OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 12 May 1992 *

Mr President,
Members of the Court,

1. The Equal Opportunities Commission, a body set up by the Sex Discrimination Act 1975 with the task, *inter alia*, of combating discrimination on grounds of sex, has made an application for judicial review in the Queen's Bench Division of the High Court of Justice of England and Wales (hereinafter 'the national court'). It seeks a declaration that the Secretary of State for Social Security has failed to bring certain provisions of the Social Security Act 1975 and the Social Security Pensions Act 1975 into line with Council Directive 79/7/EEC of 19 December 1978. [1] In connection with that application the national court has put the following question to the Court for a preliminary ruling:

'Where

(a) pursuant to Article 7(1)(a) of Directive 79/7/EEC a Member State preserves different pensionable ages for men and women (65 for men, 60 for women) for the purpose of granting old-age and retirement pensions, and

(b) national insurance contributions fund a range of benefits including State retirement pension;

does Article 7(1)(a) of Directive 79/7/EEC permit a Member State to derogate from the principle of equal treatment for men and women in matters of social security set out in Article 4 thereof:

(i) by requiring men to pay national insurance contributions for five years longer than women in order to be entitled to the same basic pension; and

(ii) by requiring men who continue in gainful employment up to the age of 65 to continue to pay national insurance contributions up to that age, when women over the age of 60 are not required to pay national insurance contributions whether or not they remain in gainful employment after that age?'

* Original language: Dutch.

1 — Directive 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.

Before answering the question I shall briefly describe the relevant Community and national provisions.

Directive 79/7

2. Article 1 of Directive 79/7 provides that the purpose of the directive is the progressive implementation of the principle of equal treatment for men and women in the field of social security. Articles 2 and 3 of the directive define its scope *ratione personae* and *ratione materiae*. The directive is applicable *ratione personae* to the working population and to retired or invalided workers and self-employed persons (Article 2). It is applicable *ratione materiae*, *inter alia*, to statutory schemes which provide protection against the following risks: sickness, invalidity, old age, accidents at work and occupational diseases, unemployment (Article 3(1)(a)).

Article 4(1) of the directive defines the principle of equal treatment as follows:

'The principle of equal treatment 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;

— the obligation to contribute and the calculation of contributions,

— the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

By virtue of Article 5, in conjunction with Article 8(1) of the directive, the Member States must abolish, within six years of the notification of the directive (thus by 23 December 1984), any laws, regulations and administrative provisions contrary to the principle of equal treatment.

Article 7(1) of the directive lists a number of matters which the Member States may exclude from the scope of the directive. Under Article 7(1)(a) the Member States may thus declare the principle of equal treatment inapplicable to:

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

Article 7(2) requires the Member States periodically to examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments, whether there is justification for maintaining the exclusions concerned.

Finally, the second subparagraph of Article 8(2) of the directive provides that the Member States are to inform the Commission of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date.

The Social Security Act 1975 and the Social Security Pensions Act 1975

3. The Social Security Act 1975 (hereinafter 'the SSA') governs contributions to the statutory social security scheme in the United Kingdom and the benefits provided for by that scheme. The SSA distinguishes between benefits for which contributions must be paid ('contributory benefits') and those which may be granted without payment of contributions ('non-contributory benefits'). The contributory benefits — which are the ones concerned here — are as follows: unemployment benefit, sickness benefit, invalidity benefit, benefits for widows, category A retirement pensions payable to a person by virtue of his own contributions, and category B retirement pensions payable to a woman by virtue of contributions paid by her husband or to a man by virtue of contributions paid by his deceased wife.

With respect to contributory social security benefits, the United Kingdom scheme does not function on the basis of capitalization of rights: contributions paid by employers, employees and self-employed persons at any given time provide the funds to finance benefits payable at that time. Moreover, all contributions are paid into a single fund (the National Insurance Fund) which finances the various social security benefits. The United Kingdom Government observes that it is sought to fix the contributions at a level which achieves a balance between contributions and benefits. It points out further that it is not possible to determine which part of an employee's contributions relates to particular social security benefits such as pensions.

