

JUDGMENT OF THE COURT (Fifth Chamber)
11 July 1991 *

In Case C-31/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Social Security Commissioners for a preliminary ruling in the proceedings pending before that tribunal between

Elsie Rita Johnson

and

Chief Adjudication Officer

on the interpretation of Articles 2 and 4 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 (Official Journal 1979 L 6, p. 24),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber,
J. C. Rodríguez Iglesias, Sir Gordon Slynn, R. Joliet and M. Zuleeg, Judges,

Advocate General: M. Darmon,

Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Elsie Rita Johnson, by Vicki Chapman, Solicitor, London,

* Language of the case: English.

- the United Kingdom, by H. A. Kaya, Treasury Solicitor, London, acting as Agent,
- the Commission of the European Communities, by Karen Banks, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument from the applicant, represented by Richard Drabble, Barrister, from the United Kingdom, represented by H. A. Kaya, acting as Agent, Robert Jay, Barrister, and John Laws, Barrister, and from the Commission at the hearing on 5 February 1991,

after hearing the Opinion of the Advocate General at the sitting on 5 March 1991,
gives the following

Judgment

- ¹ By a decision of 25 January 1990, which was received at the Court Registry on 31 January 1990, the Social Security Commissioners referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 2 and 4 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 (Official Journal 1979 L 6, p. 24).
- ² Those questions were raised in proceedings before the Social Security Commissioners between Elsie Rita Johnson and the Adjudication Officer concerning the latter's refusal to grant Mrs Johnson her claim for severe disablement allowance.

- 3 It appears from the documents before the Court that Mrs Johnson ceased working in about 1970 to look after her daughter, who was then aged six and with whom she lived alone. In 1980 she wished to resume working but was unable to do so because of a back condition. In 1981, by reason of her incapacity for work she was awarded a non-contributory invalidity pension pursuant to Section 36(2) of the Social Security Act 1975 which was then in force. However, payment of the non-contributory invalidity pension was stopped when Mrs Johnson began to cohabit with her present partner on the ground that she could not establish that she fulfilled the additional condition imposed by Section 36(2) on cohabiting women, namely that she should be incapable of performing normal household duties.
- 4 By Section 11 of the Health and Social Security Act 1984 the non-contributory invalidity pension was abolished as from 20 November 1984 and the new benefit, the severe disablement allowance, which was open to claimants of both sexes on the same conditions, was introduced with effect from 29 November 1984. However, Regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984 allowed persons who could have claimed the old non-contributory invalidity pension to benefit automatically from the new severe disablement allowance as from 29 November 1984 without having to show that they fulfilled the new conditions.
- 5 On 17 August 1987, Mrs Johnson made a claim through a Citizens' Advice Bureau for a severe disablement allowance based on Regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984. She claimed that she would have been entitled to the non-contributory invalidity pension during the period immediately preceding 29 November 1984 were it not for the household duties test which constituted an additional condition for married or cohabiting women and which, as the Court of Justice held in its judgment of 24 June 1987 in Case 384/85 (*Jean Borrie Clarke v Chief Adjudication Officer* [1987] ECR 2865), must be considered to be discriminatory.
- 6 The Adjudication Officer rejected that claim by a decision dated 13 November 1987 and her appeal was dismissed by Sutton Social Security Appeal Tribunal by a decision of 24 October 1988.

- 7 Before the Social Security Commissioners, before whom the matter came on appeal, the Adjudication Officer contended firstly that Mrs Johnson did not fall within the personal scope of Directive 79/7/EEC, as defined by Article 2 thereof. With reference to the judgment of the Court of Justice of 27 June 1989 in Joined Cases 48, 106 and 107/88 (*J. E. G. Achterberg-te Riele and Others v Sociale Verzekeringsbank, Amsterdam* [1989] ECR 1963) he argued that Mrs Johnson could not be regarded as a person whose activity had been interrupted by illness or by any of the other risks specified in Article 3 of the directive because she had voluntarily ceased working in order to look after her daughter. Secondly, the Adjudication Officer maintained that, even if she fell within the personal scope of Directive 79/7/EEC, Mrs Johnson, in so far as she had never claimed non-contributory invalidity pension before 29 November 1984, did not fulfil the conditions for obtaining severe disablement allowance since she could not show that she was entitled to non-contributory invalidity pension or, at any rate, that she had made a claim for it.

