



Press and Information

Court of Justice of the European Union
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Judgment in Case C-451/16

MB v Secretary of State for Work and Pensions (Change of gender and retirement pension)

A person who has changed gender cannot be required to annul the marriage which he or she entered into before that change of gender in order to be entitled to receive a retirement pension at the age provided for persons of the sex which he or she has acquired

Such a condition constitutes direct discrimination based on sex

An EU directive¹ prohibits discrimination on grounds of sex with respect to State benefits, including old age and retirement pensions. That Directive provides for an exception to that 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 of derogation, as a result of which the pensionable age for a woman born before 6 April 1950 is 60 and that for a man born before 6 December 1953 is 65.

MB was born a male in 1948 and married a woman in 1974. MB began to live as a woman in 1991 and underwent sex reassignment surgery in 1995. MB does not, however, hold a full certificate of recognition of her change of gender, since, pursuant to the national legislation, in order for that certificate to be granted her marriage had to be annulled.² MB and her wife wish to remain married for religious reasons.

MB reached the age of 60 in 2008 and at that time applied for a retirement pension from the State. That application was rejected on the ground that, in the absence of a full gender recognition certificate, she could not be treated as a woman for the purposes of determining her statutory pensionable age. MB challenged that decision before the UK courts. She claims that the provision stating that she must not be married constitutes discrimination prohibited by EU law. The UK Supreme Court has asked the Court whether such a situation is compatible with the Directive.

In today's judgment, the Court, first, makes it clear that in the present case it is not being asked to consider, generally, whether the legal recognition of a change of gender may be made conditional on the annulment of a marriage entered into before that change of gender. However, it notes that, even though the legal recognition of change of gender and marriage are matters which fall within the competence of the Member States with regard to civil status, the Member States must respect EU law and, in particular, the principle of non-discrimination when they exercise their powers in that area.

The Court confirms its case-law which states that the Directive, in view of its purpose and the nature of the rights which it seeks to safeguard, also applies to discrimination arising from gender reassignment. In that regard it notes that, for the purposes of application of the Directive, persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender.

¹ 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 (OJ 1979 L 6, p. 24).

² The situation has changed in the United Kingdom. The Marriage (Same Sex Couples) Act 2013 came into force on 10 December 2014 and since then has allowed persons of the same sex to marry. Schedule 5 of that Act amended section 4 of the Gender Recognition Act 2004, with the result that a Gender Recognition Panel must now issue a full gender recognition certificate to a married applicant if the applicant's spouse consents.

The Court notes that the condition that a person's marriage must be annulled in order for that person to be eligible for a State retirement pension as from the statutory pensionable age for persons of that gender applies only to persons who have changed gender. **It concludes from this that the UK legislation treats less favourably a person who has changed gender after marrying than it treats a person who has retained his or her birth gender and is married.**

The Court then goes on to examine whether the situation of a person who changed gender after marrying and the situation of a person who has retained his or her birth gender and is married are comparable — a condition that must be met in order to determine whether a difference in treatment constitutes direct discrimination.

The Court notes, in this regard, that **the purpose of the UK's statutory pension scheme is to provide protection against the risks of old age** by conferring on the person concerned the right to a retirement pension acquired in relation to the contributions paid by that person during his or her working life, irrespective of marital status. **The Court concludes that, in the light of that subject matter and those conditions for entitlement, the situation of a person who changed gender after marrying and that of a person who has kept his or her birth gender and is married are comparable.** The Court points out that the purpose of the marriage annulment condition (that purpose being to avoid marriage between persons of the same sex) is unrelated to the retirement pension scheme. As a result, that purpose does not affect the comparability of the situation of the two categories of persons mentioned above, in the light of the subject matter and the conditions under which that pension is granted.

Since the difference in treatment in question does not come within any of the derogations allowed by EU law, **the Court finds that the UK legislation constitutes direct discrimination based on sex and is, for that reason, prohibited by the Directive.**

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 EU 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 judgment is published on the CURIA website on the day of delivery.

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