JUDGMENT OF THE COURT
17 February 1998 *

In Case C-249/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Industrial Tribunal, Southampton, for a preliminary ruling in the proceedings pending before that tribunal between

Lisa Jacqueline Grant

and

South-West Trains Ltd

on the interpretation of Article 119 of the EC Treaty, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), and 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),

* Language of the case: English.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: M. B. Elmer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Ms Grant, by Cherie Booth QC, and by Peter Duffy and Marie Demetriou, Barristers,

— South-West Trains Ltd, by Nicholas Underhill QC and Murray Shanks, Barrister,

— the United Kingdom Government, by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, and Stephen Richards and David Anderson, Barristers,

— the French Government, by Catherine de Salins, Deputy Director in the Legal Affairs Department of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in that department, acting as Agents,

— the Commission of the European Communities, by Christopher Docksey, Marie Wolfcarius and Carmel O'Reilly, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Grant, represented by Cherie Booth QC, Peter Duffy QC and Marie Demetriou; South-West Trains Ltd, represented by Nicholas Underhill QC and Murray Shanks; the United Kingdom Government, represented by John E. Collins, David Anderson and Patrick Elias QC; and the Commission, represented by Carmel O'Reilly and Marie Wolfcarius, at the hearing on 9 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 30 September 1997,

gives the following

Judgment

1 By decision of 19 July 1996, received at the Court on 22 July 1996, the Industrial Tribunal, Southampton, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on the interpretation of Article 119 of that Treaty, Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), and 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).

2 Those questions were raised in proceedings between Ms Grant and her employer South-West Trains Ltd (hereinafter 'SWT') concerning the refusal by SWT of travel concessions for Ms Grant's female partner.

3 Ms Grant is employed by SWT, a company which operates railways in the Southampton region.

4 Clause 18 of her contract of employment, entitled 'Travel facilities', states:

'You will be granted such free and reduced rate travel concessions as are applicable to a member of your grade. Your spouse and depend[a]nts will also be granted travel concessions. Travel concessions are granted at the discretion of [the employer] and will be withdrawn in the event of their misuse.'

5 At the material time, the regulations adopted by the employer for the application of those provisions, the Staff Travel Facilities Privilege Ticket Regulations, provided in Clause 8 ('Spouses') that:

'Privilege tickets are granted to a married member of staff ... for one legal spouse but not for a spouse legally separated from the employee ...

...

Privilege tickets are granted for one common law opposite sex spouse of staff ... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more ...'.

6 The regulations also defined the conditions under which travel concessions could be granted to current employees (Clauses 1 to 4), employees having provisionally or definitively ceased working (Clauses 5 to 7), surviving spouses of employees (Clause 9), children of employees (Clauses 10 and 11) and dependent members of employees' families (Clause 12).

7 On the basis of those provisions Ms Grant applied on 9 January 1995 for travel concessions for her female partner, with whom she declared she had had a 'meaningful relationship' for over two years.

8 SWT refused to allow the benefit sought, on the ground that for unmarried persons travel concessions could be granted only for a partner of the opposite sex.

9 Ms Grant thereupon made an application against SWT to the Industrial Tribunal, Southampton, arguing that that refusal constituted discrimination based on sex, contrary to the Equal Pay Act 1970, Article 119 of the Treaty and/or Directive

76/207. She submitted in particular that her predecessor in the post, a man who had declared that he had had a meaningful relationship with a woman for over two years, had enjoyed the benefit which had been refused her.

10 The Industrial Tribunal considered that the problem facing it was whether refusal of the benefit at issue on the ground of the employee's sexual orientation was 'discrimination based on sex' within the meaning of Article 119 of the Treaty and the directives on equal treatment of men and women. It observed that while some United Kingdom courts had held that that was not the case, the judgment of the Court of Justice in Case C-13/94 *P* v *S and Cornwall County Council* [1996] ECR I-2143 was, on the other hand, 'persuasive authority for the proposition that discrimination on the ground of sexual orientation [was] unlawful'.

11 For those reasons the Industrial Tribunal referred the following questions to the Court for a preliminary ruling:

'1. Is it (subject to (6) below) contrary to the principle of equal pay for men and women established by Article 119 of the Treaty establishing the European Community and by Article 1 of Council Directive 75/117 for an employee to be refused travel concessions for an unmarried cohabiting same-sex partner where such concessions are available for spouses or unmarried opposite-sex cohabiting partners of such an employee?

