

Case C-130/20**Summary of the request for a preliminary ruling under Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

9 March 2020

Referring court:

Juzgado de lo Social n.º 3 de Barcelona (Spain)

Date of the decision to refer:

4 March 2020

Applicant:

YJ

Defendant:

Instituto Nacional de la Seguridad Social (INSS)

Subject matter of the main proceedings

Claim in respect of retirement against the Instituto Nacional de la Seguridad Social, requesting the maternity supplement of 10% of the retirement pension granted.

Subject matter and legal basis of the request for a preliminary ruling

The request for a preliminary ruling concerns the determination of whether exclusion of the maternity supplement for women who voluntarily take early retirement, as opposed to those who do not take early retirement and those for whom early retirement is not voluntary, is compatible with the EU legislation guaranteeing equal treatment in matters relating to social security in its broadest sense, in other words, as between men and women but also as between women.

Question referred for a preliminary ruling

‘Can a provision like Article 60(4) of the General Law on Social Security (Ley General de la Seguridad Social), which excludes the maternity supplement for women who retire [early] voluntarily, as opposed to those who retire, also voluntarily, at the normal age provided for, or who retire early but on the basis of work performed throughout their working lives, by reason [of] disability, or because they ceased employment before taking retirement through no fault of their own, be considered to constitute direct discrimination for the purposes of Directive 79/7?’

Provisions of EU law relied on

Articles 21(1) and 34(1) of the Charter of Fundamental Rights of the European Union in conjunction with Article 157(4) TFEU.

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: Articles 3(1)(a), 4(1) and (2), and 7(1)(a) and (b).

Article 2(1)(b) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

Judgment of the Court of Justice of the European Union of 12 December 2019, *Instituto Nacional de la Seguridad Social*, C-450/18, EU:C:2019:1075, paragraphs 28, 30, 33, 37, 42, 44, 46 to 50, 57, 58, 60, 62, 63 and 65 and the operative part.

Judgment of the Court of Justice of 5 June 2018, *Grupo Norte Facility*, C-574/16, EU:C:2018:390, paragraph 46.

Provisions of national law relied on

1. — Royal Legislative Decree (Real Decreto Legislativo) 8/2015 of 30 October 2015 adopting the consolidated text of the General Law on Social Security (Ley General de la Seguridad Social; ‘LGSS’)

Article 60. Maternity supplement for contributory pensions under the social security system

1. Women who have had biological or adopted children and are recipients of a contributory retirement, widow’s or permanent incapacity pension under any scheme within the social security system shall be granted a pension supplement on account of their demographic contribution to social security.

That supplement, which shall have the legal nature of a contributory State pension for all purposes, shall consist of an amount equivalent to the result of applying to the initial amount of the pensions referred to a specified percentage which shall be based on the number of children in accordance with the following scale:

- a) *in the case of two children: 5 per cent.*
- b) *in the case of three children: 10 per cent.*
- c) *in the case of four or more children: 15 per cent.*

...

2. *Where the amount of the pension initially granted exceeds the [statutory maximum] limit without application of the supplement, the total of the pension and the supplement may not exceed that limit increased by 50 per cent of the supplement allocated.*

Additionally, if the amount of the pension granted comes to the [statutory maximum] limit as a result of applying the supplement only in part, the woman concerned shall also be entitled to receive 50 per cent of the portion of the supplement which exceeds the maximum limit in force from time to time.

[...]

If the pension to be supplemented is the result of aggregating periods of insurance pro rata, in accordance with international legislation, the supplement shall be calculated on the basis of the resulting theoretical pension and the appropriate proportion shall be applied to the result obtained.

...

4. *The pension supplement shall not be applicable where the woman concerned voluntarily takes early retirement or takes partial retirement ...*

Notwithstanding the foregoing, the appropriate pension supplement shall be allocated where partial retirement is followed by full retirement, once the relevant age in each case is reached.

...

