

Case C-623/23 [Melbán]ⁱ

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 October 2023

Referring court:

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

Date of the decision to refer:

21 September 2023

Applicant:

UV

Defendant:

Instituto Nacional de la Seguridad Social (INSS)

Subject matter of the main proceedings

Retirement pension – Supplement for pensioners who have had children – Claim for supplement made by a male pensioner

Subject matter and legal basis of the request

Article 267 TFEU – Request for a preliminary ruling on interpretation – Directive 79/7/EEC – Equal treatment for men and women in matters of social security – Pension supplement for pensioners who have had children – Granting of the supplement to all female pensioners – Requirements imposed on male pensioners – Direct discrimination – Possible justifications – Consequences of a potential court finding of discrimination

ⁱ The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

Questions referred for a preliminary ruling

- 1) Must 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, be interpreted as meaning that a national rule such as that contained in Article 60 of the Ley General de Seguridad Social (General Law on Social Security; ‘the LGSS’) does not comply with the principle of equal treatment preventing any discrimination on grounds of sex, recognised in Articles 1 and 4 of that directive, where that rule, under the heading ‘Supplement to contributory pensions to reduce the gender gap’, in the case of women who have had biological or adopted children and are recipients of such pensions, recognises the right to a supplement to contributory retirement and permanent incapacity pensions, without any other requirement and irrespective of the amount of their pensions, which is not recognised on the same terms in the case of men in an identical situation, in that, in order to access the supplement to their retirement or permanent incapacity pension, certain periods without making contributions, or making lower contributions, following the birth of the children or the adoption, are required, and, in particular, in the case of children born or adopted up to 31 December 1994, having more than one hundred and twenty days without making contributions in the nine months prior to the birth and the three years following that date or, in the case of adoption, from the date of the court order establishing it and in the three subsequent years, provided that the total of the amounts of the pensions granted is less than the total of the pensions to which the woman is entitled and, in the case of children born or adopted since 1 January 1995, that the total of the income on the basis of which contributions are calculated for the twenty-four months following the birth or the court order establishing the adoption is less, by more than 15 per cent, than that for the immediately preceding twenty-four months, provided that the total of the amounts of the pensions granted is less than the total of the pensions to which the woman is entitled?
- 2) Does 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, require, as a consequence of the discrimination resulting from the exclusion of the male pensioner, that he should be granted the supplement to the retirement pension, even though Article 60 of the LGSS provides that the supplement may only be granted to one of the parents, and, at the same time, is it necessary that the granting of the supplement to the male pensioner does not bring about, as an effect of the judgment of the Court of Justice and of the lack of alignment between the national rule and the Directive, the withdrawal of the supplement granted to the female

recipient of the retirement pension, where she satisfies the legal requirements of being the mother of one or more children?

Provisions of European Union law relied on

- Article 157(4) TFEU.
- Charter of Fundamental Rights of the European Union, Articles 20, 21, 23 and 34.
- 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, third recital and Article 1, Article 3(1), Article 4 and Article 7(1)(c).

Provisions of national law relied on

Constitución española (Spanish Constitution; ‘the Constitution’), Article 9(2) (promotion of equality by public authorities) and Article 14 (principle of equality).

Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres (Organic Law 3/2007 of 22 March 2007 on genuine equality between women and men; ‘Organic Law 3/2007’), Article 3, Article 4 and Article 11(1).

Ley General de la Seguridad Social (texto refundido aprobado por el Real Decreto Legislativo 8/2015, de 30 de octubre, BOE n.º 261, de 31 de octubre de 2015) (General Law on Social Security (recast text approved by Royal Legislative Decree 8/2015 of 30 October 2015, Official State Gazette No 261 of 31 October 2015); ‘the LGSS’), following the reform introduced by Real Decreto-ley 3/2021, de 2 de febrero (Royal Decree-law 3/2021 of 2 February 2021).

Article 60 of the LGSS, which regulates the ‘supplement to contributory pensions to reduce the gender gap’, provides as follows:

‘1. Women who have had one or more children and who are recipients of a contributory retirement, permanent incapacity or widow’s pension shall be entitled to a supplement for each child, on account of the impact which, in general, the gender gap has on the amount of the contributory pensions received by women from the social security system. The right to the supplement for each child shall be granted to the woman, or maintained, provided that the supplement is not claimed by and granted to the other parent and, where that other parent is also a woman, it shall be granted to the parent in receipt of public pensions the total amount of which is less.

