JUDGMENT OF THE COURT
27 October 1993 *

In Case C-337/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Raad van Beroep, 's-Hertogenbosch (Netherlands), for a preliminary ruling in the proceedings pending before that court between

A. M. van Gemert-Derks

and

Bestuur van de Nieuwe Industriële Bedrijfsvereniging,

on the interpretation of certain provisions 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,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), R. Joliet, G. C. Rodríguez Iglesias, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

* Language of the case: Dutch.

— the Bestuur van de Nieuwe Industriële Bedrijfsvereniging, by C. R. J. A. M. Brent, Head of the Legal Service for Social Security Affairs of the *Gemeenschappelijk Administratiekantoor*,

— the Netherlands Government, represented by T. P. Hofstee, Deputy Secretary-General at the Ministry of Foreign Affairs, acting as Agent,

— the German Government, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Joachim Karl, Regierungsdirektor in the same Ministry, acting as Agents,

— the United Kingdom, represented by Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agent, assisted by Christopher Vajda, Barrister,

— the Commission of the European Communities, represented by Karen Banks and Ben Smulders, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Bestuur van de Nieuwe Industriële Bedrijfsvereniging, represented by M. A. Broekhuis, Legal Adviser of the *Gemeenschappelijk Administratiekantoor*, the Netherlands Government, represented by T. Heukels, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, the United Kingdom and the Commission at the hearing on 16 February 1993,

after hearing the Opinion of the Advocate General at the sitting on 31 March 1993,

gives the following

Judgment

1 By order of 17 December 1991, received by the Court on 30 December 1991, the Raad van Beroep, 's-Hertogenbosch (Netherlands), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of certain provisions of Council Directive 79/7/EEC 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, 'Directive 79/7').

2 Those questions were raised in the course of proceedings between A. M. van Gemert-Derks, a Dutch national, and the Bestuur van de Nieuwe Industriële Bedrijfsvereniging (Board of the New Trade Association for Industry).

3 In the Netherlands, the Algemene Arbeidsongeschiktheidswet (General Law on Incapacity for Work, hereinafter 'the AAW') confers a right to benefits after the first year of incapacity for work until the person concerned reaches the age of 65.

4 Article 32(1)(b) of the AAW provides as follows:

'Benefits for incapacity for work shall be withdrawn:

(...)

(b) when a woman to whom they have been granted becomes entitled to a widow's pension or temporary widow's benefit under the Algemene Weduwen-en Wezenwet.'

5 The Algemene Weduwen-en Wezenwet (General Law on Widows and Orphans, hereinafter 'the AWW'), entitles widows of insured persons, subject to certain conditions, to widows' pensions up to the age of 65.

6 Under Article 23(1) of the AWW, the pension is granted by the Sociale Verzekeringsbank on the submission of a claim. Under Article 23(2) it may, by way of exception to subsection (1), also grant the pension automatically.

7 Mrs van Gemert-Derks, the plaintiff in the main proceedings, born on 16 January 1937, became self-employed in 1972. In February 1982 she was found to be unfit for work and was granted a benefit under the AAW from 31 January 1983 for incapacity of work of 80 to 100%.

8 On 23 October 1987 her husband died. She was consequently granted a widow's pension under the AWW from 1 October 1987.

9 By decision of 8 January 1988, the Bestuur van de Bedrijfsvereniging voor de Chemische Industrie (Board of the Trade Association for the Chemical Industry), the predecessor in law of the Nieuwe Industriële Bedrijfsvereniging (New Trade Association for Industry), the defendant in the main proceedings, withdrew the plaintiff's benefit under the AAW with effect from 1 October 1987, pursuant to Article 32(1)(b) of the AAW. It appears from the order making the reference that the transfer from the AAW scheme to the AWW scheme entailed, for Mrs van Gemert-Derks, a reduction of between some tens of guilders and 100 HFL per month, in the net benefit she was receiving.