Order of the Tribunal Constitucional (Constitutional Court, Spain) No 114/18 of 16 October 2018 (ECLI:ES:TC:2018:114A)

That ruling dismissed the question of unconstitutionality referred by a social court because, 'from the point of view of a pension supplement which is intended to compensate mothers who, involuntarily and for the reasons set out in Article 207 LGSS, have their "insurance history" reduced, there is an objective and reasonable justification for the distinction inserted by the legislature into

Article 60(4) of the LGSS ... since early retirement shortens the period of contribution to the scheme and extends the period during which the pension is received, from which it follows that it is logical that the legislature should introduce provisions to discourage it’.

Succinct presentation of the facts and procedure in the main proceedings

- 1 Ms YJ, born in 1954, applied for a retirement pension on 2 December 2017 and, on 11 December 2017, a decision was given granting the pension based on a monthly basic amount of EUR 2 954.05, the proportion of the pension being 86% of the maximum monthly pension of EUR 2 573.70 since the pension was reduced by 0.50% for each quarter that the ordinary retirement age had been brought forward, with the result that the pension was fixed at EUR 2 470.75 per month with effect from 4 December 2017.
- 2 The applicant lodged a prior administrative complaint in which she claimed that she was entitled to the pension maternity supplement as she had had three children and therefore the pension should be increased by 10%. The defendant gave its decision on 9 May 2018 and, in the light of the refusal of her claim, Ms YJ brought an action seeking the award of the so-called maternity supplement provided for in Article 60 of the Ley General de la Seguridad Social (General Law on Social Security; ‘LGSS’), which consists of an increment of between 5 and 15% for women in receipt of a permanent incapacity, retirement or widow’s pension who have had two or more children.

Essential arguments of the parties to the main proceedings

Position and arguments of the applicant

- 3 The applicant contends that the justification for the supplement, as framed by the legislature, creates discrimination against women who have made a genuine contribution to the social security system and who, because they take voluntary early retirement, are not eligible for the supplement, unlike women who retire with a full pension, and also with the maximum amount of pension, and widows, whose professional career path is not checked because they are entitled to the supplement on account of the contributions paid by the husband or deceased.
- 4 Referring to the order of the Tribunal Constitucional (Constitutional Court) No 114/18, the applicant states that the position taken in one of the dissenting opinions in that order was based on the view that the gender perspective should take priority in the field of interpreting legal provisions, meaning that when apparently neutral provisions lead to unfair situations which breach the right to equal treatment and create covert or indirect discrimination, the constitutional interpreter must perform a task which goes beyond the wording.

- 5 The applicant goes on to argue that the current rules laid down in Article 60 LGSS conflict with the Community legislation and are inconsistent with the purpose for which that legislation was drafted, which reflected the recommendations of the European Commission, the Parliament and the Council aimed at reducing the State pension gender gap. In that connection, the applicant relies on Articles 21(1) and 34(1) of the Charter of Fundamental Rights of the European in conjunction with Article 157(4) TFEU.
- 6 Consequently, the applicant submits that women who have had two or more children are treated unequally based solely on the manner in which they access their retirement pension, regardless of the aim of a provision which is stated to be to compensate for the demographic contribution which is made by all female workers equally.
- 7 The applicant expresses her agreement with the reference for a preliminary ruling and she refers in particular to Article 2(1)(b) of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, in the sense that there is indirect discrimination on grounds of sex since an unjustified and disproportionate difference is created between women when they access their retirement pension. The applicant cites paragraph 46 of the judgment of the Court of Justice of 5 June 2018 (Case C-574/16) which states that the principle of non-discrimination requires that comparable situations should not be treated differently.