For men to be entitled to receive the supplement, one of the following requirements must be satisfied:

- (a) Being granted a widower's pension on account of the death of the other parent of the children in common, provided that one of those children is entitled to receive an orphan's pension.
 - (b) Being entitled to a contributory retirement or permanent incapacity pension and having interrupted their professional career, or had it affected, on account of the birth or adoption, in accordance with the following conditions:
 - (1) In the case of children born or adopted up to 31 December 1994, having more than one hundred and twenty days without making contributions in the nine months prior to the birth and the three years following that date or, in the case of adoption, from the date of the court order establishing it and in the three subsequent years, provided that the total of the amounts of the pensions granted is less than the total of the pensions to which the woman is entitled.
 - (2) In the case of children born or adopted since 1 January 1995, that the total of the income on the basis of which contributions are calculated for the twenty-four months following the birth or the court order establishing the adoption is less, by more than 15 per cent, than that for the immediately preceding twenty-four months, provided that the total of the amounts of the pensions granted is less than the total of the pensions to which the woman is entitled.
- [...]
2. The granting of the supplement to the second parent shall imply the termination of the supplement already granted to the first parent [...].
 3. This supplement shall, for all relevant purposes, have the legal status of a contributory public pension.

The amount of the supplement per child shall be determined in the relevant Ley de Presupuestos Generales del Estado (Law on the General State Budget). [...].

The amount of the supplement shall not be taken into account in applying the maximum pension limit [...].'

The **thirty-seventh additional provision** of the LGSS states as follows:

'Temporal scope of the supplement to contributory pensions to reduce the gender gap.

1. The right to receive the supplement to contributory pensions to reduce the gender gap, provided for in Article 60, shall remain for as long as the

gender gap in retirement pensions becoming claimable in the previous year is greater than five (5) per cent.

2. For the purposes of this law, the gender gap in retirement pensions means the percentage difference between the average amount of the contributory retirement pensions becoming claimable in a given year by men and by women.

[...].’

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant is retired and the father of two children, born in 1991 and 1994. The retirement pension he receives is less than the retirement pension received by the mother of those children.
- 2 The applicant asked the Instituto Nacional de la Seguridad Social (INSS) (National Institute for Social Security, Spain) to grant him the supplement to contributory pensions to reduce the gender gap (‘the supplement at issue’), provided for in Article 60 of the LGSS.
- 3 The INSS issued a decision refusing him the supplement at issue, in view of the fact that he did not satisfy the requirements laid down in that article.
- 4 Subsequent to that decision, the mother of those children was granted the supplement at issue.
- 5 The applicant has brought a legal challenge to that decision, believing the regulation of the supplement at issue to be contrary to EU law and, in particular, to the principle of equal treatment for men and women in matters of social security. Indeed, the applicant argues that, while that supplement is granted to all female pensioners who have had children, additional requirements are imposed on male pensioners who have had children in order to be able to obtain it.

The essential arguments of the parties in the main proceedings

- 6 The INSS maintains that the regulation of the supplement complies with the requirements of Directive 79/7/EEC, in particular Article 4(1) and Article 7(1)(b) of that directive, and that it corrects the deficient regulation of the supplement that gave rise to the judgment of the Court of Justice of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)*, C-450/18, EU:C:2019:1075 (‘judgment C-450/18’). The INSS also refers to the legitimate and proportionate aim of the regulation of the supplement at issue and underlines the fact that it reflects the subordinate situation of women in the labour market, having historically assumed a principal role in the work of looking after children. It adds that, nevertheless, the door is left open such that those fathers who can

prove a detriment to their pension contribution history on account of the birth or adoption of a child and the assumption of those care responsibilities are able to access the supplement. The INSS also emphasises the temporal scope of the new supplementary payment, which is linked to achievement of the objective of reducing the gender gap in contributory pensions to below 5%. Lastly, the INSS argues that, if the regulation of the supplement at issue were found to constitute discrimination on grounds of sex pursuant to Directive 79/7, granting the supplement to the applicant would entail terminating the supplement that has already been granted to the mother, because the mother's pension is larger than that of the applicant.

- 7 The applicant argues that the regulation of the supplement is contrary to EU law, in particular the principle of equal treatment for men and women in matters of social security, and that the current Article 60 of the LGSS does not correct the previous regulation which the Court of Justice found to be contrary to EU law in judgment C-450/18.

