OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 21 September 1988

My Lords,

Article 2(1) of Council Directive 76/207 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 (Official Journal 1976, L 39, p. 40) defines 'the principle of equal treatment' for the purposes of the directive as meaning that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. However, by Article 2 (3):

'This directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.'

By Article 5:

'1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

2. To this end, Member States shall take the measures necessary to ensure that:

(a) . . . ;

(b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings or in rules governing the independent occupations and professions shall be, or may be declared, null and void or may be amended . . . ' .

The first subparagraph of Article 9 (1) of the directive gave the Member States 30 months to implement the directive and inform the Commission of the measures taken to that effect. In the case of France that period expired on 12 August 1978.

The French Republic adopted Law No 83-635 amending the Labour Code and the Criminal Code as regards equality at work between women and men, on 13 July 1983, almost five years after the expiry of the time-limit stipulated by the directive. Article L 123-1c of the Labour Code, as substituted by Law No 83-635, lays down a general prohibition on adopting any measure on grounds of sex, particularly in regard to remuneration, training,

assignment, qualification, classification, professional advancement or transfer. Article L 123-2 of the Labour Code, as substituted by Law No 83-635, prohibits the insertion of any term reserving the benefit of any measure to one or more employees on the grounds of sex in any collective agreement or contract of employment, except where such a clause is intended to implement certain articles of the Labour Code which provide for the protection of women by reason of pregnancy, maternity and nursing.

However, by Article 19 of Law No 83-635:

'The provisions of Articles L 123-1c and L 123-2 of the Labour Code do not prohibit the application of usages, terms of contracts of employment or of collective agreements in force at the date on which this law is promulgated granting particular rights to women.

However, employers, groups of employers and groups of employed persons shall proceed, by collective negotiation, to bring such terms into conformity with the provisions of the abovementioned articles.'

The Commission took the view that Article 19 was not in accordance with the directive. After a preliminary notice and a reasoned opinion to that effect, by an application lodged at the Court on 12 December 1986, the Commission claimed a declaration that, by failing to adopt within the period prescribed in the first subparagraph of Article 9 (1) of Council Directive 76/207 all the measures necessary to secure the full and precise implementation of that directive and by adopting Article 19 of the Law of 13 July 1983 which conflicts with the requirements of the said directive, the French Republic had failed to fulfil its obligations under the Treaty.

The Commission takes essentially two points. First, the first paragraph of Article 19 of the law preserves beyond the deadline for implementation of the directive existing provisions of the kind referred to in Article 5 (2) (b) thereof; second, it does not effectively ensure that such provisions are amended in accordance with the latter article since it leaves it to management and labour to bring the provisions into line without imposing a time-limit or any effective sanction or machinery if the provisions are not brought into line within a fixed or reasonable time.

France's reply to the first point is that Article 2 (3) of the directive allows the retention of protective provisions not directly connected with pregnancy or maternity. Moreover, Article 2 (4) permits the retention of measures 'to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1)', and these include not just access to employment and working conditions but social measures relating to the sharing of family responsibilities which may affect women's oppor-

tunities in those areas. As part of such process of removing inequalities in the field of employment, particular rights for women may be retained.

As to the second point, France, it is said, was entitled pursuant to Article 5 (2) (c) of the directive and in accordance with the revision provided for in Article 9 (1) thereof, to 'request' labour and management to eliminate offending provisions and to ensure that in future agreements submitted for approval contained no such provisions.

In order to remove the inequalities which women have long faced in the area of employment it might have been possible for the Community as a matter of policy to require simply that provisions discriminatory against women should be removed and that those in favour of women should be retained. Despite some of the arguments in this case, this clearly was not done. Men and women are to be guaranteed the same conditions without discrimination on grounds of sex. Provisions discriminatory against men workers are therefore barred unless preserved by specific provisions of the directive.

