

JUDGMENT OF THE COURT  
7 July 1992 \*

In Case C-9/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice of England and Wales, Queen's Bench Division, for a preliminary ruling in the proceedings pending before that court between

**The Queen**

and

**Secretary of State for Social Security**

**Ex parte the Equal Opportunities Commission**

on the interpretation of 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),

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco, M. Zuleeg and J. L. Murray, Judges,

Advocate General: W. Van Gerven,  
Registrar: J. A. Pompe,

\* Language of the case: English.

after considering the written observations submitted on behalf of:

- the Equal Opportunities Commission, by Anthony Lester QC, and Judith Beale, Barrister,
- the United Kingdom Government, by H. A. Kaya, of the Treasury Solicitor's Department, assisted by Richard Plender QC, and David Pannick, Barrister,
- the German Government, by Ernst Röder, Regierungsdirektor in the Federal Ministry of Economic Affairs, and Joachim Karl, Oberregierungsrat in that ministry,
- the Commission of the European Communities, by Karen Banks, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Equal Opportunities Commission, the United Kingdom Government, represented by Lucinda Hudson, assisted by Richard Plender QC, and David Pannick, Barrister, the German Government and the Commission at the hearing on 18 March 1992,

after hearing the Opinion of the Advocate General at the sitting on 12 May 1992,

gives the following

### Judgment

- 1 By order of 3 December 1990, which was received at the Court on 14 January 1991, the High Court of Justice of England and Wales, Queen's Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty

a question on the interpretation of Article 7(1)(a) of 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, hereinafter 'the Directive').

- 2 That question was raised in connection with an application for judicial review made in the High Court by the Equal Opportunities Commission (hereinafter 'the EOC'), a statutory body set up on the basis of Article 53 of the Sex Discrimination Act 1975 with the task, *inter alia*, of working towards the elimination of discrimination and promoting equality of opportunity between men and women generally.
- 3 The EOC seeks, first, a declaration that the United Kingdom State pension scheme unlawfully discriminates against men on the ground of their sex, inasmuch as it requires men to pay contributions for 44 years and women for 39 years in order to qualify for the same full basic retirement pension, and inasmuch as a man working between the ages of 60 and 64 pays contributions whereas a woman in the same situation does not; and, secondly, a declaration that the Secretary of State for Social Security is in breach of the obligation laid down in Article 5 of the Directive requiring Member States to take the necessary measures to ensure that any discriminatory provisions falling within the scope of the Directive are abolished.
- 4 Article 4(1) of the Directive provides that:

'1. The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to marital or family status, in particular as concerns:

— the scope of the schemes and the conditions of access thereto,

- the obligation to contribute and the calculation of contributions,
  
- the calculation of benefits including increases due in respect of a spouse and for dependants and the conditions governing the duration and retention of entitlement to benefits.'

5 Article 7(1) of the Directive allows Member States to exclude certain matters from the scope of the Directive, namely:

- '(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;
  
- (b) advantages in respect of old-age pension schemes granted to persons who have brought up children; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;
  
- (c) the granting of old-age or invalidity benefit entitlements by virtue of the derived entitlements of a wife;
  
- (d) the granting of increases of long-term invalidity, old-age, accidents at work and occupational disease benefits for a dependent wife;
  
- (e) the consequences of the exercise, before the adoption of this Directive, of a right of option not to acquire or incur obligations under a statutory scheme.'

6 It appears from the documents before the Court that in the United Kingdom all employers and the majority of the working population, whether employed or self-employed, are liable under the National Insurance Act 1946 to pay contributions to the national social security scheme, membership of which is compulsory. The Social Security Act 1975 (hereinafter 'the SSA') makes provision for the collection of national insurance contributions and for the payment of benefits. Benefits may be 'contributory', that is to say subject to the payment of contributions, or 'non-contributory', that is to say funded by general taxation. Contributory benefits include, in addition to benefits such as unemployment, sickness and invalidity benefits, the basic retirement pension, which is a weekly amount based on the number of years for which contributions were paid.

7 In order to qualify for a basic pension a person must have attained pensionable age and have satisfied the conditions laid down concerning contributions. Section 27(1) of the SSA defines pensionable age as 65 for men and 60 for women. Contributions are payable by workers throughout their working life. Under Article 27(2) of the SSA a person's working life commences with the tax year in which he attained the age of 16 and ends with the tax year in which he attained pensionable age or died before reaching that age.

8 Under section 5 of Schedule 3 to the SSA a full basic pension is payable only where a person has made contributions for 90% of his working life (that is to say, 39 of the 44 years for a woman and 44 of the 49 years for a man). A proportion of the full basic pension, corresponding to the periods for which contributions were actually made, is paid to persons who made contributions for 25% to 90% of their working life, no pension being payable in the case of persons who made contributions for less than 25% of their working life.

9 It is against that legislative background that the High Court, before ruling on the EOC's application, submitted the following preliminary question to the Court:

'Where

- (a) pursuant to Article 7(1)(a) of Directive 79/7/EEC a Member State preserves different pensionable ages for men and women (65 for men, 60 for women) for the purpose of granting old-age and retirement pensions, and
- (b) national insurance contributions fund a range of benefits including State retirement pension;

does Article 7(1)(a) of Directive 79/7/EEC permit a Member State to derogate from the principle of equal treatment for men and women in matters of social security set out in Article 4 thereof:

- (i) by requiring men to pay national insurance contributions for five years longer than women in order to be entitled to the same basic pension; and
- (ii) by requiring men who continue in gainful employment up to the age of 65 to continue to pay national insurance contributions up to that age, when women over the age of 60 are not required to pay national insurance contributions whether or not they remain in gainful employment after that age?'

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 It was common ground both in the proceedings in the High Court and in the written observations submitted to the Court that the application of the contributory pension scheme concerned in the main proceedings gives rise to the two forms of discrimination between men and women described in the order for reference: first, in order to qualify for the same full basic pension men must make contributions for 44 years and women for 39 years, the corollary of this being that a man who has made contributions for 39 years receives a lower basic pension than a woman who has made contributions for the same number of years; secondly, a man who is in gainful employment between the ages of 60 and 64 must make contributions whereas a woman of the same age who is in gainful employment is under no such obligation.

12 By its question the High Court seeks to ascertain whether those forms of discrimination, which are in principle contrary to Article 4(1) of the Directive, are none the less temporarily permissible by virtue of the power conferred upon Member States by Article 7(1)(a) to derogate from the Directive by fixing different pensionable ages for men and women for the purposes of granting old-age and retirement pensions. The question therefore is whether that power of derogation merely allows men and women to be treated unequally with respect to the moment at which they become entitled to a pension or whether it also covers other legislative and financial consequences flowing from a different pensionable age, such as the obligation to contribute until reaching that age.

13 Since the text of the derogation refers to 'the determination of pensionable age for the purpose of granting old-age and retirement pensions', it is clear that it concerns

the moment from which pensions become payable. The text does not, however, refer expressly to discrimination in respect of the extent of the obligation to contribute for the purposes of the pension or the amount thereof. Such forms of discrimination therefore fall within the scope of the derogation only if they are found to be necessary in order to achieve the objectives which the Directive is intended to pursue by allowing Member States to retain a different pensionable age for men and women.

- 14 In that regard it should be noted that the express purpose of the Directive is to achieve the progressive implementation of the principle of equal treatment for men and women in matters of social security. The progressive nature of the implementation is reflected in a number of derogations, including the one provided for by Article 7(1)(a), and manifests itself by the absence of any precise time-limit for their maintenance. Thus, Article 7(2) requires Member States periodically to examine matters excluded under Paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether the maintenance of the exclusions can be justified. Moreover, Article 8(2) requires Member States to communicate to the Commission *inter alia* the provisions adopted pursuant to Article 7(2) and to inform it of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date.

- 15 Although the preamble to the Directive does not state the reasons for the derogations which it lays down, it can be deduced from the nature of the exceptions contained in Article 7(1) of the Directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. Those advantages include the possibility for female workers of qualifying for a pension earlier than male workers, as envisaged by Article 7(1)(a) of the Directive.



- 16 In a system such as the one concerned in the main proceedings, whose financial equilibrium is based on men contributing for a longer period than women, a different pensionable age for men and women cannot be maintained without altering the existing financial equilibrium, unless such inequality with respect to the length of contribution periods is also maintained.
- 17 Consequently, any interpretation of Article 7(1) of the Directive whose effect would be to restrict the scope of the derogations provided for in subparagraph (a) to that of allowing Member States to provide that men and women do not become entitled to a pension at the same time and to exclude discrimination with respect to contribution periods would lead to the financial disequilibrium of the pension schemes.
- 18 Interpreted in that way, the derogation laid down in Article 7(1)(a) would be rendered nugatory since the consequence would be that the Member States concerned would have been obliged, before the expiry of the six-year period laid down by Article 8 for the implementation of the Directive, to undertake a general restructuring of the system of contributions and benefits and to alter substantially a financial equilibrium based on an obligation to contribute until pensionable ages that were different for men and women.
- 19 To exclude from the derogation discrimination concerning contribution periods, determined according to pensionable age, would thus be contrary to the very objective of Article 7(1). Article 7(1)(a) of the Directive must therefore be interpreted as authorizing the maintenance of different contribution periods for male and female workers under pension schemes such as the one concerned in the main proceedings.

20 On the basis of the foregoing considerations it must be held, in reply to the preliminary question put by the High Court, that Article 7(1)(a) of 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 is to be interpreted as authorizing the determination of a statutory pensionable age which differs according to sex for the purposes of granting old-age and retirement pensions and also forms of discrimination such as those described by the national court which are necessarily linked to that difference.

### Costs

21 The costs incurred by the German and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

### THE COURT

in answer to the question referred to it by the High Court of Justice of England and Wales, Queen's Bench Division, by order of 3 December 1990, hereby rules:

**Article 7(1)(a) of 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 must be interpreted as authorizing the determination of a statutory pensionable age which differs according to sex for the purposes of granting old-age and retirement pensions and also forms**

of discrimination such as those described by the national court which are necessarily linked to that difference.

Due	Joliet	Schockweiler	Grévisse
Kapteyn	Mancini	Moitinho de Almeida	
Rodríguez Iglesias	Diez de Velasco	Zuleeg	Murray

Delivered in open court in Luxembourg on 7 July 1992.

J.-G. Giraud  
Registrar

O. Due  
President