- 8 Taking the view that they needed an interpretation of the directive in order to resolve the matter, the Social Security Commissioners stayed the proceedings and referred the following questions to the Court for a preliminary ruling:
 - ‘1. Is Article 2 of Directive 79/7/EEC to be interpreted as including within its personal scope a woman (or man) who was a worker but who left employment for the purposes of child care and who was later prevented from returning to employment by illness?

 2. In particular, is such a woman (or man) to be regarded as included within the personal scope of the directive if she would be working or seeking employment but for illness, or is it necessary in all cases for a person who claims to be within the personal scope of the directive to have left employment in the first place not because of child care but because of the materialization of one of the risks referred to in Article 3?

 3. Is it material for the consideration of the position of such a woman in relation to Article 2 of the directive to determine whether or not she has sought employment in the period between the end of her child care responsibilities and the onset of the illness that now prevents her from working?

4. Does Article 4 of Directive 79/7/EEC have direct effect so as to provide a woman with a right to benefit (benefit "B") for the period after she makes her claim in circumstances where: -
 - (i) a Member State had provided an invalidity benefit (such as the non-contributory invalidity benefit considered in *Clarke*) (benefit "A") that was subject to a provision preventing married or co-habiting women qualifying for it unless they met an additional test not applied to any man;
 - (ii) benefit "A" has been abolished and replaced by benefit "B";
 - (iii) entitlement to benefit "B" is at least in some cases based on prior entitlement to the abolished benefit "A";
 - (iv) the woman did not establish entitlement to benefit "A" as a matter of domestic law, by making a claim for it before its abolition, and any claim now made would not secure entitlement to benefit because entitlement cannot be obtained for any period more than 12 months before the date on which a claim for that benefit is made?
- 9 Reference is made to the Report for the Hearing for a more detailed account of the facts of and legal background to the case before the national court, the course of the procedure and the written observations submitted to the Court, which are discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 10 The questions referred by the Social Security Commissioners raise two distinct issues: first, the determination of the personal scope of Directive 79/7/EEC (first, second and third questions) and, secondly, the determination of the meaning of the principle of equal treatment referred to in Article 4 of Directive 75/7/EEC with regard to the conditions for obtaining a social security benefit (fourth question).

- 11 According to Article 1 of Directive 79/7/EEC, the purpose of the directive

‘... is the progressive implementation, in the field of social security and other elements of social protection provided for in Article 3, of the principle of equal treatment for men and women in matters of social security, hereinafter referred to as “the principle of equal treatment”.’

- 12 According to Article 2, the directive

‘shall apply to the working population — including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment — and to retired or invalided workers and self-employed persons.’

- 13 According to Article 3(1), the directive is to apply to

‘(a) statutory schemes which provide protection against the following risks:

— sickness

— invalidity

— old age

— accidents at work and occupational diseases

— unemployment

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a)’.

14 Article 4 provides that:

‘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.’

15 According to Article 7(1), the directive

‘... shall be without prejudice to the right of Member States to exclude from its scope:

(a) ...

(b) ... ; the acquisition of benefit entitlements following periods of interruption of employment due to the bringing up of children;’

The personal scope of Directive 79/7/EEC

16 By the first three questions, which should be examined together, the Social Security Commissioners essentially seek to determine whether or not a person who has interrupted his or her occupational activity in order to attend to the upbringing of his or her children and who is prevented by illness from returning to work falls within the personal scope of Directive 79/7/EEC.

- 17 More particularly, the Court is asked by the second and third questions to clarify in this regard

whether a person who, in the absence of illness, is working or seeking employment must, in order to come within the scope of Directive 79/7/EEC, have given up his or her previous occupational activity owing to the materialization of one of the risks specified in Article 3 of the directive;

whether the fact that the person concerned was seeking or was not seeking employment at the time of the materialization of one of the risks specified in Article 3 of the directive is a determining factor in answering the question whether that person falls within the scope of Directive 79/7/EEC.

