JUDGMENT OF THE COURT (Sixth Chamber)

16 December 1999 *

In Case C-382/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), United Kingdom, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for Social Security,

ex parte: **John Henry Taylor,**

on the interpretation of Articles 3 and 7(1)(a) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of

* Language of the case: English.

equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24),

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting as President of the Sixth Chamber, P.J.G. Kapteyn, G. Hirsch, H. Ragnemalm (Rapporteur) and V. Skouris, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Taylor, by D. Rose, Barrister, and P. Leach, Legal Director, Liberty,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by D. Pannick QC and T. de la Mare, Barrister,

— the Austrian Government, by C. Pesendorfer, Oberrätin in the Ministry of Justice, acting as Agent,

— the Commission of the European Communities, by A. Aresu, of its Legal Service, and N. Yerrell, 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 Mr Taylor, of the United Kingdom Government and of the Commission at the hearing on 8 July 1999,

after hearing the Opinion of the Advocate General at the sitting on 23 September 1999,

gives the following

Judgment

1 By order of 9 October 1998, received at the Court on 26 October 1998, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 3 and 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 judicial-review proceedings brought before the High Court of Justice by Mr Taylor who claims to be the victim of discrimination on grounds of sex contrary to the Directive, on the basis that he was refused the winter fuel payment provided for under the Social Fund Winter Fuel Payment Regulations 1998 ('the Regulations').

The Community legislation

3 The Directive applies, under Article 3(1)(a) thereof, to statutory schemes which provide protection against the following risks:

— sickness,

— invalidity,

— old age,

— accidents at work and occupational diseases,

— unemployment.

4 Article 7(1)(a) of the Directive provides, however, that:

'[t]his Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

5 However, under Article 7(2) of the Directive, Member States are periodically to 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.

The national legislation

6 The Regulations were made on 8 January 1998 pursuant to the Social Security Contributions and Benefits Act 1992 ('the Act of 1992').

7 Regulation 2 provides that the following two categories of persons are entitled to the winter fuel payment, which is made from the Social Fund:

— under Regulation 2(2), persons in receipt of income support or income-based jobseeker's allowance (both means-tested benefits) who receive one of a number of premiums which are payable only to those who have, or who live with a person who has, reached a particular minimum age (in all cases, 60 or over);

— under Regulation 2(5), persons within the categories set out in Regulation 2(6), namely men aged 65 or over and women aged 60 or over who are entitled to one of the benefits listed in Regulation 2(6). Some of those benefits are means-tested, others not, including the State retirement pension.

8 Under Regulation 3(1), persons within the first category are entitled to a fuel payment of £50 per year. Those within the second category are entitled to a payment of £20, or £10 if they live with another person who is also entitled to a payment.

9 It should be made clear that, under Regulation 1, read together with section 44 of the Act of 1992 and Schedule 4 to the Pensions Act 1995, a 'retirement pension' for the purposes of Regulation 2(6) means a State retirement pension, which

becomes payable upon a claimant satisfying the relevant contribution conditions and attaining the age of 65 in the case of a man and 60 in the case of a woman.

The facts in the main proceedings

10 Mr Taylor, who was born on 3 June 1935 and employed by the Post Office until he retired, paid social security contributions throughout his working life. In 1998, aged 62, he was in receipt of a Post Office pension. If he had been a woman, he would have been in receipt of a State retirement pension. He claims to be the victim of unlawful discrimination on the ground of sex in that he was denied a winter fuel payment of £20, to be made by the State, which had been introduced under the Regulations. It is common ground that, in the same circumstances, a woman of the same age would have been in receipt of that payment.

11 On 6 April 1998, Mr Taylor brought proceedings before the High Court of Justice challenging the refusal to grant him the winter fuel payment.

The questions referred

12 It is in those circumstances that the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), decided to stay proceedings and to refer to the Court for a preliminary ruling the following two questions:

'1. Is a winter fuel payment made under Regulations 2(5), 2(6) and 3(1)(b) of the Social Fund Winter Fuel Payment Regulations 1998 within the scope of Article 3 of Directive 79/7/EEC?

2. If the answer to Question 1 is yes:

(a) Does Article 7(1)(a) of Directive 79/7/EEC apply in the circumstances of this case?