I shall now explain the two sets of provisions of the United Kingdom social security scheme which are central to this case, namely (i) the provisions governing the obligation to make contributions and (ii) the provisions governing the grant of category A retirement pensions.

4. Sections 1 to 11 of the SSA govern the *obligation to make contributions*. Section 1(2) of the SSA distinguishes between four classes of contribution:

(i) Class 1 contributions: earnings-related contributions payable under section 4 of the SSA by employees over the age of 16 and by their employers;

(ii) Class 2 contributions: flat-rate contributions payable under section 7 of the SSA by self-employed persons over the age of 16;

(iii) Class 3 contributions: voluntary contributions which are not relevant for the purposes of this case;

(iv) Class 4 contributions: contributions payable under section 9 of the SSA by self-employed persons on profits chargeable to income tax.

Other provisions state the period for which Class 1, 2 and 4 contributions must be paid. Section 4 of the Social Security Pensions Act 1975 (hereinafter 'the SSPA') provides with respect to Class 1 and 2 contributions, and Regulation 58 of the Social Security (Contributions) Regulations 1979 provides with respect to Class 4 contributions, that no further contributions are payable by employees who have attained pensionable age (although they are payable by their employers where employees continue in gainful employment after reaching pensionable age) or by self-employed persons who have attained that age.

Section 27(1) of the SSA defines 'pensionable age' as 65 for men and 60 for women.

It is apparent from the above provisions that an employee or self-employed person must pay contributions under the United Kingdom statutory social security scheme until the age of 60 in the case of a woman and 65 in the case of a man, even where the woman or the man continues in gainful employment after the age of 60 or 65 respectively.

5. The provisions governing the *grant of category A retirement pensions* are contained in different parts of the SSA and the SSPA. Section 6 of the SSPA distinguishes between the basic pension of a fixed weekly amount independent of the number of years for which contributions were paid and the additional earnings-related pension, [2] the weekly amount of which depends on the earnings on the basis of which contributions were paid. The discrimination referred to by the national court in part (i) of its question concerns the basic pension, to which the following provisions apply.

Section 28 of the SSA lays down the conditions for entitlement to a category A basic pension:

— The person concerned must be over pensionable age, as defined in Section 27(1) of the SSA; and

— He must satisfy the contribution conditions specified in Schedule 3 of the Act.

Schedule 3, paragraph 5, provides that a person is entitled to a full category A basic pension only if he has made contributions for a certain proportion (approximately 90%) of his working life. In the case of a working life exceeding 40 years, the man or woman concerned must more specifically have made

2 — Employees may contract out of the earnings-related part of the government pension and replace it by a contracted-out company scheme.

contributions for the number of years of his or her working life *less five*. For the sake of brevity, I shall refer to this rule as the '90% rule'.

Section 27(2) of the SSA defines 'working life' as the number of complete tax years between the age of 16 and pensionable age (or death if earlier). It follows from that definition, in conjunction with the definition of 'pensionable age', that a full 'working life' is 49 years for men and 44 years for women. Consequently, having regard to the abovementioned 90% rule, in order to be entitled to a full category A basic pension men must pay contributions for 44 years, whereas women must pay contributions for 39 years for the same pension.

Section 33 of the SSA permits regulations to be enacted allowing a man who has not paid contributions for 44 years or a woman who has not paid contributions for 39 years to receive a basic pension, albeit a smaller one. The United Kingdom Government states in that connection that an employee or self-employed person is entitled under the current rules to a basic pension in proportion to the number of years for which he has paid contributions, at least in so far as he has paid contributions for more than 25% of his working life. For its part, the Equal Opportunities Commission points to the following consequence of the rules: a man who has paid contributions for less than 44 years receives a smaller basic pension than a woman who has been liable to contribute for the same number of years.

As appears from the answer given by the United Kingdom Government to a question put by the Court, men and women who have reached the pensionable age can apply for payment of their pension even where they continue in gainful employment after that age. Alternatively, however, they may ask for payment of the pension to be postponed for up to five years after they have reached pensionable age, that is to say until the age of 65 for women and 70 for men, without being liable to make contributions during that period. Where payment of the pension is postponed in that manner, the amount of the pension is increased.