Position and arguments of the defendant

- 8 The INSS refused to grant the maternity supplement in the administrative proceedings on the basis that Article 60(4) of the General Law on Social Security provides that that pension supplement is not applicable in cases where the woman concerned takes early retirement voluntarily.
- 9 The defendant contends that the non-application of the maternity supplement to voluntary retirement pensions (voluntary early retirement and partial retirement) is intended to prevent the encouragement, by businesses or by the persons concerned, of early retirement among workers who have basic amounts higher than the maximum pension because they are not penalised by the reduction coefficients which are absorbed by the basic amount.
- 10 On another point, the defendant objects to the reference for a preliminary ruling because Article 157(4) TFEU is not applicable to the matter in dispute since the action does not concern discrimination on grounds of sex derived from the disproportionality of the legislative measure at issue but rather the possible inequality before the law of one person vis-à-vis another, both female, on account of the amount of retirement pension where that pension is accessed in accordance with different rules.
- 11 The defendant goes on to adopt as its own the arguments set out in the order of the Tribunal Constitucional (Constitutional Court) in relation to this being a case of

inequality before the law rather than discrimination, and the broad discretion of the legislature to lay down provisions governing social security benefits.

- 12 Lastly, the defendant argues that the measures for positive action to which Article 157(4) TFEU refers come within the sphere of substantive equality, unlike the prohibition of discrimination which comes within the sphere of formal equality, and that the Court of Justice has reasoned that such measures do not involve excessive discriminatory treatment of men vis-à-vis women, without carrying out an assessment of whether their application to all women is appropriate.
- 13 In the light of the foregoing, the INSS opposes the reference for a preliminary ruling on the ground that the Tribunal Constitucional (Constitutional Court) has dispelled any uncertainties regarding the compatibility of Article 60(4) LGSS with the principle of equality before the law enshrined by Article 14 of the Spanish Constitution (Constitución Española) and by Article 20 of the Charter of Fundamental Rights of the European Union, and on the ground that the provisions of EU law are not applicable to the circumstances of the case.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 14 In relation to order No 114/18 of the Tribunal Constitucional (Constitutional Court), the referring court proceeds on the basis that that court approached the issue from the perspective of the review of constitutionality, in other words, an examination of whether the maternity supplement is compatible with the criterion for interpretation of the fundamental right of equal treatment under the law enshrined in Article 14 of the Spanish Constitution. Accordingly, the referring court takes the view that it does not impede this reference for a preliminary ruling because the issue raised here concerns the application of EU law and not the Spanish Constitution.
- 15 In that connection, the referring court maintains that since the case before it is not concerned with compensating for situations where women have taken maternity leave or with reversing the career disadvantages of women who interrupt their employment after giving birth, given that it is not possible to link the supplement to the biological condition of women who have given birth, and since it does not apply to women who have interrupted their careers to bring up their children, on which basis it has been acknowledged that Article 60(1) LGSS constitutes direct discrimination against men in an identical situation, which is prohibited by Directive 79/7, there are no tactical or legal reasons which prevent the application of the same reasoning in relation to all women in the same situation, regardless of the manner and time of access to the supplemented pension.
- 16 In other words, since Article 60(4) LGSS excludes a category of women who enter retirement, specifically women who take voluntary early retirement (albeit not all such women because in certain situations where the retirement age is brought forward that exclusion does not apply), despite the fact that retirement is

in all circumstances and at all times voluntary, it is necessary to ask whether it can also be considered to be discriminatory for the purposes of Directive 79/7 to exclude women who bring forward the ordinary statutory retirement age, on the grounds that that exclusion is unreasonable and unjustified.

- 17 As regards the argument that the applicant's pension exceeds the maximum pension provided for in Spain at the material time, the fact is that the maternity supplement is applicable, as stipulated by Article 60(2) LGSS, even if the resulting amount exceeds the maximum pension, as it does in the present case, since the resulting pension would be higher than that maximum pension.
- 18 In order to adjudicate on the instant case, it is necessary to ask whether exclusion of the maternity supplement for women who voluntarily bring forward their retirement age, as opposed to women who retire at the normal age provided for or who retire early but on the basis of work performed throughout their working lives or in the event of disability, and also women who retire early because their employment ceased in the period immediately before retirement through no fault of their own, is compatible with the EU legislation guaranteeing equal treatment in its broadest sense, in other words, as between men and women but also as between women.

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