The first question is, therefore, whether the 'particular rights to women' preserved by Article 19 of the law are provisions concerning the protection of women within the meaning of Article 2 (3) of the directive. There is no dispute that provisions directly linked to pregnancy and maternity may be retained and the Commission accepts that extra maternity leave beyond the prescribed protective period falls within the scope of that provision, since it seeks to protect a woman in connection with the effects of pregnancy and motherhood (Case 184/83 *Hofmann* v *Barmer Ersatzkasse* [1984] ECR 3047, at p. 3075, paragraph 26 of the judgment). France, however, particularly in the light of what it says is the role of the mother in French society, seeks to retain other rights hitherto enjoyed solely by women which are not directly connected with pregnancy and maternity. Many examples are given in the pleadings, without it being suggested that the list is all-embracing, such as the reduction of working time for women over 59 years of age or engaged in certain occupations such as typing and computer operating, the advancement of retiring age, time off for the adoption of a child, leave for sick children, a day off on the first day of the school term, some hours off on Mothers' Day, payments to help mothers meet the cost of nurseries or childminders.

Article 2 (3), as an exception to the principal rule contained in Articles 1 and 2 (1) of the directive, however, falls to be strictly construed: paragraph 44 of the judgment in Case 222/84 (*Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, at pp. 1688 and 1689). Although the word 'particularly' in Article 2 (3) indicates that situations other than pregnancy and maternity may fall within its scope, those words colour the scope of the

exceptions. The Court has already laid down criteria for defining them. At paragraph 25 of its judgment in *Hofmann* and paragraph 44 of its judgment in *Johnston*, the Court held that Article 2 (3) is intended to protect a woman's biological condition and the special relationship which exists between a woman and her child. The Court (in *Hofmann*, paragraph 25) made it clear that the 'special relationship' to which the Court was referring in that case was confined to that between a woman and her child over the period which follows pregnancy and childbirth, and not any later period.

It is important to bear in mind that the object of these proceedings is not to ensure the abolition of these rights accorded to women; it is rather to ensure that men and women are treated equally except where the provisions concern the protection of women as such by reason of their biological condition or the special relationship which exists between a mother and her baby.

Applying the approach adopted by the Court in *Johnston* and *Hofmann*, it seems to me that most of the examples cited of rights given to women are not justified under Article 2 (3) of the directive. True, some women may wish to retire at 59, to have time off from particular occupations or for particular occasions such as Mothers' Day, to have grants for childminders or school equipment. It cannot, however, be said that men do not, or may not ever, need such rights or privileges or that the latter can be classified as relating solely to the biological condition of womanhood. A father, in modern social conditions, may just as much be responsible for looking after sick children or need to pay childminders; he may no less for health reasons need to retire early or to have time off from certain stressful jobs. France's insistence on the traditional role of the mother, as I see it, ignores developments in society whereby some men in 'single-parent families' have the sole responsibility for children or whereby parents living together decide that the father will look after the children, in what would traditionally have been the mother's role, because of the nature of the mother's employment. This does not mean that both parents can claim the right; one of them, not exclusively the woman, can.

I say most of the examples because it is arguable that time off for the adoption of a young baby, even if principally for the benefit of the baby, is justified because of the link between the adopting mother and the baby. This has not, however, been argued and it may be that in some Member States even quite a young child may be adopted by a man.

Accordingly, in my view, the rights conferred on women by and large are not justified under Article 2 (3).

Nor can they be justified under Article 2 (4) which allows measures which promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities. The

kind of right referred to above has never been enjoyed by men so that there exist no inequalities in favour of men which affect women's opportunities in the employment field. It is not permissible to argue, as France appears to argue, that because women in general have been discriminated against then any provisions in favour of women in the employment field are *per se* valid as part of an evening-up process.

Nor does Article 5 (2) (c) of the directive, in my view, assist France: even if in times past the measures were justified because of the factual role of the mother, they were banned by the directive and did not initially qualify for exemption under Article 2 (3) (paragraph 44 of the judgment in *Johnston*).

Accordingly, in my view, the first paragraph of Article 19 of the law is contrary to the directive save in so far as it continues particular rights for the protection of women which are justified by the biological condition of the woman or the relationship with her child, and in particular pregnancy, maternity and nursing. It does not seem to me that the Commission's case fails because it is pleaded in general terms whereas it is possible that some rights enjoyed in France do fall within the exemption. It seems to me that if this legislation is drafted in such broad terms and is substantially invalid it is for France to draft a new law which covers only those rights which fall within the exemption.