Scope of the preliminary question

6. The parties to the main proceedings are in agreement on a number of points.

First, the parties agree that Article 4(1) of Directive 79/7, which gives specific expression to the principle of equal treatment, is sufficiently precise and unconditional to be relied upon without implementing provisions from 23 December 1984 (the date on which the period for implementing the directive expired) by individuals before their national courts in order to prevent the application of a national provision contrary to that article. [3]

3 — See on this point *inter alia* the judgments in Case 71/85 *Netherlands* v *FNV* [1986] ECR 3855, Case 384/85 *Borrie Clarke* [1987] ECR 2865, and C-31/90 *Johnson* [1991] ECR I-3723, at paragraph 34.

Secondly, the parties both consider that discrimination on grounds of sex concerning 'the conditions of access' to social security schemes (first indent), the 'obligation to contribute' (second indent) and 'the calculation of benefits' (third indent) are prohibited by Article 4(1) of Directive 79/7, unless such discrimination is covered by one of the exceptions laid down by Article 7(1).

Thirdly, they agree that the United Kingdom may, on the basis of the exception laid down in Article 7(1)(a) and in derogation from Article 4(1), first indent, make 'access' to statutory old-age or retirement pensions conditional on attainment of a pensionable age which differs according to sex.

Finally, the parties agree that the abovementioned provisions of the United Kingdom statutory social security scheme lead to two types of discrimination, described as follows by the national court in its order for reference:

(i) In order to be eligible for a full basic category A retirement pension a man must contribute for 44 years and a woman for only 39 years;

(ii) A working man aged 60 to 64 must make contributions, whereas a working woman of that age is under no such obligation.

7. According to the Equal Opportunities Commission, the rules stated at (i) and (ii) above are contrary to the principle of equal treatment, inasmuch as they entail discrimination with respect to 'the obligation to contribute' within the meaning of Article 4(1), second indent, of the directive; moreover, the rule stated at (i) above discriminates with respect to 'the calculation of benefits' for the purposes of Article 4(1), third indent, since as already stated a man who has paid contributions for less than 44 years receives a smaller pension than a woman who has paid contributions for the same number of years.

For its part, the Commission points out that all these instances of discrimination stem from the obligation on employees and self-employed persons to pay contributions until a pensionable age differing according to sex. That analysis seems to me to be correct. If my understanding is correct, the rules not only entail that a working man between 60 and 65 is liable to pay contributions, whereas a working woman of the same age is not, but also are the source of the discrimination concerning the calculation of the basic pension. Under the United Kingdom pension scheme the 90% rule, under which a full basic pension is payable only to persons who have paid contributions for approximately 90% of their 'working life' (i. e. the period between the age of 16 and the pensionable age differing according to sex), applies to all employees or self-employed persons, irrespective of sex. That a man must pay contri-

butions for a longer period than a woman in order to be entitled to the same pension is not a consequence of the 90% rule as such, which applies without distinction to both sexes, but stems from the obligation to pay contributions to a pensionable age which differs according to sex and which is taken into account for the purpose of calculating the 'working life'.

8. Having regard to the foregoing, it seems to me that the preliminary question is intended essentially to ascertain whether Article 7(1)(a) of Directive 79/7 permits a Member State to derogate from the principle of equal treatment laid down in Article 4(1) by requiring that men and women pay contributions until the pensionable age in order to finance statutory social security benefits, including old-age and retirement pensions, with the resultant consequences with regard to the calculation of the pensions, where by virtue of the abovementioned provision a pensionable age differing according to sex is provided for in that Member State.

In examining this question I shall assume that the abovementioned exception in Directive 79/7 is valid, even though it permits the Member States to maintain provisions which are contrary to the principle of equal treatment for men and women, which has been recognized by the Court as fundamental. [4] Neither the national court nor the parties nor the Commission have raised the question of the validity of that provision. Moreover, the Court has already repeatedly ruled on it without questioning its validity. [5] [6]

Reply to the preliminary question

9. According to Article 7(1)(a) of Directive 79/7, the directive shall be without prejudice to the right of Member States to exclude from its scope 'the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits'.

