



Press and Information

Court of Justice of the European Union
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Advocate General's Opinion in Case C-451/16
MB v Secretary of State for Work and Pensions

Advocate General Bobek considers that a requirement in national law for a person who has changed gender to be unmarried in order to qualify for a state retirement pension is unlawful

Such a requirement is incompatible with the EU Directive on equal treatment between men and women

MB was born in 1948, registered at birth as a man, and married in 1974. In 1991 she began to live as a woman and in 1995 she underwent gender reassignment surgery. However, MB did not apply for a full gender recognition certificate under national legislation as, at that time, a married applicant for such a certificate would have to have his/her marriage annulled since same sex marriage was not permitted under UK law. MB and her wife were unwilling to see their marriage annulled.

In 2008, MB reached the age of 60, the pensionable age for women born before 6 April 1950. She applied for a state retirement pension. Her application was rejected on the basis that she did not have a full gender recognition certificate and therefore could not be treated as a woman for the purpose of determining her pensionable age. MB challenged that decision before the national courts. She claims that the condition to be unmarried amounts to discrimination contrary to EU law.

An EU Directive¹ prohibits discrimination on grounds of sex with respect to state benefits, including old age and retirement pensions. The Directive provides for an exception to this prohibition, allowing Member States to exclude from its scope the determination of pensionable age for the purpose of granting old age and retirement pensions. The UK has exercised that right and the pensionable age for a woman born before 6 April 1950 is 60, and for a man born before 6 December 1953 is 65.

However, at the time that MB brought her case before the national courts, the acquired gender of a transgender person was not recognised for the purpose of determining the qualifying age for a state pension if that person was and remained party to a subsisting marriage.² The UK Supreme Court asks the Court of Justice whether this position is compatible with the Directive.

In today's Opinion, Advocate General Michal Bobek considers that **the requirement, applicable only to transgender persons, to be unmarried in order for them to access a state pension is contrary to the Directive. In his view, this amounts to direct discrimination on the basis of sex which is not open to objective justification.**

In reaching this conclusion, the Advocate General undertakes an assessment as to whether the circumstances of the case give rise to direct discrimination on the grounds of sex. Direct discrimination is characterised by the unequal treatment of a comparable group of persons to the detriment of another group due to their "protected characteristic" (in this case their sex).

¹ Council Directive of 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).

² The domestic situation in the UK has changed. The Marriage (Same Sex Couples) Act 2013 came into force on 10 December 2014. It allows same-sex couples to marry. Schedule 5 of that act amended section 4 of the Gender Recognition Act 2004 to provide that a Gender Recognition Panel must issue a full gender recognition certificate to a married applicant if the applicant's spouse consents.

The Advocate General refers to the Court's previous case law in which it confirmed that the scope of the prohibition of discrimination on grounds of sex covers discrimination on the basis of gender reassignment.

Next, the Advocate General takes the view that the relevant comparator group for establishing sex discrimination in the context of gender reassignment will depend on the context of the case. In the present case, the Advocate General considers that the appropriate comparator group is cisgender women since the point in issue is access to retirement benefits for male to female transgender as compared to cisgender women.

Finally, the Advocate General concludes that there is unequal treatment since marital status does not play any role for cisgender persons in order to access a state retirement pension, whereas married transgender persons are subject to the requirement to annul their marriage.

In the Advocate General's view, such a difference in treatment on the grounds of sex cannot be justified. Direct discrimination on the basis of sex is allowed only in the specific cases listed under the Directive. The derogation allowing Member States to maintain different retirement ages for eligibility to a retirement pension between men and women does not allow for a difference in treatment between transgender persons and those persons whose gender is not a result of gender reassignment.

The Advocate General then goes on to discuss the wider implications of the case.

He notes that the real issue in this case could be argued to be the conditions for the recognition of gender reassignment, as opposed to the conditions for access to a state retirement pension.

The Advocate General acknowledges that it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person. However, he does not accept the argument that this prevents a conclusion of unlawful treatment on the basis that the requirement to be unmarried is not a direct requirement for access to the state retirement pension, but a requirement for gender reassignment recognition, the conditions for which fall within the competence of the Member States.

He explains that, in his view, such an approach would make the scope of application of EU law related to the prohibition of discrimination on the grounds of sex, entirely dependent on the various nationally established conditions, which could ultimately lead to discrimination "by the back door". The Advocate General recalls that Member States are required to exercise their competence in a way that complies with EU law, in particular, the provisions relating to the principle of non-discrimination.

The Advocate General makes clear that his conclusion does not, however, mean that Member States would be compelled to recognise same-sex marriage. In fact, all that would be required of the Member States would be to make access to the benefit at issue independent of this particular condition to be unmarried. Member States remain free to allow or not to allow same-sex marriage.

As a final point, the Advocate General reiterates that this is not a case about same-sex marriage, but rather the combination of a number of conditions creating a rather peculiar situation. This situation arises, in part, from a derogation from one of the fundamental principles of EU law, allowing for direct discrimination based on sex in respect of access to a state retirement pension, which is not only exceptional but is also expected to progressively disappear as the UK converges the retirement ages for men and women. Consequently, the root of the problem in this case is bound to disappear as well.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

Press contact: Holly Gallagher ☎ (+352) 4303 3355

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