OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 24 May 1988

My Lords,

Article 3 of Council Directive 76/207/EEC of 9 February 1976 (Official Journal 1976, L 39, p. 40) on the implementation of the principle of equal treatment for men and women, in particular as regards access to employment, provides:

'(1) Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

(2) To this end, Member States shall take the measures necessary to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;

(b) . . . ;

(c) . . .'

By way of exception, Article 2 (2) provides: 'This directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.' Article 9 (2) provides: 'Member States shall periodically assess the occupational activities referred to in Article 2 (2) in order to decide, in the light of social developments, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.'

Pursuant to Article 9 (1) of the directive, in the case of the French Republic the directive should have been implemented by 12 August 1978.

In 1982 French Law No 82-380 of 7 May 1982 inserted a new Article 18 *bis* into the Order of 4 February 1959 on the statut général des fonctionnaires (General Staff Regulations) enabling separate recruitment to be organized for certain corps in the French civil service where sex constituted a determining factor for the duties involved. That provision was re-enacted by Article 21 of Law No 84-16 of 11 January 1984 which is in the following terms:

'For certain corps a list of which will be drawn up by decree of the conseil d'état . . . separate recruitment may be

organized for men and women if belonging to one or other sex constitutes a determining factor for the performance of the duties carried out by persons in such corps.'

The list of corps for which separate recruitment could thus be organized was laid down by Decree No 82-886 of 15 October 1982 and maintained in force by Decree No 84-957 of 25 October 1984. The list specifies: police superintendents, captains and officers, inspectors, investigators and police constables and policemen in the national police force; assistants at the maisons d'éducation of the Légion d'honneur; corps in the external departments of the prison service, namely management, technical and vocational training and custodial staff; customs inspectors, investigators and officers; teachers; physical education and sports teachers and assistant teachers.

The three categories of customs inspectors, customs investigators and customs officers were removed from the list by Decree No 85-841 of 6 August 1985.

By an application lodged at the Court on 17 December 1986 the Commission asked for a declaration that:

by failing to take all necessary measures for the full and proper implementation of Council Directive 76/207/EEC within the period laid down in the first subparagraph of Article 9 (1) of that directive, and in particular by maintaining a system of separate recruitment according to sex for appointment to the civil service corps listed above, contrary to the requirements of that directive, the French Republic had failed to fulfil its obligations under the Treaty.

The Commission's application, it is said, is directed at both the legal provision for separate recruitment and the practice of such recruitment.

The Commission accepts that the directive permits separate recruitment to take place for assistants at the maisons d'éducation of the Légion d'honneur and for custodial staff in the prison service, but contends that separate recruitment for 'chefs de maison d'arrêt' responsible for the direction of prisons (which I refer to as 'governors') and for other officers in the list is not compatible with the directive.

After the application had been lodged, the French Republic adopted Decree No 87-55 of 2 February 1987 removing teachers from the list, and in its reply the Commission withdrew its claim as regards teachers.

After the hearing in the case, the French Republic adopted Decree No 88-476 of 29 April 1988 removing physical education and sports teachers and assistant teachers from the list. The Commission withdrew its claim as regards those categories but claimed its costs on that point, to which in my opinion it is entitled pursuant to Article 69 (4) of the Rules of Procedure.

The application, therefore, remains directed at the five corps in the national police force, management staff and technical and vocational training staff in the external

departments of the prison service and governors.

The French Government has told the Court that legislation is in train to remove from the list management staff in the external departments of the prison service and technical and vocational training staff in the external departments of the prison service. The infringement is in effect admitted in relation to these two categories of civil servants. Although the French Government has manifested its intention of complying with its obligations in regard to these categories, it seems to me that the Commission is entitled to the declaration it seeks as the legislation has not yet been adopted.

The remaining dispute, therefore, concerns the five corps in the national police force and governors of prisons.

Recruitment into the five corps of the police force does not involve the organization of separate competitions, with separate examinations and separate selection boards. There is a single competition, but the decision ordering the holding of a competition fixes in each case the percentage of posts to be allotted to men and women respectively. The effect is that a person of one sex who obtained good marks in a recruitment examination to one of those corps might be refused employment in favour of a person of the other sex with worse marks if the quota for the sex of the first person was exhausted and the other quota not. The Commission contends that between 10 and 30% of posts (depending on the corps concerned) have, in the past, been reserved for women upon recruitment.

