

JUDGMENT OF THE COURT (Sixth Chamber)  
30 March 1993 \*

In Case C-328/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the House of Lords for a preliminary ruling in the proceedings pending before that court between

Secretary of State for Social Security

and

Evelyn Thomas,

Frances Iris Cooze,

Joyce Beard,

Sarah Murphy,

Eleanor Ethel Morley,

The Equal Opportunities Commission,

on the interpretation of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation on the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24),

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, G. F. Mancini, F. A. Schockweiler, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

\* Language of the case: English.

Advocate General: G. Tesauero,  
Registrar: Lynn Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Evelyn Thomas, Frances Cooze, Joyce Beard, Eleanor Ethel Morley and Sarah Murphy and the Equal Opportunities Commission, by J. A. Lakin, Solicitor and Legal Adviser, of the Equal Opportunities Commission, represented by Anthony Lester, QC, and Judith Beale, Beverley Lang and Mark Rowland, Barristers at Law,
- the Government of the Federal Republic of Germany, by Ernst Röder, Ministerialrat in the Federal Ministry for Economic Affairs, acting as Agent,
- the United Kingdom, by S. Lucinda Hudson, of the Treasury Solicitor's Department, acting as Agent, assisted by Richard Plender, QC,
- 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 Evelyn Thomas, Frances Cooze, Joyce Beard, Eleanor Ethel Morley and Sarah Murphy and the Equal Opportunities Commission, the United Kingdom and the Commission at the hearing on 26 November 1992,

after hearing the Opinion of the Advocate General at the sitting on 27 January 1993,

gives the following

## Judgment

- 1 By judgment of 27 November 1991, which was received at the Court on 17 December 1991, the House of Lords referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions 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).
- 2 Those questions were raised in proceedings between Evelyn Thomas, Frances Iris Cooze, Joyce Beard, Sarah Murphy and Eleanor Ethel Morley and the Adjudication Officer concerning the grant to them of severe disablement allowance or invalid care allowance.
- 3 In the United Kingdom, the Social Security Act 1975, as amended, provides for the grant of severe disablement allowance to people who are incapable of work and invalid care allowance to people engaged in caring for a severely disabled person. People who have attained retirement age, which is 65 for men and 60 for women, are not entitled to those benefits.
- 4 Mrs Thomas and Mrs Morley were refused severe disablement allowance on the ground that they had ceased employment because of invalidity after attaining retirement age. Similarly, Mrs Cooze, Mrs Beard and Mrs Murphy were refused invalid care allowance on the ground that they had applied for that benefit after attaining retirement age.
- 5 An appeal was lodged by the Secretary of State for Social Security against a judgment of the Court of Appeal, which had held that the United Kingdom legislation was incompatible with Directive 79/7, and the House of Lords decided to stay the proceedings until the Court of Justice had given a ruling on the following questions:

- ‘1. Where pursuant to Article 7(1)(a) of Directive 79/7, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, a Member State preserves different pensionable ages for men and women for the purpose of granting old-age and retirement pensions, is the scope of the derogation permitted by the words “possible consequences ... for other benefits” in Article 7(1)(a) limited to:
  - (a) provisions in schemes for those other benefits which are necessary to enable the schemes to operate consistently with the schemes for old-age and retirement pensions without illogicality, unfairness or absurdity; or
  - (b) provisions in schemes for those other benefits which the Member State has linked to provisions in old-age and retirement pension schemes, in the exercise of its discretion, acting in accordance with the principle of proportionality; or
  - (c) some other provisions, and if so which ones?
2. If the principle of proportionality applies, is the Member State required to show:
  - (a) that the provision is appropriate and necessary to achieve the aim of the Member State; or
  - (b) that the provision is appropriate and necessary to achieve the aim of Directive 79/7; or
  - (c) both (a) and (b) above; or
  - (d) that the provision was enacted for the purpose of reducing, minimizing or limiting the overall discriminatory effects of providing different pensionable ages for men and women; or
  - (e) that some other test is satisfied, and if so which one?

3. Is the Member State permitted by Article 7(1)(a):
  - (a) to rely upon statistical data relating to male and female working and retirement patterns to justify the differential treatment of men and women; or
  - (b) to rely upon the derogation notwithstanding that in a particular case the applicant for the benefit can show that although over pensionable age she does not in fact receive an old-age or retirement pension and/or she would have been working but for the occurrence of the relevant risk (invalidity or severe disablement)?
4. Where national law provides that there shall be pensionable ages of 60 for women and 65 for men for the purpose of granting old-age and retirement pensions and that there shall be an invalidity benefit scheme for persons of working age, does Directive 79/7 require a Member State to apply the same upper age limit (if any) for both men and women when defining the scope of the scheme for invalidity benefit?’
- 6 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
- 7 Before addressing the first question, it must be held, *in limine*, that the respondents in the main proceedings are persons covered by Directive 79/7 and that, in so far as they provide protection against the risk of invalidity, the statutory schemes at issue before the national court fall within Article 3(1)(a) of that directive. Moreover, national legislation of the kind described by the national court, which denies women who have attained the age of 60 entitlement to the benefits in question whereas men continue to receive them until the age of 65,

is discriminatory and may therefore be justified only under Article 7(1)(a) of Directive 79/7, according to which the directive is to be without prejudice to the right of the Member States to exclude from its scope the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