In order to answer the preliminary question it is necessary to determine precisely what sort of discrimination Article 7(1)(a) of the directive permits: solely discrimination with regard to the moment when the social security benefits must be paid, as the Equal Opportunities Commission claims, or also discrimination concerning the extent of the obligation to contribute in respect of those

4 — Judgment in Case 149/77 *Defrenne* [1978] ECR 1365, paragraph 27. See also judgment in Joined Cases 75/82 and 117/82 *Razzouk and Beydoun* [1984] ECR 1509, paragraph 16.

5 — See the judgment in Case 19/81 *Burton* [1982] ECR 555, the three judgments of 26 February 1986 in Cases 151/84 *Roberts* [1986] ECR 703, 152/84 *Marshall* [1986] ECR 723 and 262/84 *Beets-Proper* [1986] ECR 773 and also the judgment in Case C-262/88 *Barber* [1990] ECR I-1889.

6 — The German Government correctly observes that the Community-law framework within which the present preliminary question must be answered is different in significant respects from the framework in the *Barber* case. The present case concerns a pensionable age which discriminates according to sex for the grant of *statutory* social security benefits (including pensions) which, according to established case-law of the Court (see Case 80/70 *Defrenne* [1971] ECR 445 and *Barber*, at paragraphs 22 and 23), do not fall within the term 'pay' for the purposes of Article 119 of the EEC Treaty, whereas the questions in *Barber* concerned a pensionable age discriminating on grounds of sex for the grant of a substitute, contracted-out *private* company pension, which according to the Court's decision in that case is to be regarded as 'pay' for the purposes of Article 119 of the EEC Treaty.

benefits and the calculation of the benefits, as claimed by the United Kingdom Government.

For the purposes of answering that question, the wording of Article 7(1)(a) provides little guidance. In particular, I find little support for the Equal Opportunities Commission's view that the words 'for the purposes of granting old-age and retirement pensions' in Article 7(1)(a) correspond to the phrase 'the conditions of access' in Article 4(1), first indent, and that it may be inferred from this that Article 7(1)(a) solely envisages unequal treatment with respect to the time at which benefits are paid. If both expressions were intended to have the same meaning, why are they differently worded? It appears in any event from the second clause of Article 7(1)(a) that the exception laid down therein covers the *consequences* which may flow for other benefits from the fixing of a different pensionable age. [7] In *Roberts* (paragraph 36), *Marshall* (paragraph 37) and *Beets-Proper* (paragraph 39) the Court stated generally with respect to that provision that Article 7(1)(a) (solely) 'concerns the consequences which pensionable age has for social security benefits'. Those words appear to me also to refer to the consequences, including the financial consequences, which flow from such fixing of the pensionable age for the old-age and retirement pensions *themselves*.

Consequently, in so far as anything may be inferred from the wording of Article 7(1)(a) concerning the question which concerns us here, it tends to support the view taken by the United Kingdom Government.

10. Whatever the position, the parties agree that only discrimination which is *linked* to the determination of a pensionable age differing according to sex is covered. They disagree, however, about how broadly that link must be understood.

Having regard to the fact that Article 7(1)(a) constitutes an exception and to the Court's ruling that provisions which constitute an exception to the fundamental principle of equal treatment for men and women must be interpreted strictly, [8] the Equal Opportunities Commission and the Commission take the view that that provision only permits discrimination which is necessary in order to be able to continue to *pay* social security benefits at a pensionable age differing according to sex. It is not impossible, according to the Commission, for men and women to be required to pay the same contributions for the same number of years and to limit the unequal treatment to the moment at which payment of the pension begins (for example, in the case of men five years later than in the case of women). It is in any event already the case under the United Kingdom social security scheme that,

7 — That provision is also open to interpretation. In Case C-328/91 *Secretary of State for Social Security* v *Thomas, Equal Opportunities Commission and Others* [1993] ECR I-1247, the House of Lords has asked whether the second clause of Article 7(1)(a) of Directive 79/7 is applicable to discrimination with respect to the grant, at a different age, of social security benefits such as severe disablement allowance and invalid care allowance.