It is not disputed that Article 3 of the directive applies to employment in the public service (paragraph 16 of the judgment in Case 248/83 *Commission* v *Germany* [1985] ECR 1459, at p. 1480) and the fixing of these quotas *ex facie* is contrary to the wording of that article, namely: 'there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts'.

The question is thus whether the rule and practice adopted fall within an exception to that provision.

The French Government's position is that the case comes within the terms of Article 2 (2) of the directive (occupational activities for which the sex of the worker constitutes a determining factor). It contends that the maintenance of public order requires a display of the capacity to use force at all times, which would be disrupted by large-scale recruitment of women. The need to dissuade potential troublemakers and the physical dangers of the job justify recruiting only a limited proportion of women.

The Commission replies that the dissuasive effect has more to do with the physical strength than with the sex of the person concerned.

It seems clear that Article 2 (2) is to be construed narrowly (paragraph 36 of the judgment in Case 222/84 *Johnston* v *Chief Constable of the RUC* [1986] ECR 1651). In my opinion, in order to decide whether that exception is satisfied it is necessary to have regard to the specific activities involved and to consider whether in those activities, by reason of their nature or the context in

which they are carried out, the sex of the worker constitutes a determining factor.

The activities of the five police corps in question are many and varied. It is accepted by the French Government that many of these activities can be carried out by either sex. The argument is, however, that police officers have to be interchangeable and that all may be liable to perform police duties which involve the display of force. The latter, it is said, are unsuitable to be carried out by women.

There is force in this argument, but it seems to me that it seeks to extend Article 2 (2) too far. It may well be that for some police activities (where the use of force or a display of the capacity to use force are required) sex could be a determining factor not simply because on average men are bigger and stronger than women (which in itself would not necessarily be sufficient) but because potential delinquents regard men as more ready to use force, and perhaps because men are more willing to use force. These, however, are matters which it seems to me not necessary or, on the evidence available, not possible to decide, especially if regard is had to the role which women now appear to play in warfare and in police forces in some parts of the world. There may be a difference between handling violent crowds and situations where one or two individuals are threatening violence. As to the former, the Commission appears to accept that the exception in Article 2 (2) would apply to such bodies as the compagnies républicaines de sécurité (CRS) whose activities regularly involve the use of force where substantial numbers of people may be involved. As to the latter, there may be an argument that in some situations with which the police have to deal the presence of women could be a deterrent to violence.

Even assuming, however, that in dealing with violence or threats of violence sex could be a determining factor, the French Government has not limited the quotas adopted to police officers who regularly do, or are regularly liable to, perform such a role. It has adopted the quotas for all police officers in the five corps concerned.

It seems to me that there are many degrees of violent behaviour and it has not been established that women cannot deal with any of them or that, even if for specific areas or for specific purposes the use of men only is justified, the engagement of women on a quota basis throughout the police force has been shown to be justified whatever the nature of the activities actually carried out. The French provisions lay down in advance a quota of jobs available to men and women without regard to the context in which the occupational activity is carried out.

Johnston was a special case in a situation 'characterized by frequent assassinations'. I do not read what is said, particularly in paragraphs 36 to 40 and in point 3 of the operative part of that judgment as applying to all Member States and at all times, even though serious outbreaks of violence have from time to time occurred in many of

them. The provisions in question here seem to me to be disproportionate (*Johnston*, paragraph 38).

Nor does the potential danger to women if outbreaks of violence occur, in my view, justify this across-the-board approach, whatever may be the position in regard to special corps dealing with serious and violent crowd or group disturbances. These risks do not fall, either, within Article 2 (3) of the directive which makes an exception for 'provisions concerning the protection of women' such as regards pregnancy and maternity, and does not cover risks and dangers which do not specifically affect women as such.

The French Government has also relied on Article 9 (2) of the directive, which mentions 'social developments', to argue that its system of separate recruitment is an evolutionary way of gradually attaining complete equality between men and women in matters of recruitment. In my view, that argument fails because Article 9 (2) comes into play only after an exception has been established under Article 2 (2) which in this case has not been established on the broad basis for which France contends.