As to the second contention of the Commission, it does not seem to me that Article 5 (2) (c) and Article 9 (1) of the directive justify the progressive adaptation of the provisions, as France contends. The measures in question were at all times since the expiry of the time-limit for the implementation of the directive contrary to its terms. France was obliged by Article 5 (2) (b) and the first subparagraph of Article 9 (1) to take steps to ensure the annulment or amendment of these provisions in e. g. collective agreements and contracts of employment. If, as I consider, these provisions should have been declared void or removed, then it was not sufficient to leave it to labour and management without specific requirements as to the time or methods of enforcement. There is no State guarantee of effective enforcement of the principle of equality should the negotiation process between the two sides of industry fail: see paragraph 8 of the judgment in Case 143/83 (*Commission* v *Denmark* [1985] ECR 427, at pp. 434 and 435), and paragraph 20 of the judgment in Case 235/84 (*Commission* v *Italy* [1986] ECR 2291, at p. 2302).

The results of the legislation in practice demonstrate the absence of any effective State guarantee of compliance, notwithstanding the existence of a procedure for government approval of collective agreements. It appears that in 1983 in France 1 050 collective agreements were concluded in branches of working activity and 2 400 in individual undertakings. In 1984 the figures were 927 and 6 000 respectively. By contrast, only 16 collective agreements were renegotiated on a non-discriminatory basis under the second paragraph of Article 19 of the law in the period 1984-87.

The French Government has argued that the withdrawal from women of the 'particular rights' in question would have been a socially retrograde step. That, however, is not the Commission's case. As far as the Commission is concerned, equality could equally well be achieved by a levelling-up process applying the same benefits to men. In my view, such an approach is in accordance with the terms and spirit of the directive, the third recital of which sets out the aim of furthering the harmonization of living and working conditions 'while maintaining their improvement'. Community law does not require, and the Commission in this action does not seek, the withdrawal from women of the benefits in question: it merely requires them to be offered to men and women on equal terms.

On the other hand, the French Government has argued that the immediate extension to all workers of rights such as daily pauses, the reduction of working hours, the attribution of extra days holiday, the reduction of retirement age, allowances for childminding or bonuses in the calculation of retirement pensions, would have represented a considerable economic cost, and the French legislator adopted an approach which would allow businesses to absorb the extra costs progressively. Even if the cost would have been as great as alleged (of which no evidence has been submitted) that is not in my opinion a factor which would justify a Member State in failing to fulfil its obligation to implement a directive. It is an argument which if valid could be raised in respect of every step taken to achieve equalization — as in the case of payments to part-time workers who are women, simply because they are women. It is well established in the Court's case-law that practical difficulties which appear at the stage when a Community measure is put into effect cannot permit a Member State unilaterally to opt out of fulfilling its obligations. A provision such as the second paragraph of Article 19 is not in my view the only way of dealing with the difficulty alleged. It would have been possible for the French legislator to adopt a measure prohibiting discriminatory terms of employment such as those at issue and requiring the two sides of industry to renegotiate them on a non-discriminatory basis within a reasonable period.

I do not accept the French Government's argument that because Article 9 (1) gives 30 months to put into force the necessary laws and administrative provisions, and that there is no time-limit prescribed for their coming into effect, time is unlimited and there is no breach of the directive. The Law of 1983, even in relation to future agreements, was already five years late: existing provisions should have been dealt with within a reasonable time of August 1978. By the time these proceedings were brought in 1986 that reasonable time had long since lapsed.

Accordingly, in my opinion, the Commission is entitled:

(a) to a declaration that, by failing to adopt within the period prescribed in the first subparagraph of Article 9 (1) of Council Directive 76/207 all the measures necessary to secure the full and precise implementation of that directive and by adopting Article 19 of the Law of 13 July 1983 which conflicts with the requirements of the said directive save in so far as it provides for the protection of women by reason of their biological condition and the special relationship which exists between a mother and her child particularly in relation to pregnancy, maternity or nursing, the French Republic has failed to fulfil its obligations under the Treaty;

(b) to its costs of this action.