- 18 It follows from Articles 2 and 3 of Directive 79/7/EEC, read in conjunction, that the directive applies only to persons who are available on the labour market or who have ceased to be so owing to the materialization of one of the risks specified in the directive.
- 19 This means, firstly, that a person who has given up his or her occupational activity in order to attend to the upbringing of his or her children does not fall within the scope of Directive 79/7/EEC as a worker whose activity has been interrupted by one of the risks specified in the directive, since the interruption of employment due to the bringing up of children is not one of the risks listed in Article 3(1)(a) of the directive.
- 20 Secondly, it means that that person may still be regarded as falling within the scope of Directive 79/7/EEC as a person seeking employment whose search is made impossible by the materialization of one of the risks specified in Article 3(1)(a) of the directive.

- 21 In order to be a member of the working population within the meaning of Article 2 of the directive, it is sufficient for the person concerned to be a person seeking employment; no distinction according to the reason for which the person concerned left previous employment or even according to whether or not that person previously carried on an occupational activity is necessary.
- 22 However, the person concerned must prove that he or she was a person seeking employment when one of the risks specified in Article 3(1)(a) of the directive materialized. In this regard, it is for the national court to determine whether the person concerned was actually seeking employment at the time when he or she was affected by one of the risks specified in the directive by looking to see in particular whether that person was registered with an employment organization responsible for dealing with offers of employment or assisting persons seeking employment, whether the person had sent job applications to employers and whether certificates were available from firms stating that the person concerned had attended interviews.
- 23 It follows that the protection guaranteed by Directive 79/7/EEC to persons who have given up their occupational activity in order to attend to the upbringing of their children is afforded only to those persons in that category who suffered incapacity for work during a period in which they were seeking employment.
- 24 As the United Kingdom and the Commission have pointed out, it is mainly women who interrupt their occupational activities in order to attend to the upbringing of children and who are therefore put at a disadvantage when they fall ill or suffer invalidity before having even to resume looking for employment.
- 25 It must be observed, however, that according to the first recital of the preamble to Directive 79/7/EEC and Article 1 thereof, the directive has in view only the progressive implementation of the principle of equal treatment for men and women in matters of social security. As far as the social protection of mothers remaining at home is concerned, it follows from Article 7(1)(b) of Directive 79/7/EEC that the

acquisition of entitlement to benefits following periods of interruption of employment due to the upbringing of children is still a matter for the Member States to regulate.

- 26 In those circumstances, it is for the Community legislature to take such measures as it considers appropriate to remove the discrimination which still exists in this regard in some bodies of national legislation.
- 27 The answer to the first three questions must therefore be that Article 2 of Directive 79/7/EEC must be interpreted as meaning that the directive does not apply to a person who has interrupted his or her occupational activity in order to attend to the upbringing of his or her children and who is prevented by illness from returning to employment unless that person was seeking employment and his or her search was interrupted by the materialization of one of the risks specified in Article 3(1)(a) of the directive, it being unnecessary to make a distinction according to the reason for which that person left previous employment. It is for the national court to determine that the person relying on Directive 79/7/EEC was actually seeking employment at the time when one of the risks specified in Article 3(1)(a) of the directive materialized.

The principle of equal treatment referred to in Article 4 of Directive 79/7/EEC

- 28 By its fourth question the Social Security Commissioners seek to ascertain whether Article 4 of Directive 79/7/EEC is preclusive of the effects of national legislation which makes entitlement to a benefit subject to the previous submission of a claim for a different benefit which has since been abolished and which entailed a condition discriminating against female workers. If the answer to that question is in the affirmative, they seek to ascertain which consequences ensue from the fact that the national legislation in question is incompatible with Article 4 of the directive.
- 29 It appears from the documents before the Court that the effect of Section 165A of the Social Security Act 1975, which lays down the conditions entitling the person concerned to claim a benefit, is that a person who has not claimed payment of the non-contributory invalidity pension before the abolition of that benefit may not claim automatic entitlement to the severe disablement allowance under Regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984.