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

First question referred

- 8 The applicant, who is the father of two children and receives a pension that is smaller than that of the mother of those children, is not entitled to the pension supplement, because he cannot provide evidence of 120 days without making contributions in the nine months prior to the birth of the children and the three years following that date, as required by Article 60 of the LGSS.
- 9 The supplement at issue is included in the scope of Directive 79/7, because it forms part of a statutory scheme to provide protection against one of the risks listed in Article 3(1) of that directive, namely old age or retirement, and it is directly and effectively linked to protection against that risk, as stated in judgment C-450/18.
- 10 There is unquestionably a difference in treatment among individuals receiving the supplement according to whether they are men or women. The national legislation accords less favourable treatment to male pensioners who have had biological or adopted children. Such less favourable treatment on grounds of sex may constitute direct discrimination within the meaning of Article 4(1) of Directive 79/7.
- 11 It is, therefore, necessary to examine whether that difference in treatment is justified.
 - (a) Justification based on the gender gap in pensions in general or on caring for and attending to children being work mainly done by women

The question arises of whether the difference in treatment may be regarded as justified in view of the well-known fact (on the basis of statistical data accepted

by all of the parties and, moreover, in the public domain) that, in Spain, balancing work and family life, as well as caring for, attending to and bringing up children, mostly falls to women. It is undeniable that there is historical and structural discrimination against women in the labour market on account of their assumption of the role of carers for children.

That fact often entails detriment to women's professional careers and also to the amount paid in [to their pensions] by means of their contributions to the social security system, which gives rise to gaps in contributions during the periods of caring for children who are below the age of majority, or lower contributions in comparison with those made by men. That has an ultimate impact on the gender gap in the Spanish pension system (a fact that is also well known and accepted by the parties).

In that regard, the Spanish legislature justified the supplement at issue on the basis of the historical and structural discrimination against women in the labour market on account of their assumption of the role of carers for children. According to that legislature, maternity has a decisive impact on a woman's career path during her professional life and that is one – if not the most important – cause of the gender gap: the greater the number of children, the smaller the number of years for which contributions are made, the smaller the proportion of full-time or equivalent contracts and the smaller, ultimately, the pension granted. The Spanish legislature adds that it is a question of repairing damage that women who are now accessing their pension have suffered throughout their professional career, that is, damage caused in the past, and that, therefore, it is perfectly compatible and consistent with the implementation of ambitious equality policies that correct the inequalities that currently exist in the labour market and the allocation of roles relating to caring for children. Consistent with that approach, the temporal scope of the new supplementary payment is linked to achievement of the objective of reducing the gender gap in contributory retirement pensions to below 5%.

Nevertheless, an objection to the above justification may be that, according to the legislation regulating the supplement at issue, the supplement is granted to women regardless of the real impact that maternity or adoption has had on their professional career, and also of the amount of their pension and of the amount paid in by means of contributions to the social security system. In order to access the supplement at issue, women are not required to have gaps in their contributions or contributions that are lower than those which men may have made during their working life, either in general or during particular periods of time close to the birth or adoption.

Moreover, the supplement at issue is granted to all women who access the retirement or permanent incapacity pension, irrespective of the amount of the pension they receive. Indeed, the supplement is granted to women even when their pension is larger than the average for the social security system or even if they have the maximum pension allowed by law.

In the present case, the retirement pension received by the mother is larger than that of the applicant. The applicant, however, is not entitled to the supplement at issue, because he does not have more than 120 days without making contributions in the nine months prior to the birth of his children and the three years following that date.

The automatic granting of the supplement at issue to women also does not require evidence to be provided of having duly attended to and cared for the biological or adopted children, nor of having exercised flexible working rights, such as working reduced hours or taking an extended leave of absence, linked to such care, nor of any loss of or detriment to their working or professional career.

According to the statistical data provided by the INSS, since the supplement at issue went into effect, 326 593 supplements to retirement and permanent incapacity pensions have been granted. Of that total, 279 910 were supplements granted to female pensioners and 46 683 were supplements granted to male pensioners. Of the total number of female pensioners receiving the supplement, 8 920 retirement pensions had reached the maximum legal pension, to which amount the amount of the supplement is added; in the case of retirement pension supplements granted to men, 1 402 had reached the maximum pension. Those data highlight the greater difficulties men have in satisfying the requirements for accessing the supplement at issue.

In these circumstances, the question arises of whether the gender gap in pensions in general, or the indisputable fact that it is women who, for the most part, do the work of attending to and caring for children and make use of flexible working rights, may be regarded as legitimate and proportionate reasons to establish a statutory scheme benefiting all women, as a positive action measure, which involves granting the pension supplement automatically, regardless of the amount of the contributions made during the periods of time following the birth of the child or the adoption, or even if there are no gaps in contributions (or exit from the labour market or decrease in earnings), while, in the case of men, the granting of the supplement is conditional on the existence of gaps in contributions or lower contributions during periods immediately following the birth or the adoption, even if the amount of their pension is lower than the average for the social security system

(b) Justification based on the detriment that women have suffered throughout their professional career, even if they are not suffering it at the time when they begin to receive their pension

The question arises of whether the fact that, in the words of the Spanish legislature, ‘it is a question of repairing damage that women who are now accessing their pension have suffered throughout their professional career, that is, damage caused in the past’ may be regarded as justification for the discrimination, especially if a judicial interpretation is required which takes into consideration the gender perspective, in so far as equal treatment for men and women is a formative

principle of the legal system, and which takes account of the cross-cutting nature of the principle of equality.