The practical difficulty of applying the directive, which refers to specific occupational activities, to a civil service where recruitment is made into a corps but not into any specific job within that corps is also emphasized. While these difficulties exist under the present system, the Court has stated many times that, 'a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives' (e.g. in Case 42/80 *Commission* v *Italy* [1980] ECR 3635, at p. 3640). As I see it, it is for the French Government, pursuant to Article 189 of the EEC Treaty, to decide on and put into effect the measures necessary to comply with the directive in this regard, even if that means making changes in its civil service recruitment arrangements.

Finally, the French Government has mentioned other practical difficulties of recruiting women into the five corps of police in question on equal terms with men, such as the fact that a relatively large proportion of the women recruited have requested part-time work and the fact that a pregnant police officer can no longer wear a uniform and so has to be given a desk job. It does not seem to me that the making of requests for part-time work by workers of either sex can justify a discriminatory system of recruitment. Pregnancy of female staff has to be accommodated by employers as one of the consequences of the equal treatment required by the directive. Managerial difficulties of this kind cannot in my view justify a Member State in failing to implement the directive even in respect of such a vital service as the police.

Accordingly in my opinion the Commission is entitled to the declaration sought in relation to the five police corps in question.

The case of governors of prisons differs from the case of the five police corps just dealt with inasmuch as such posts are not filled by initial recruitment to a corps but are part of the career of prison wardens and are filled by way of promotion. Thus Article 1 of Decree No 77-1540 of 31 December 1977 provides that the corps of custodial staff in the external departments of the prison service comprises three grades, the highest being head warden ('surveillant chef'). By virtue of Article 15 of the decree prisons of less than 100 places may be run by a governor, and by Article 17 of the decree head wardens who have reached the third step in their grade are eligible for appointment as governors if they are placed on a list of suitable candidates after a joint committee of staff and administration representatives has been consulted. Although I use the word governor for 'chef de maison d'arrêt', the latter has to be distinguished from a 'directeur d'établissement pénitentiaire' who apparently has broader responsibilities and is appointed in a different way.

The Commission has accepted that custodial staff (i. e. wardens) below the rank of governor may be recruited on the basis of sex consistently with the directive, on the ground that for the purposes of Article 2 (2) sex is a determining factor for the employment of prison staff who actually carry out custodial duties. However, it maintains that the same does not apply to the appointment of governors because such persons do not exercise custodial duties but administrative ones and hence do not wear a uniform.

If regard is had to the nature of the duties of a governor and the context in which they are carried out, it does not seem to me that sex is a determining factor.

The French Government has shown that women and men are both appointed to these posts as governor, and the Commission has not rebutted the information given. The Commission, however, contends that to appoint a governor from amongst staff originally recruited separately by sex is itself vitiated by discrimination. I do not accept that argument, particularly as it is recognized by the Commission that custodial staff can be recruited separately. What matters is whether appointments to the post of governor are made on a discriminatory basis, which apparently is not the case here. In my opinion, therefore, the conditions applied in practice for the appointment of head wardens as governors are not contrary to Article 3 (1) of the directive.

There remain in force, however, the legislative provisions allowing for separate recruitment to the post of governor inasmuch as that post is comprised in the corps of custodial staff mentioned in the list. Even though the posts in question are filled by way of promotion, that in itself does not in my opinion take them outside the scope of Article 3 (1) of the directive, which specifically refers to access 'to all levels of the occupational hierarchy'. To that extent the French Government has maintained in force legislative provisions contrary to the directive and the Commission is entitled to the declaration sought.

Accordingly, in my opinion, the Commission is entitled to a declaration that the French Republic has failed to fulfil its obligations under the Treaty by failing to take all necessary measures for the full and proper implementation of Council Directive 76/207/EEC within the period laid down in the first subparagraph of Article 9 (1) of that directive, and in particular by maintaining, contrary to the requirements of that directive, a system of separate recruitment according to sex for appointment to the following civil service corps: police superintendents in the national police force, captains and officers in the national police force, inspectors in the national police force, investigators in the national police force, police constables and policemen in the national police force, management staff in the external departments of the prison service, technical and vocational training staff in the external departments of the prison service and 'chefs de maison d'arrêt' responsible for the direction of prisons.

The Commission is, in my opinion, entitled to its costs of the case since it has substantially succeeded in its claim.