibited by that directive if it is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

34 Although it is for the national court to establish whether such an objective justification exists, the Court of Justice, which is called on to provide answers of use to the national court, may provide guidance in order to enable the national court to give judgment (see, to that effect, the judgment of 10 March 2005, *Nikoloudi*, C-196/02, EU:C:2005:141, paragraphs 48 and 49).

35 In the present case, the Greek Government submits that the aim of the law at issue in the main proceedings is to enable the effective accomplishment of the task of the Greek police and that possession of certain particular physical attributes, such as being of a minimum height, is a necessary and appropriate condition for achieving that aim.

36 It should be recalled that the Court has already held that the concern to ensure the operational capacity and proper functioning of the police services constitutes a legitimate objective (see, as regards Article 4(1) of Council Directive 2000/78 of 27 November 2000 establishing a general framework for

equal treatment in employment and occupation (OJ 2000 L 303, p. 16), the structure, provisions, and objective of which is largely comparable with those of Directive 76/207, the judgments of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 44, and 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, paragraph 38).

37 It must, however, be ascertained whether a minimum height requirement, such as provided for in the law at issue in the main proceedings, is suitable for securing the attainment of the objective pursued by that law and does not go beyond what is necessary in order to attain it.

38 In that regard, while it is true that the exercise of police functions involving the protection of persons and goods, the arrest and custody of offenders and the conduct of crime prevention patrols may require the use of physical force requiring a particular physical aptitude, the fact remains that certain police functions, such as providing assistance to citizens or traffic control, do not clearly require the use of significant physical force (see, to that effect, the judgment of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraphs 39 and 40).

39 Furthermore, even if all the functions carried out by the Greek police required a particular physical aptitude, it would not appear that such an aptitude is necessarily connected with being of a certain minimum height and that shorter persons naturally lack that aptitude.

40 In that context, it may be taken into account that until 2003 the Greek law required, for the purposes of admission to the competition for entry to the Greek School for Police Officers and Policemen, different minimum heights for men and for women, since, regarding the latter, the minimum height was fixed at 1.65m, compared with 1.70m for men.

41 The facts referred to by Ms Kalliri that, as regards the Greek armed forces, port police and coast guard, different minimum heights are required for men and women and, for women, the minimum height is 1.60m, is also relevant.

42 In any event, the aim pursued by the law at issue in the main proceedings could be achieved by measures that are less disadvantageous to women, such as a preselection of candidates to the competition for entry into Schools for Police Officers and Policemen based on specific tests allowing their physical ability to be assessed.

43 It follows that, subject to the assessments that it is for the national court to carry out, the law in question is not justified.

44 In those circumstances, the answer to the question referred is that the provisions of Directive 76/207 must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70m, since that law works to the disadvantage of a far greater number of women compared with men and that law does not appear to be either appropriate or necessary to achieve the legitimate objective that it pursues, which it is for the national court to determine.

Costs

45 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The provisions of Council Directive 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, as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to the competition for entry to the police school of that Member State subject, whatever their sex, to a requirement that they are of a physical height of at least 1.70m, since that law works to the disadvantage of a far greater number of women compared with men and that law does not appear to be either appropriate or necessary to achieve the legitimate objective that it pursues, which it is for the national court to determine.

[Signatures]