2. For the purposes of Article 119 does "discrimination based on sex" include discrimination based on the employee's sexual orientation?

3. For the purposes of Article 119, does "discrimination based on sex" include discrimination based on the sex of that employee's partner?

4. If the answer to Question (1) is yes, does an employee, to whom such concessions are refused, enjoy a directly enforceable Community right against his employer?

5. Is such a refusal contrary to the provisions of Council Directive 76/207?

6. Is it open to an employer to justify such refusal if he can show (a) that the purpose of the concessions in question is to confer benefits on married partners or partners in an equivalent position to married partners and (b) that relationships between same-sex cohabiting partners have not traditionally been, and are not generally, regarded by society as equivalent to marriage; rather than on the basis of an economic or organisational reason relating to the employment in question?'

12 In view of the close links between the questions, they should be considered together.

13 As a preliminary point, it should be observed that the Court has already held that travel concessions granted by an employer to former employees, their spouses or dependants, in respect of their employment are pay within the meaning of Article 119 of the Treaty (see to that effect Case 12/81 *Garland* v *British Rail Engineering* [1982] ECR 359, paragraph 9).

14 In the present case it is common ground that a travel concession granted by an employer, on the basis of the contract of employment, to the employee's spouse or the person of the opposite sex with whom the employee has a stable relationship outside marriage falls within Article 119 of the Treaty. Such a benefit is therefore not covered by Directive 76/207, referred to in the national tribunal's Question 5 (see Case C-342/93 *Gillespie and Others* v *Northern Health and Social Services Board and Others* [1996] ECR I-475, paragraph 24).

15 In view of the wording of the other questions and the grounds of the decision making the reference, the essential point raised by the national tribunal is whether an employer's refusal to grant travel concessions to the person of the same sex with whom an employee has a stable relationship constitutes discrimination prohibited by Article 119 of the Treaty and Directive 75/117, where such concessions are granted to an employee's spouse or the person of the opposite sex with whom an employee has a stable relationship outside marriage.

16 Ms Grant submits, first, that such a refusal constitutes discrimination directly based on sex. She submits that her employer's decision would have been different if the benefits in issue in the main proceedings had been claimed by a man living with a woman, and not by a woman living with a woman.

17 Ms Grant argues that the mere fact that the male worker who previously occupied her post had obtained travel concessions for his female partner, without being married to her, is enough to identify direct discrimination based on sex. In her

submission, if a female worker does not receive the same benefits as a male worker, all other things being equal, she is the victim of discrimination based on sex (the 'but for' test).

18 Ms Grant contends, next, that such a refusal constitutes discrimination based on sexual orientation, which is included in the concept of 'discrimination based on sex' in Article 119 of the Treaty. In her opinion, differences in treatment based on sexual orientation originate in prejudices regarding the sexual and emotional behaviour of persons of a particular sex, and are in fact based on those persons' sex. She submits that such an interpretation follows from the judgment in *P* v *S* and corresponds both to the resolutions and recommendations adopted by the Community institutions and to the development of international human rights standards and national rules on equal treatment.

19 Ms Grant claims, finally, that the refusal to allow her the benefit is not objectively justified.

20 SWT and the United Kingdom and French Governments consider that the refusal of a benefit such as that in issue in the main proceedings is not contrary to Article 119 of the Treaty. They submit, first, that the judgment in *P* v *S*, which is limited to cases of gender reassignment, does no more than treat discrimination based on a person's change of sex as equivalent to discrimination based on a person's belonging to a particular sex.

21 They submit, next, that the difference in treatment of which Ms Grant complains is based not on her sexual orientation or preference but on the fact that she does not satisfy the conditions laid down in the undertaking's regulations.

22 Finally, in their opinion, discrimination based on sexual orientation is not 'discrimination based on sex' within the meaning of Article 119 of the Treaty or Directive 75/117. They refer on this point in particular to the wording and objectives of Article 119, the lack of consensus among Member States as to whether stable relationships between persons of the same sex may be regarded as equivalent to stable relationships between persons of opposite sex, the fact that those relationships are not protected by Articles 8 or 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter 'the Convention'), and the consequent absence of discrimination within the meaning of Article 14 of the Convention.