10 Mrs van Gemert-Derks lodged an appeal against this decision with the Raad van Beroep, 's-Hertogenbosch, which, finding that the case raised questions of the interpretation of Community law, decided to refer the following questions to the Court for a preliminary ruling:

1. Is it compatible with Community law for a national court to interpret Article 26 of the International Covenant on Civil and Political Rights — which is binding on (at least) 11 of the 12 Member States — as meaning that that article requires as from 23 December 1984 full equal treatment as between men and women in the field of statutory survivors' pensions, if that area is only temporarily excluded from the jurisdiction of the Community?

2. Is a national provision such as that contained in Article 32(1)(b) of the AAW — which according to the Centrale Raad van Beroep ceased on 23 December 1984 to have direct discriminatory effect with regard to women inasmuch as 'the effect of benefits being lower as a result of the transition from AAW benefit to AWW benefit may now occur just as well in the case of men' — compatible with Article 4(1) of Directive 79/7/EEC if the national provision continues in practice to bring about a drop in income for all widows who are unfit for work (whether 100% or, as in this case, only partially) and only in exceptional cases (that is to say, in cases where 'special hardship' has led to the award of a widower's pension with long retroactive effect and there is a possibility of claiming back the AAW benefit) for widowers in a comparable situation?

3. If Question 1 or Question 2 is answered in the negative: under Community law is it for the national court to decide whether national legislation such as that described in the second question is wholly inapplicable or to interpret it as requiring a deduction to be made? If not, which approach is most compatible with Community law?

11 Reference is made to the Report for the Hearing for a fuller account of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First question

12 The first question seeks to ascertain whether Community law precludes a national court from interpreting Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966 (*Treaty Series*, vol. 999, p. 171, 'the International Covenant') as meaning that that article requires equal treatment for men and women in the field of survivors' benefits.

13 The AWW does not on the face of it confer on widowers a right to survivors' benefits. However, by two judgments of 7 December 1988, the Centrale Raad van Beroep held, on the basis of Article 26 of the International Covenant, that entitlement to benefits under the AWW must be granted without distinction as to sex.

14 It should be observed that Directive 79/7 seeks the gradual implementation of the principle of equal treatment for men and women in matters of social security, but it does not yet extend to the whole of this field. Thus, according to Article 3(2), it does not apply to provisions concerning survivors' benefits.

15 Consequently, in the absence of harmonization in this area, these benefits are regulated by the provisions of domestic and international law in force in the Member State concerned.

16 National case-law which, on the basis of Article 26 of the International Covenant, extends the principle of equal treatment to an area which is not at present covered

by Directive 79/7 cannot affect the gradual implementation of the principle contemplated by the same Directive, which is itself the first stage in that implementation.

17 Therefore the reply to the first question must be that Community law does not preclude a national court from interpreting Article 26 of the International Covenant as requiring equal treatment for men and women as regards survivors' benefits inasmuch as that matter lies outside the scope of Directive 79/7.

Second question

18 It is not for the Court, in the context of Article 177 of the EEC Treaty, to rule on the compatibility of a national law or national case-law with Community law. However, it does have jurisdiction to provide the national court with the guidance as to the interpretation of Community law necessary to enable it to assess that compatibility for the purpose of deciding the case before it (see, *inter alia*, Case C-369/89 *Piageme* [1991] ECR I-2971, paragraph 7).

19 It appears from the order for reference that, at the time when the plaintiff in the main proceedings had her benefit for incapacity for work under the AAW withdrawn because she became entitled to a widow's pension under the AWW, widowers who were unfit for work and were not entitled to a pension under the AWW continued to receive the AAW benefit.

20 Therefore the second question must be understood as asking in effect whether Article 4(1) of Directive 79/7 precludes a national rule which withdraws from widows who are unfit for work the benefits applicable to that risk on their being granted a widow's pension, if such withdrawal does not apply to widowers receiving benefits for incapacity for work.

21 It must be observed, firstly, that the Netherlands Government points out that, pursuant to Article 3(2) of Directive 79/7, the Directive does not apply to provisions concerning survivors' benefits and that, therefore, the question arises whether a provision regulating the coexistence of benefits for incapacity for work and survivor's benefits, such as Article 32(1)(b) of the AAW, falls within the ambit of the Directive.