(c) Justification based on the protection of women in their capacity as parents or on the protection of maternity

As occurred with the previous regulations, which, in judgment C-450/18, the Court of Justice found to be contrary to Directive 79/7, there is nothing in the current Article 60 of the LGSS that establishes a link between the award of the pension supplement at issue and taking maternity leave or the disadvantages suffered by a woman in her career as a result of being absent from work during the period following the birth of a child.

In particular, that supplement is granted to women who have adopted children, which means that the national legislature did not intend to limit the application of Article 60 of the LGSS to protecting the biological condition of women who have given birth.

In addition, that provision does not require women to have actually stopped working at the time they had their children, and thus the condition relating to maternity leave is absent. That is particularly the case where a woman has given birth before entering the job market.

Therefore, the new pension supplement does not appear to fall within the scope of the exception established in Article 4(2) of Directive 79/7.

(d) Justification based on the exclusion of the pension supplement from the scope of Directive 79/7 as an advantage in respect of old-age pension schemes granted to persons who have brought up children and the acquisition of entitlements following periods of interruption of employment due to the bringing-up of children

The question arises of the possible application of the exception provided for in Article 7(1)(b) of Directive 79/7, according to which that directive is without prejudice to the right of Member States to exclude from its scope advantages in respect of old-age pension schemes granted to persons who have brought up children and the acquisition of benefit entitlements following periods of interruption of employment due to the bringing-up of children.

However, in judgment C-450/18, the Court of Justice held that Article 7(1)(b) of Directive 79/7 does not apply to a benefit such as the pension supplement at issue in that judgment and it appears that the same answer may be given in respect of the supplement now at issue, set out in the new wording of Article 60 of the LGSS.

(e) Justification as a positive action measure, pursuant to Article 157(4) TFEU

The question arises of whether the supplement may be placed among the positive action measures allowed under Article 157(4) TFEU.

However, as was stated in judgment C-450/18, ‘that provision cannot be applied to national legislation such as Article 60(1) of the LGSS, given that the pension supplement at issue is limited to granting women a surplus at the time when a pension is awarded, in particular in the case of permanent invalidity, without providing a remedy for the problems which they may encounter in the course of their professional career, and that supplement does not appear to compensate for the disadvantages to which women are exposed by helping them in that career and, thus, to ensure full equality in practice between men and women in working life’.

It appears that the same reasoning could be applied in respect of the supplement at issue, [set out] in the new wording of Article 60 of the LGSS.

Second question referred

- 12 In the event that the Court of Justice finds the regulation of the supplement at issue not to be consistent with the principle of equal treatment for men and women in matters of social security, a further question arises regarding the effects of such a finding.
- 13 Article 60 of the LGSS provides that the supplement gives rise to a single entitlement; that is, it may only be granted to one of the parents. Moreover, if the pensioner is a man, obtaining the supplement is conditional on his pension being smaller than that received by the mother.
- 14 That being the case, the question arises of whether the useful effect of Directive 79/7 and compliance with the principle of non-discrimination require that the supplement at issue also be granted to a male pensioner who claims it, even though the national legislation provides that it may only be granted to one of the two parents.
- 15 At the same time, given that, in the present case, the female pensioner is entitled to the supplement because she satisfies the legal requirements, the question arises of whether the existence of discrimination against the male pensioner, where that is found to be the case by the Court of Justice, would or would not prevent the entitlement to the supplement at issue being maintained for both parents, even if the national law states that it may only be granted to one of them.
- 16 In the present case, if the national provision were applied, granting the supplement to the applicant would entail the female pensioner losing the supplement granted to her, because her pension is larger than that of the applicant.
- 17 However, if the supplement at issue were only granted to the pensioner whose pension was lower in amount, the finding of the Court of Justice that discriminatory treatment exists would lack any useful effect. Furthermore, the

national provision according to which the supplement must be granted solely to the person whose pension is lower in amount refers to the situation in which there are two parents who satisfy the legal requirements for obtaining it. Accordingly, it is not applicable when that supplement is granted to a father who does not satisfy the requirements established in that provision.

WORKING DOCUMENT