- 30 In this regard, it must be borne in mind that the grant of the non-contributory invalidity pension to married or cohabiting women was subject, *inter alia*, to the condition that the woman concerned was not fit for household duties, a condition whose discriminatory character is not disputed.
- 31 By requiring those women to have applied for the non-contributory invalidity pension in order to be able to claim the severe disablement allowance, Section 165A, cited above, in conjunction with Regulation 20(1), cited above, maintains that discrimination because virtually all the women who suffered the discrimination entailed by the household duties test may not in future claim automatic payment of the severe disablement allowance, whereas men in a comparable situation are automatically entitled to it. Such men were in fact entitled to the non-contributory invalidity pension and could therefore reasonably claim payment of that benefit whereas women had no reason to make such a claim since they knew that they had no entitlement to it.
- 32 As the Court of Justice held in paragraph 10 of its judgment in *Borrie Clarke*, cited above, the directive does not provide for any derogation from the principle of equal treatment laid down in Article 4(1) of the directive so as to authorize the continuation of the discriminatory effects of earlier provisions of national law. Therefore, after 22 December 1984, the date on which the period laid down by the directive for bringing national legislation into conformity with the directive expired, a Member State may not maintain any inequalities of treatment.
- 33 It must accordingly be held that national legislation such as the combination of Section 165A of the Social Security Act 1975 and Regulation 20(1) of the Social Security (Severe Disablement Allowance) Regulations 1984, which makes entitlement to a benefit subject to the previous submission of a claim for a different benefit which entailed a condition discriminating against female workers, must be regarded as incompatible with Article 4(1) of Directive 79/7/EEC.
- 34 Finally, it must be observed, as the Court of Justice held in paragraph 9 of its judgment in *Borrie Clarke*, cited above, that, standing by itself, and in the light of the objective and contents of the directive, Article 4(1) is sufficiently precise to be

relied upon by an individual before a national court so as to lead that court to set aside any national provision not in conformity with that article.

- 35 It is also apparent from paragraph 12 of that judgment that since 23 December 1984 women are entitled to be treated in the same manner and to have the same rules applied to them as men who are in the same situation, since, where the directive has not been implemented correctly, those rules remain the only valid point of reference.
- 36 The answer to the fourth question must therefore be that since 23 December 1984 it has been possible to rely on Article 4 of Directive 79/7/EEC in order to have set aside national legislation which makes entitlement to a benefit subject to the previous submission of a claim in respect of a different benefit which has since been abolished and which entailed a condition discriminating against female workers. In the absence of appropriate measures for implementing Article 4 of Directive 79/7/EEC, women placed at a disadvantage by the maintenance of the discrimination are entitled to be treated in the same manner and to have the same rules applied to them as men who are in the same situation, since, where the directive has not been implemented correctly, those rules remain the only valid point of reference.

Costs

- 37 The costs incurred by the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Social Security Commissioners by decision of 25 January 1990, hereby rules:

1. Article 2 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 meaning that the directive does not apply to a person who has interrupted his or her occupational activity in order to attend to the upbringing of his or her children and who is prevented by illness from returning to employment unless that person was seeking employment and his or her search was interrupted by the materialization of one of the risks specified in Article 3(1)(a) of the directive, it being unnecessary to make a distinction according to the reason for which that person left previous employment. It is for the national court to determine that the person relying on Directive 79/7/EEC was actually seeking employment at the time when one of the risks specified in Article 3(1)(a) of the directive materialized.
2. Since 23 December 1984 it has been possible to rely on Article 4 of Directive 79/7/EEC in order to have set aside national legislation which makes entitlement to a benefit subject to the previous submission of a claim in respect of a different benefit which has since been abolished and which entailed a condition discriminating against female workers. In the absence of appropriate measures for implementing Article 4 of Directive 79/7/EEC, women placed at a disadvantage by the maintenance of the discrimination are entitled to be treated in the same manner and to have the same rules applied to them as men who are in the same situation, since, where the directive has not been implemented correctly, those rules remain the only valid point of reference.

Moitinho de Almeida

Rodríguez Iglesias

Slynn

Joliet

Zuleeg

Delivered in open court in Luxembourg on 11 July 1991.

J.-G. Giraud

J. C. Moitinho de Almeida

Registrar

President of the Fifth Chamber