22 In this connection it is sufficient to observe that Article 32(1)(b) of the AAW relates to the withdrawal of benefits for incapacity for work and that Directive 79/7 applies to such benefits by virtue of Article 3(1)(a). This finding is not invalidated by the fact that withdrawal is effected following the grant of a benefit which is not within the scope of Directive 79/7, in the present case a survivor's benefit.

23 Secondly, it must be observed that Article 4(1) of Directive 79/7 prohibits all discrimination on the ground of sex, in particular as concerns the conditions of access to statutory schemes, including that which provides protection against the risk of invalidity.

24 Under this provision, women are entitled to claim a benefit for incapacity for work in the same way as men.

25 A national provision depriving women of the right to claim a benefit which men continue to receive in the same situation therefore constitutes discrimination within the meaning of Directive 79/7.

26 The defendant in the main proceedings contends that an AWW pension, which entails the withdrawal of the benefit for incapacity under Article 32(1)(b) of the AAW, is granted only when claimed and that the claim can be withdrawn before

the pension is granted. However, since mid-July 1989, insured persons claiming a pension under the AWW are informed of all the consequences which the grant of the pension could have.

27 On this point it should be observed that equal treatment is not achieved in the case of the voluntary surrender by a widow of the benefit for incapacity unless she is given clear, specific information on the potential financial consequences of replacing that benefit by an AWW pension.

28 It is for the national court to determine whether such surrender has actually been made.

29 Therefore the answer to be given to the second question is that Article 4(1) of Directive 79/7 precludes a national rule which withdraws from widows who are unfit for work the benefits applicable to that risk on their being granted a widow's pension, if that withdrawal is not the result of a voluntary renunciation by the beneficiary and is not applicable to widowers who are entitled to benefits for incapacity to work.

Third question

30 The third question seeks to ascertain the consequences of a finding by the national court that the national provisions in question are incompatible with Article 4(1) of Directive 79/7.

31 The Court has held on many occasions (see, *inter alia*, Case C-102/88 *Ruzius-Wilbrink* [1989] ECR 4311, paragraph 19) that Article 4(1), considered above and in the light of the purpose and content of that directive, is sufficiently precise to be

relied upon by an individual before a national court in order to have any national provision not in conformity with that article disapplied.

32 It is clear from the judgment in Case 71/85 *Netherlands* v *Federatie Nederlandse Vakbeweging* [1986] ECR 3855 that women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the directive has not been implemented, those rules remain the only valid point of reference.

33 Although Article 4(1) of Directive 79/7 has the recognized effect of excluding the application of an incompatible national provision, it does not restrict the power of national courts to apply such procedures of domestic law as will safeguard the individual rights conferred by Community law.

34 Therefore the reply to be given to the third question is that, in the absence of adequate measures transposing Article 4(1) of Directive 79/7/EEC into national law, it is for the national courts to apply such procedures of domestic law as will guarantee to women the benefit of the same rules as those applicable to men in the same situation.

Costs

35 The costs incurred by the Netherlands Government, the German Government, the United Kingdom 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Raad van Beroep, 's-Hertogenbosch (Netherlands), by order of 17 December 1991, hereby rules:

1. **Community law does not preclude a national court from interpreting Article 26 of the International Covenant on Civil and Political Rights of 19 December 1966 as requiring equal treatment for men and women as regards survivors' benefits, inasmuch as that matter lies outside the scope 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.**

2. **Article 4(1) of Directive 79/7/EEC precludes a national rule which withdraws from widows who are unfit for work the benefits applicable to that risk on their being granted a widow's pension, if that withdrawal is not the result of a voluntary renunciation by the beneficiary and is not applicable to widowers who are entitled to benefits for incapacity for work.**

3. **In the absence of adequate measures transposing Article 4(1) of Directive 79/7/EEC into national law, it is for the national courts to apply such procedures of domestic law as will guarantee to women the benefit of the same rules as those applicable to men in the same situation.**

Due Mancini Moitinho de Almeida Diez de Velasco

Edward Joliet Rodríguez Iglesias Kapteyn Murray

Delivered in open court in Luxembourg on 27 October 1993.

J.-G. Giraud O. Due

Registrar President