23 The Commission likewise considers that the refusal of the benefits to Ms Grant is not contrary to Article 119 of the Treaty or Directive 75/117. In its opinion, discrimination based on the sexual orientation of workers may be regarded as 'discrimination based on sex' for the purposes of Article 119. It submits, however, that the discrimination of which Ms Grant complains is based not on her sexual orientation but on the fact that she is not living as a 'couple' or with a 'spouse', as those terms are understood in the laws of most of the Member States, in Community law and in the law of the Convention. It considers that in those circumstances the difference of treatment applied by the regulations in force in the undertaking in which Ms Grant works is not contrary to Article 119.

24 In the light of all the material in the case, the first question to answer is whether a condition in the regulations of an undertaking such as that in issue in the main proceedings constitutes discrimination based directly on the sex of the worker. If it does not, the next point to examine will be whether Community law requires that stable relationships between two persons of the same sex should be regarded by all employers as equivalent to marriages or stable relationships outside marriage between two persons of opposite sex. Finally, it will have to be considered whether discrimination based on sexual orientation constitutes discrimination based on the sex of the worker.

25 First, it should be observed that the regulations of the undertaking in which Ms Grant works provide for travel concessions for the worker, for the worker's 'spouse', that is, the person to whom he or she is married and from whom he or she is not legally separated, or the person of the opposite sex with whom he or she has had a 'meaningful' relationship for at least two years, and for the children, dependent members of the family, and surviving spouse of the worker.

26 The refusal to allow Ms Grant the concessions is based on the fact that she does not satisfy the conditions prescribed in those regulations, more particularly on the fact that she does not live with a 'spouse' or a person of the opposite sex with whom she has had a 'meaningful' relationship for at least two years.

27 That condition, the effect of which is that the worker must live in a stable relationship with a person of the opposite sex in order to benefit from the travel concessions, is, like the other alternative conditions prescribed in the undertaking's regulations, applied regardless of the sex of the worker concerned. Thus travel concessions are refused to a male worker if he is living with a person of the same sex, just as they are to a female worker if she is living with a person of the same sex.

28 Since the condition imposed by the undertaking's regulations applies in the same way to female and male workers, it cannot be regarded as constituting discrimination directly based on sex.

29 Second, the Court must consider whether, with respect to the application of a condition such as that in issue in the main proceedings, persons who have a stable relationship with a partner of the same sex are in the same situation as those who are married or have a stable relationship outside marriage with a partner of the opposite sex.

30 Ms Grant submits in particular that the laws of the Member States, as well as those of the Community and other international organisations, increasingly treat the two situations as equivalent.

31 While the European Parliament, as Ms Grant observes, has indeed declared that it deplores all forms of discrimination based on an individual's sexual orientation, it is nevertheless the case that the Community has not as yet adopted rules providing for such equivalence.

32 As for the laws of the Member States, while in some of them cohabitation by two persons of the same sex is treated as equivalent to marriage, although not completely, in most of them it is treated as equivalent to a stable heterosexual relationship outside marriage only with respect to a limited number of rights, or else is not recognised in any particular way.

33 The European Commission of Human Rights for its part considers that despite the modern evolution of attitudes towards homosexuality, stable homosexual relationships do not fall within the scope of the right to respect for family life under Article 8 of the Convention (see in particular the decisions in application No 9369/81, *X. and Y.* v *the United Kingdom*, 3 May 1983, *Decisions and Reports* 32, p. 220; application No 11716/85, *S.* v *the United Kingdom*, 14 May 1986, D. R. 47, p. 274, paragraph 2; and application No 15666/89, *Kerkhoven and Hinke* v *the Netherlands*, 19 May 1992, unpublished, paragraph 1), and that national provisions which, for the purpose of protecting the family, accord more favourable treatment to married persons and persons of opposite sex living together as man and wife than to persons of the same sex in a stable relationship are not contrary to Article 14 of the Convention, which prohibits *inter alia* discrimination on the ground of

sex (see the decisions in *S.* v *the United Kingdom*, paragraph 7; application No 14753/89, *C. and L. M.* v *the United Kingdom*, 9 October 1989, unpublished, paragraph 2; and application No 16106/90, *B.* v *the United Kingdom*, 10 February 1990, D. R. 64, p. 278, paragraph 2).

