

Press and Information Division

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Opinion delivered by Advocate General Ruiz-Jarabo in Case C-117/01

K.B. v The National Health Service Pensions Agency and the Secretary of State for Health

ADVOCATE GENERAL RUIZ-JARABO CONCLUDES THAT NATIONAL RULES WHICH, BY NOT ALLOWING TRANSSEXUALS TO MARRY, DENY THEM ENTITLEMENT TO A WIDOW'S OR WIDOWER'S PENSION ARE CONTRARY TO COMMUNITY LAW

The Advocate General seeks to ensure that full effect is given to the principle that there should be no discrimination based on sex and calls on the national court to overcome any technical difficulties in applying that principle until such time as the United Kingdom adopts the legislation necessary to enable transsexuals to marry

K.B., a British citizen, worked for the National Health Service (NHS) for twenty years, during which time she paid contributions to the NHS pension scheme. The scheme provides for a survivor's pension to be payable to a member's surviving spouse. "Spouse" means the person to whom the scheme member has been married.

K.B. is concerned that her partner, R, who has undergone female-to-male gender reassignment surgery, should, if appropriate, be entitled to receive the widower's pension. United Kingdom legislation, however, prevents transsexuals from marrying on the basis of their acquired gender.

K.B. brought proceedings before the United Kingdom courts, since she considered that she was the victim of pay-related sex discrimination owing to the NHS's refusal to pay the widower's pension to her partner in due course. The Court of Appeal is seeking a preliminary ruling from the Court of Justice on this issue.

The principle of equal pay for male and female workers is laid down by Community law. "Pay" includes widow(er)'s pensions.

Furthermore, the Court of Justice has held that a dismissal based on the fact that the worker was a transsexual is contrary to the prohibition on discrimination based on sex.

Advocate General Ruiz-Jarabo is delivering his Opinion today.

The Advocate General's views are not binding upon the Court of Justice. His role is to propose to the Court, acting with complete independence, a decision on the legal points in order that the cases referred to it may be resolved.

Mr Ruiz-Jarabo begins by analysing the Court of Justice's case-law in order to ascertain whether the refusal to pay a transsexual a widow(er)'s pension is contrary to the principle of equal pay.

In his view, that principle does not require that the unmarried partner of an employee be awarded a benefit such as a surviving spouse's pension. The fact that that person is a transsexual is not a determining factor, since the same outcome would apply in relation to other impediments to contracting a valid marriage, i.e. where persons are without legal capacity or are in a relationship of consanguinity.

The Advocate General none the less deems it necessary to **examine the compatibility with Community law of national rules which, by not allowing transsexuals to marry, deny such persons entitlement to a widow(er)'s pension.**

Mr Ruiz-Jarabo is of the view that the fact that **in these circumstances it is impossible to marry is contrary to the general principles of Community law.** The right of a transsexual to marry a person of the same biological sex is incorporated into the laws of the majority of Member States and the European Convention on Human Rights.

Although **Member States are free to enact legislation laying down the requirements relating to marriage, they are not free to impose a condition contrary to fundamental rights where enjoyment of an economic right protected by the Treaty (the widow(er)'s pension) is subject to that condition.** Therefore, the fact that it is impossible for transsexuals to marry is contrary to Community law where this prevents them from receiving a surviving spouse's pension.

The Advocate General thus seeks to ensure that full effect is given to the principle that there should be no discrimination based on sex and calls on the national court to overcome any technical difficulties in applying that principle until such time as the United Kingdom adopts the necessary legislation to enable transsexuals to marry. ¹

Note: The judges of the Court of Justice now begin their deliberation in this case. The judgment will be delivered at a later date.

¹ • The House of Lords has already pointed out that English law is incompatible with the European Convention on Human Rights, urging the United Kingdom Government to adopt the measures necessary to resolve this problem.

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Also available in Danish, Dutch, Finnish, French, German, Italian, Spanish and Swedish.

*For the full text of the Opinion, please consult the Court of Justice's internet page
www.curia.eu.int at approximately 3 pm today.*

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