8 — See the abovementioned judgments in *Roberts* (paragraph 35), *Marshall* (paragraph 36) and *Beets-Proper* (paragraph 38).

with respect to women or men who continue in gainful employment after the age of 60 or 65 respectively, the moment at which contributions cease to be payable differs from the moment at which the pension is paid (see point 4 above). The Commission considers therefore that, subject to confirmation by the national court, there is no necessary link between the types of discrimination at issue here and the fixing of the pensionable age.

The United Kingdom Government, on the other hand, takes the view that the link between the fixing of a pensionable age differing according to sex and the permissible discrimination to which that gives rise must be appraised in the light of the principle of proportionality. That implies that the exception in Article 7(1)(a) also covers discriminatory consequences which are appropriate and necessary in order to achieve the aim sought by that provision. That aim is said to consist, *inter alia*, in preserving the financial equilibrium of the social security systems of Member States which have fixed a pensionable age differing according to sex. According to the United Kingdom, the (temporary) retention of the obligation to contribute until the pensionable age differing according to sex is necessary in order to safeguard the financial equilibrium of the United Kingdom scheme.

11. It is undoubtedly correct that, where the wording is unclear, the scope of Article 7(1)(a) must be determined in the light of the aims of the provision. Moreover, the Court stated in *Johnston* [9] (paragraph 38) in connection with the principle of equal treatment laid down by Directive 76/207/EEC, [10] that:

'In determining the scope of any derogation from an individual right such as the equal treatment of men and women provided for by the directive, the principle of proportionality, one of the general principles of law underlying the Community legal order, must be observed. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view ...'.

In the preamble to Directive 79/7 there is, however, no guidance to be found concerning the aim sought by Article 7(1)(a). The only recital which concerns a derogation from the principle of equal treatment is the third recital in which it is stated, in relation to Article 4(2) of the directive, that the directive does not prejudice the provisions relating to the protection of women on the ground of maternity and that the Member States may adopt specific provisions in this respect for women to remove existing instances of unequal treatment. However, there is no explanation to be found in the preamble concerning Article 7(1). From the nature of the matters covered it may be inferred that most of them concern the fixing of benefits, in particular in connection with old age, in favour of or for the sake of the spouse who has spent a certain period of her

9 — Judgment in Case 222/84 [1986] ECR 1651.

10 — 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 (OJ 1976 L 39, p. 40).

life working at home, in particular in order to bring up children. It appears from the provisions of Article 7(2) and Article 8(2) that the exceptions in Article 7(1) are intended to disappear over a period of time 'in the light of social developments in the matter concerned' and that Member States which have made use of the derogating provisions must, under the supervision of the Commission, justify the need for maintaining the national measures based on the exceptions and examine the possibility of reviewing them.

12. From that altogether sparse information it can nevertheless be inferred that the possibility of adopting derogating measures under Article 7(1) is left to the Member States which, in connection with certain social security payments and/or the contributions relating thereto, take account of the phenomenon, which was more widespread when the directive came into force than now, that women have not worked or worked for a shorter period than men. Article 7(1) of the directive permitted Member States to maintain the relevant advantages for the women concerned and the corresponding disadvantages for working men with regard to the obligation to contribute and/or payment of benefits. The period for which such inequality may be maintained is however not specified, although the Member States were placed under an obligation to monitor continuously and to justify the need to maintain the situation, and to review the inequality flowing from it as soon as possible.

No reason was given for the period of grace given to the Member States; none the less, in my view, it is reasonable to assume that those reasons are to be found in the need, in order to achieve complete equality of treatment of men and women in all the matters mentioned in Article 7(1), to carry out a review of the entire social security system in a manner which is coherent and ensures a financial equilibrium, including a restructuring of the system of contributions and benefits. With more specific reference to the possibility of derogation in Article 7(1)(a), the bringing into line of pensionable ages for men and women entails a recalculation of contributions and payments — for the future but taking account of the provisions built up in the past without regard to the principle of equal treatment — and a review of the rules in other areas of social security in so far as they refer to the pensionable age.