(b) In particular, is the respondent prevented from relying upon Article 7(1)(a) of Directive 79/7/EEC where both the Social Fund Winter Fuel Payment Regulations 1998 and the Social Security Contributions and Benefits Act 1992 under which those Regulations were made came into force after 23 December 1984, the latest date for the said Directive to be given full effect in domestic law?'

The first question

13 By its first question, the High Court of Justice asks whether Article 3(1) of the Directive must be interpreted as meaning that a winter fuel payment, such as that made under Regulations 2(5), 2(6) and 3(1), is covered by that directive.

14 As the Court has already held, in order to fall within the scope of the Directive, a benefit must constitute the whole or part of a statutory scheme providing protection against one of the risks listed in Article 3(1) of the Directive, or a form

of social assistance having the same objective, and be directly and effectively linked to protection against one of those risks (see the judgments in Case C-243/90 *Smithson* [1992] ECR I-467, paragraphs 12 and 14; Joined Cases C-63/91 and C-64/91 *Jackson and Cresswell* [1992] ECR I-4737, paragraphs 15 and 16; and Case C-137/94 *R* v *Secretary of State for Health, ex parte Richardson* [1995] ECR I-3407, paragraphs 8 and 9).

15 It should be noted, and indeed it has not been disputed before the Court, that the benefit at issue in the main proceedings is part of a statutory scheme in so far as it is provided for by an enabling Act, namely the Act of 1992, and it is implemented by delegated legislation, namely the Regulations.

16 It is therefore necessary to examine whether the benefit at issue in the main proceedings is directly and effectively linked to protection against any of the risks listed in Article 3(1) of the Directive (see *Richardson*, paragraph 9).

17 According to Mr Taylor and the Commission, the winter fuel payment is directly and effectively linked to one of the risks listed in Article 3(1) of the Directive, namely the risk of old age. In that regard, they emphasise that the making of the payment is subject to the condition that its recipient has attained the age of 65, if a man, or 60, if a woman. They point out that the fact that the Social Fund covers a number of needs and risks going beyond the scope of the Directive is not conclusive. They state, on that point, that, if general considerations relating to the Social Fund were to constitute grounds for holding that an individual scheme of payments made from that fund does not fall within the scope of Article 3(1) of the Directive, the effectiveness of that directive would be compromised.

18 On the other hand, the United Kingdom and Austrian Governments submit that the benefit is not linked to a risk covered by the Directive in so far as that benefit

aims to help people in need to pay their heating expenses during the winter, which constitutes a risk which is not covered by Article 3(1) of the Directive.

19 The United Kingdom Government relies, in particular, on the statutory context of the benefit, namely the Act of 1992 which confers power to make regulations relating to benefits to be paid from the Social Fund. The aim of that fund is to help categories of persons who are less well-off financially and materially. The fact that the criterion of old age is also relevant for the payment of the benefit at issue in the main proceedings is not enough to bring it within the scope of the Directive.

20 In addition, the United Kingdom Government submits that, even if a distinction were drawn between the Regulations and their overall statutory context, it is clear from the very wording of the Regulations that one of the essential objectives of the benefit is to help persons in financial need. In that regard, that government considers Regulation 2(2) and 2(6) together. It emphasises that the first category of persons, specified in Regulation 2(2), is limited to those who are in receipt of income support or income-based jobseeker's allowance; the second category, under Regulation 2(6), to which Regulation 2(5) refers, includes the same persons.

21 It should be pointed out that the aim of the Social Fund is not relevant for the purpose of determining whether the benefit at issue in the main proceedings meets one of the risks listed in the Directive, since that fund is one from which a wide variety of benefits are paid. It is therefore necessary to examine the legislation concerning the benefit at issue in the main proceedings, namely the Regulations.

22 In that regard, it should be noted that the Regulations contain two different definitions of persons who may receive the benefit, the first in Regulation 2(2), the second in Regulation 2(5) and (6). In so far as the question referred concerns only the second definition and that definition is independent of the first, it is

necessary, contrary to what is claimed by the United Kingdom Government, to examine that definition in isolation and to verify whether the benefit, whose purpose is determined in relation to the persons referred to in the second definition, falls within the scope of Article 3(1) of the Directive.