34 In another context, the European Court of Human Rights has interpreted Article 12 of the Convention as applying only to the traditional marriage between two persons of opposite biological sex (see the *Rees* judgment of 17 October 1986, Series A no. 106, p. 19, § 49, and the *Cossey* judgment of 27 September 1990, Series A no. 184, p. 17, § 43).

35 It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.

36 In those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position.

37 Finally, Ms Grant submits that it follows from *P* v *S* that differences of treatment based on sexual orientation are included in the 'discrimination based on sex' prohibited by Article 119 of the Treaty.

38 In *P* v *S* the Court was asked whether a dismissal based on the change of sex of the worker concerned was to be regarded as 'discrimination on grounds of sex' within the meaning of Directive 76/207.

39 The national court was uncertain whether the scope of that directive was wider than that of the Sex Discrimination Act 1975, which it had to apply and which in its view applied only to discrimination based on the worker's belonging to one or other of the sexes.

40 In their observations to the Court the United Kingdom Government and the Commission submitted that the directive prohibited only discrimination based on the fact that the worker concerned belonged to one sex or the other, not discrimination based on the worker's gender reassignment.

41 In reply to that argument, the Court stated that the provisions of the directive prohibiting discrimination between men and women were simply the expression, in their limited field of application, of the principle of equality, which is one of the fundamental principles of Community law. It considered that that circumstance argued against a restrictive interpretation of the scope of those provisions and in favour of applying them to discrimination based on the worker's gender reassignment.

42 The Court considered that such discrimination was in fact based, essentially if not exclusively, on the sex of the person concerned. That reasoning, which leads to the conclusion that such discrimination is to be prohibited just as is discrimination

based on the fact that a person belongs to a particular sex, is limited to the case of a worker's gender reassignment and does not therefore apply to differences of treatment based on a person's sexual orientation.

43 Ms Grant submits, however, that, like certain provisions of national law or of international conventions, the Community provisions on equal treatment of men and women should be interpreted as covering discrimination based on sexual orientation. She refers in particular to the International Covenant on Civil and Political Rights of 19 December 1966 (*United Nations Treaty Series*, Vol. 999, p. 171), in which, in the view of the Human Rights Committee established under Article 28 of the Covenant, the term 'sex' is to be taken as including sexual orientation (communication No 488/1992, *Toonen* v *Australia*, views adopted on 31 March 1994, 50th session, point 8.7).

44 The Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law (see, for example, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 31, and Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgian State* [1990] ECR I-3763, paragraph 68).

45 However, although respect for the fundamental rights which form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community (see, *inter alia*, on

the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/94 [1996] ECR I-1759, paragraphs 34 and 35).

46 Furthermore, in the communication referred to by Ms Grant, the Human Rights Committee, which is not a judicial institution and whose findings have no binding force in law, confined itself, as it stated itself without giving specific reasons, to 'noting ... that in its view the reference to "sex" in Articles 2, paragraph 1, and 26 is to be taken as including sexual orientation'.

47 Such an observation, which does not in any event appear to reflect the interpretation so far generally accepted of the concept of discrimination based on sex which appears in various international instruments concerning the protection of fundamental rights, cannot in any case constitute a basis for the Court to extend the scope of Article 119 of the Treaty. That being so, the scope of that article, as of any provision of Community law, is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context. It follows from the considerations set out above that Community law as it stands at present does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings.

48 It should be observed, however, that the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, provides for the insertion in the EC Treaty of an Article 6a which, once the Treaty of Amsterdam has entered into force, will allow the Council under certain conditions (a unanimous vote on a proposal from the Commission after consulting the European Parliament) to take appropriate action to eliminate various forms of discrimination, including discrimination based on sexual orientation.

49 Finally, in the light of the foregoing, there is no need to consider Ms Grant's argument that a refusal such as that which she encountered is not objectively justified.

50 Accordingly, the answer to the national tribunal must be that the refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the Treaty or Directive 75/117.

Costs

51 The costs incurred by the United Kingdom and French Governments and by 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 tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Industrial Tribunal, Southampton, by decision of 19 July 1996, hereby rules:

The refusal by an employer to allow travel concessions to the person of the same sex with whom a worker has a stable relationship, where such concessions are allowed to a worker's spouse or to the person of the opposite sex with whom a worker has a stable relationship outside marriage, does not constitute discrimination prohibited by Article 119 of the EC Treaty or Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Mancini Moitinho de Almeida

Kapteyn Murray Edward

Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 17 February 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President