13. For the purpose of answering the preliminary question two points may be inferred from the foregoing discussion. The first concerns the scope of Article 7(1)(a) of the directive and the second the application of the principle of proportionality, which the Court has held to restrict the scope of derogations from the principle of equal treatment (see point 11 above).

As regards the first point, it seems to me that the fact that provision is made for an indeterminate transitional period for the withdrawal of the derogation from the principle of equal

treatment permitted by Article 7(1)(a) shows that the narrow interpretation of the provision proposed by the Equal Opportunities Commission and the Commission is incorrect. If, as the Equal Opportunities Commission and the Commission maintain, the possibility of derogation laid down therein allowed the Member States *solely* to treat men and women unequally with respect to the moment at which the pension is paid, and if it did not extend to other financial and regulatory consequences flowing from a different pensionable age, it would, on that view, have been necessary to eliminate discrimination regarding the latter consequences by the end of the period for implementation of Directive 79/7 (which was in any event a long one), and the (even longer) transitional period in Article 7(2) would not have applied in respect thereof. If that interpretation is correct, then I fail to see why, for the examination (and review) of the national measures based on Article 7(1)(a), construed so narrowly, it was necessary to provide for an implementation period which was longer than normal.

As regards the second point, I consider that in a context such as the present the principle of proportionality plays a smaller role than is usual. The principle of proportionality requires the Court to weigh the interest pursued by the rule in question (in this case the derogating provision in Article 7(1)(a) and the national rules based thereon) against the interest which that rule infringes (in this case the principle of equal treatment). The infringement of the latter interest may go no further than is appropriate and necessary for the purposes of the former interest.

In a case such as the present where the relevant rules — in particular Article 7(2) and Article 8(2) of the directive — themselves lay down a procedure involving the balancing of interests, it is not as a rule, in my view, for the Court to undertake such a balancing of interests itself. In my view, in such circumstances it may do so only very exceptionally, for example where it appears that the procedure provided for by the rules was not taken seriously by the State concerned (a claim which is not made by the Commission in this case [11]) *or* because it appears that the discrimination may be eliminated without excessive legislative or financial difficulties, i. e. in this case where the national court could grant men equality of treatment with women with respect to the instances of discrimination which it mentions [12] without unduly jeopardizing the coherence or financial equilibrium of the national social security system concerned (being the reasons for the period of grace granted to the Member State — see point 12 above). [13] It is a matter for the national court to consider this last question.

11 — That the process of review is fully under way in the United Kingdom seems clear from the document 'Options for Equality in State Pension Age' that was laid before the United Kingdom Parliament in December 1991.

12 — From the case-law of the Court it appears that, where a court finds that there is unlawful discrimination, the group discriminated against, in this case men, are entitled, pending legislative intervention, to the same treatment and to the application of the same rules as the other group in the same situation, in this case women: see *inter alia* the judgment in Case 71/85 *FNV* [1986] ECR 3855, at paragraph 22, and the judgment in Case C-377/89 *Cotter and McDermott* [1991] ECR I-1155, at paragraph 18.

13 — That for the purposes of the application of the principle of proportionality account may be taken of the proper and coherent functioning of the system set up by the Member State has been recently confirmed by the Court in connection with a national tax system in the judgments in Cases C-204/90 *Bachmann* [1992] ECR I-249 and C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

Conclusion

14. On the basis of the foregoing I suggest that the Court reply as follows to the preliminary question:

Where a Member State has fixed a pensionable age differing according to sex for the purposes of the grant of old-age and retirement pensions (65 years for men and 60 years for women), that Member State may still, on the basis of Article 7(1)(a) of Directive 79/7, derogate from the principle of equal treatment laid down in Article 4(1) of the directive by requiring:

(i) that men pay contributions for five years longer than women for the same old-age or retirement pension;

(ii) that men who continue in gainful employment until the age of 65 continue to pay contributions until that age, when women over the age of 60 are not required to pay such contributions, regardless of whether they continue in gainful employment after that age,

unless such unequal treatment of men can be eliminated by the national court without unduly jeopardizing the coherence or financial equilibrium of the national social security system concerned.