23 It is clear from Regulation 2(5) and (6) that the benefit may be granted to elderly persons, even if they do not have financial or material difficulties. It follows that, contrary to what is claimed by the United Kingdom Government, protection against a lack of financial means cannot be considered to be the aim of the Regulations. On the other hand, the benefit can be granted only to persons who have reached the minimum age of 60 for women and 65 for men. That is a condition for the grant of the benefit, applicable to all those referred to in the provision concerned.

24 The fact is that the benefit at issue in the main proceedings is aimed only at persons who have reached the statutory age of retirement and, consequently, is aimed at protecting them against the risk of old age mentioned in Article 3(1) of the Directive. That finding is not affected by the fact that the applicant for the benefit must also be in receipt of one of the benefits listed in Regulation 2(6). Those benefits are varied in nature and only some of them are intended to protect against a lack of pecuniary means.

25 In so far as the grant of the winter fuel payment to any of the categories of persons referred to is always subject to the materialisation of the risk of old age, that payment must be deemed to protect directly and effectively against that risk.

26 Consequently, the answer to the first question is that Article 3(1) of the Directive must be interpreted as meaning that a winter fuel payment, such as that made under Regulations 2(5), 2(6) and 3(1), is covered by that directive.

The second question

27 By the first part of its second question, the High Court of Justice asks whether the derogation laid down in Article 7(1)(a) of the Directive is applicable to a winter fuel payment, such as that paid under Regulations 2(5), 2(6) and 3(1).

28 In accordance with the settled case-law of the Court, the application of different ages, according to sex, to a benefit scheme other than the old-age and retirement pension scheme can be justified only if the discrimination to which the difference in age gives rise is objectively necessary in order to avoid disrupting the financial equilibrium of the social security system or to ensure consistency between the retirement pension scheme and the other benefit scheme (see Case C-328/91 *Secretary of State for Social Security* v *Thomas and Others* [1993] ECR I-1247, paragraph 12).

29 As regards, first of all, the condition concerning preservation of the financial equilibrium of the social security system, it should 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).

30 It is necessary, next, to note that the participants in the proceedings before the Court have acknowledged that the argument concerning financial equilibrium could not apply to non-contributory benefits, such as those at issue in the main proceedings.

31 In those circumstances, it must be accepted that eliminating discrimination has no impact on the financial equilibrium of the social security system as a whole.

32 As regards consistency between the retirement pension scheme and the other benefit scheme, it is necessary to examine whether the unequal ages laid down for the grant of the benefit at issue in the main proceedings are objectively necessary.

33 According to the United Kingdom Government, if the benefit at issue in the main proceedings were regarded as designed to provide protection against the risk of old age, it would not be consistent to choose an age other than that applicable to payment of the State retirement pension, which meets, specifically, the risk of old age.

34 In that regard, it should be observed that, if the benefit is designed to provide protection against the risk of old age and must, therefore, be paid only to those above a certain age, it does not follow that that age must necessarily coincide with the statutory age of retirement and, as a result, be different for men and women.

35 In the light of the foregoing, it must be concluded that discriminatory treatment such as that at issue in the main proceedings is not necessarily linked to the difference in the statutory age of retirement for men and women and is therefore not covered by the derogation laid down in Article 7(1)(a) of the Directive.

36 Accordingly, the answer to the second question must be that the derogation laid down in Article 7(1)(a) of the Directive is not applicable to a benefit such as that paid under Regulations 2(5), 2(6) and 3(1).

37 Having regard to the answer given to the first part of the second question, it is not necessary to give an answer to the second part of that question.

Costs

38 The costs incurred by the United Kingdom and Austrian Governments 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 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 High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court) by order of 9 October 1998, hereby rules:

1. **Article 3(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 must be interpreted as meaning that a winter fuel payment, such as that made under Regulations 2(5), 2(6) and 3(1) of the Social Fund Winter Fuel Payment Regulations 1998, is covered by that directive.**

2. **The derogation laid down in Article 7(1)(a) of Directive 79/7 is not applicable to a benefit such as that paid under Regulations 2(5), 2(6) and 3(1) of the Social Fund Winter Fuel Payment Regulations 1998.**

Schintgen Kapteyn Hirsch

Ragnemalm Skouris

Delivered in open court in Luxembourg on 16 December 1999.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber