

Case C-626/23 [Sergamo]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:

12 October 2023

Referring court:

Tribunal Superior de Justicia de Madrid (Spain)

Date of the decision to refer:

13 September 2023

Appellant:

XXX

Respondent:

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

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.

Question referred for a preliminary ruling

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, and Articles 20, 21 and 23 and Article 34(1) of the Charter of Fundamental Rights of the European Union be interpreted as meaning that they preclude national legislation, such as that at issue in the main proceedings, which establishes the right to a pension supplement for recipients of contributory retirement pensions who have had biological or adopted children, which is granted automatically to women, while, in the case of men, they are required either to be in receipt of a widower's pension on account of the death of the other parent, with one of the children being in receipt of an orphan's pension, or to have had their professional career interrupted or harmed (as provided for by law and described previously) on account of the birth or adoption of the child?

Provisions of European Union law relied on

- Charter of Fundamental Rights of the European Union, Articles 20, 21 and 23 and Article 34(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, second and third recitals, Articles 1 and 2, Article 3(1) and Articles 4 and 7.

Provisions of national law relied on

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 appellant is retired and the father of three children, born in 1979, 1984 and 1986. He 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.
- 2 The INSS did not respond to that request. The appellant brought a claim against that implied rejection before the Juzgado de lo Social n.º 4 de Madrid (Madrid Social Court No 4, Spain), on the basis, in essence, that that rejection was unlawful because the regulation of the supplement at issue is contrary to EU law, in particular Directive 79/7/EEC.
- 3 Madrid Social Court No 4 rejected the claim, essentially considering Article 60 of the LGSS to be consistent with EU law.
- 4 The appellant has lodged an appeal against the decision of that court with the Tribunal Superior de Justicia de Madrid (Madrid High Court of Justice, Spain).

The essential arguments of the parties in the main proceedings

- 5 The applicant maintains that Article 60 of the LGSS infringes Directive 79/7/EEC and the case-law established in 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’). He argues that the difference in treatment between men and women contained in Article 60 of the LGSS, as originally worded, which was found to be contrary to Directive 79/7/EEC by the Court of Justice, is maintained in the current wording of Article 60 of the LGSS, since the requirement that they should have interrupted their professional career does not apply to women, but does apply to men.
- 6 No arguments of the INSS appear in the order for reference.

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

- 7 It is necessary to determine the compatibility of the regulation of the supplement at issue with Directive 79/7/EEC and with Articles 20, 21 and 23 and Article 34(1) of the Charter.

- 8 Indeed, the regulation of the supplement in question includes a difference in treatment between men and women, since it requires the former to show that they satisfy certain requirements which the latter are not required to satisfy. It must be borne in mind that judgment C-450/18 found that Directive 79/7/EEC must be interpreted as meaning that it precludes national legislation, such as that contained in the same Article 60 of the LGSS prior to its reform by Royal Decree-law 3/2021, which made provision for the right to a pension supplement for women who had had at least two biological or adopted children and who were in receipt of contributory pensions from the national social security system, while men in an identical situation did not have a right to such a pension supplement.
- 9 The Spanish legislature reacted to that judgment by amending Article 60 of the LGSS and changing the name of the supplement. It now becomes payable on account of having had one or more children, although the amount varies according to the number of children. In addition, it was established that the supplement at issue will cease to have effect when the percentage difference between the average amount of the contributory retirement pensions becoming claimable in a given year by men and by women ('the gender gap') ceases to be greater than 5%.
- 10 The new rules also allow men to access the supplement at issue, but they impose on them certain additional requirements that are not imposed on women:
 - either they must be in receipt of a widower's pension on account of the death of the other parent of the children in common, with the further requirement that one of those children is entitled to receive an orphan's pension (it must be borne in mind that the orphan's pension is not granted or is terminated when the child concerned reaches the age of 23, unless he or she has a disability);
 - or they must have interrupted their professional career, or had it affected, on account of the birth or adoption, in accordance with certain specific legal conditions which are different for children born or adopted up to 31 December 1994.
- 11 Those requirements do not apply to women, such that women are entitled to the supplement at issue automatically, if they have had one or more children. Those requirements always apply to male parents and not to female parents, regardless of the sex of the other parent, which may be the same or otherwise.
- 12 When the law introduces a difference in treatment on grounds of sex, it is necessary for the legislature to provide sufficient justification for that difference on the basis of objectives designed to compensate for basic social inequalities; such justification should not be limited to declaring that the purpose of the measure is to restore fundamental equality, but rather it should also be proved, in a rigorous and serious manner, that the impact of the difference is sufficient to achieve that aim and, moreover, that the sacrifice imposed on the formal right of

equality is proportionate to the objective pursued. To merely state the aim, therefore, is not sufficient; it is also necessary to configure the measure in a suitable and proportionate manner.

- 13 In the present case, the justification for the difference in treatment on grounds of sex given in the preamble to Royal Decree-law 3/2021 is limited to stating that the design of the legislation seeks to configure the supplement at issue as a lever for reducing the gender gap – which reflects the subordinate situation of women in the labour market, having historically assumed a principal role in the work of looking after children – but that it is done leaving the door 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. That is, according to the preamble, positive action in favour of women (‘if neither of the parents can prove a detriment to their contribution history, the supplement is received by the woman’) is combined with provision leaving the door open to those men who may find themselves in a comparable situation.
- 14 However, that justification is insufficient. For one thing, the statement that, if neither of the parents can prove a detriment to their contribution history, the supplement at issue is received by the woman, is not true, since, when there is no woman receiving the supplement (because the relevant woman is not entitled to a pension to be supplemented, because she has not claimed the supplement or because neither of the parents is a woman), male parents are still required to prove a detriment to their professional career in order to access the supplement. The only exception is the situation where there is a widower’s pension, but, in that case, there is the further requirement that one of the children is in receipt of an orphan’s pension, which makes it a very restricted situation. Moreover, where one parent is a man and the other is a woman, if the former can prove a detriment and the latter cannot, the supplement at issue is still granted to the woman, unless the total of the amounts of the pensions granted to the man is less than the total of the pensions to which the woman is entitled.
- 15 Secondly, the specific configuration of the detriment to their professional career that men are required to prove raises serious questions. The impact studies which the legislature may have used to configure those requirements are unknown. Prima facie, it seems that, as they are designed, [the requirements] de facto prevent the majority of men from accessing the supplement at issue and would most likely prevent a large proportion of women from accessing it, if they were applied to them. Thus, the purpose of those requirements may be to restore the difference in treatment between men and women which was held to be contrary to EU law in judgment C-450/18. Furthermore, as they are configured, there does not appear to be any relationship between the detriment caused to the professional career and the impact on the amount of the pension compensated for by means of a particular percentage.

- 16 The fact that those requirements are not applicable to women also means that the supplement at issue, designed to compensate for the detriment to an individual's professional career, is even granted to those women who have not had their professional career affected. It must be borne in mind that this supplement is configured as a percentage of the pension and, consequently, it benefits individuals with higher levels of earnings (and, therefore, better pensions) more, even though within that social group is where bringing up children may be thought to cause the least detriment to the parents' professional careers, as they have the option of paying for resources from outside the family to that end. In the extreme case of parents with low-paying jobs who have been removed from the labour market by bringing up children, it may be that they are not entitled to any pension at all and, therefore, would not be entitled to such a supplement. These are considerations that are not in any way marginal when the quantity of public resources involved in paying the supplement at issue is certainly considerable.
- 17 In addition, it must be emphasised that the supplements of the two parents are incompatible and, in the event that both are entitled to the supplement:
- a) if the two parents are women, it is granted to the parent who receives public pensions the total amount of which is less;
 - b) if the two parents are men, it is granted to the parent who receives public pensions the total amount of which is less;
 - c) if one parent is a woman and the other a man, it is only granted to the man if the total of the amounts of the pensions granted to the man is less than the total of the pensions to which the woman is entitled.
- 18 In the present case, the problem of both parents receiving the supplement and the compatibility of those supplements does not arise, but rather only [that of] the man's right to the supplement, owing to the fact that certain requirements are imposed on him which he does not satisfy and which are not imposed on women in order to access the supplement.
- 19 However, the fact that the law now establishes that the supplements of the two parents are incompatible, such that, when both of them are entitled to it, it always supplements the pension which is lower in amount, does seem relevant. In that regard, given that the gender gap is defined in law as the difference between the average amount of men's and women's pensions, it might be asked whether, in order to achieve the equalisation objective set by the law (a gender gap which does not exceed 5%), it would be sufficient to grant the supplement at issue only to the pensions that are lower in amount, regardless of the sex of the parent.
- 20 The question, therefore, is whether those requirements, which introduce a difference according to the sex of the recipient, may be regarded as compatible with the principle of equality between men and women, in view of the fact that 'the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented

sex’ (Article 23 of the Charter). The question also arises of whether those requirements could be understood to constitute an exclusion from the principle of equality pursuant to Article 7(1)(b) of Directive 79/7/EEC.

WORKING DOCUMENT