- 8 In considering the scope of the derogation provided for by that provision, it is to be noted, first, that, in view of the fundamental importance of the principle of equal treatment, which the Court has reaffirmed on numerous occasions, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) of Directive 79/7 must be interpreted strictly (see the judgments in Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 36, and Case 262/84 *Beets-Propser v Van Landschot Bankiers* [1986] ECR 773, paragraph 38).
- 9 Next, in its judgment in Case C-9/91 *The Queen v Secretary of State for Social Security, ex parte the Equal Opportunities Commission* [1992] ECR I-4297, paragraph 15, the Court held that, although the preamble to Directive 79/7 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 that respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored. The Court also held in that judgment that those advantages include the possibility for female workers to qualify for a pension earlier than male workers, as envisaged by Article 7(1)(a) of Directive 79/7.
- 10 In that judgment, which was concerned not with the 'possible consequences ... for other benefits' of setting different retirement ages for men and women but with discrimination regarding contribution periods, the Court interpreted Article 7(1)(a) 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 such forms of discrimination as are necessarily linked to that difference.

- 11 There must, for the same reasons, be a similar link as regards the possible discriminatory consequences for other benefits of the determination of a different statutory retirement age according to sex for the purposes of granting old-age and retirement pensions.
- 12 It follows that forms of discrimination provided for in benefit schemes other than old-age and retirement pension schemes can be justified, as being the consequence of determining a different retirement age according to sex, only if such discrimination is objectively necessary in order to avoid disrupting the complex financial equilibrium of the social security system or to ensure consistency between retirement pension schemes and other benefit schemes.
- 13 Although it is for the national court, in preliminary-ruling proceedings, to establish whether such a necessity exists in the specific case before it, the Court of Justice, which is called upon to provide the national court with worthwhile answers, has jurisdiction to give guidance based on the documents before the national court and the written and oral observations which have been submitted to it, in order to enable the national court to give judgment.
- 14 As regards the requirement of preserving financial equilibrium as between the old-age pension scheme and the other benefit schemes, it should be noted that the grant of benefits under non-contributory schemes, such as severe disablement allowance and invalid care allowance, to persons in respect of whom certain risks have materialized, regardless of the entitlement of such persons to an old-age pension by virtue of contribution periods completed by them, has no direct influence on the financial equilibrium of contributory pension schemes.
- 15 Furthermore, as the Advocate General shows in paragraph 10 of his Opinion, discrimination between men and women under non-contributory schemes, such as those of the severe disablement allowance and the invalid care allowance, is unnecessary to preserve the financial equilibrium of the entire social security system, particularly since the national rules contain provisions to prevent overlapping between benefits such as severe disablement allowance or invalid care allowance and the old-age pension and, in fact, the grant of those benefits takes the place of benefits paid under other non-contributory schemes, such as benefits paid to people who have insufficient resources to support themselves.

- 16 As regards preservation of the consistency between schemes such as those of the severe disablement allowance and the invalid care allowance, on the one hand, and the pension scheme on the other, the United Kingdom's argument that those benefits are intended to replace income in the event of materialization of the risk, far from generally precluding the grant of such benefits to women who have attained retirement age, should, on the contrary, justify it in circumstances such as those at issue in the main proceedings.
- 17 In its judgment in *Marshall*, cited above, the Court held that women are entitled to go on working beyond the qualifying age for an old-age pension, that is to say at least until the age at which a man is supposed to retire.
- 18 Where women have continued to work, as they may under the national legislation, after attaining the normal retirement age for women and before attaining the normal retirement age for men, or do not yet receive benefits under the old-age pension scheme despite their having attained the normal retirement age, they are entitled, in the event that the insured risk materializes, to receive benefits such as severe disablement allowance or invalid care allowance.
- 19 As to the United Kingdom's argument that the vast majority of women receive an old-age pension once they have attained the age of 60, suffice it to say that the grant of benefits such as severe disablement allowance or invalid care allowance constitutes, for women who are not yet in receipt of old-age pension despite their having attained the normal retirement age, an individual right which cannot be denied them on the ground that, statistically, their situation is exceptional by comparison with that of most women.
- 20 For these reasons, the answer to the first question submitted by the House of Lords must be that where, pursuant to Article 7(1)(a) of Directive 79/7, a Member



State prescribes different retirement ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a) is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in retirement age.

- 21 In view of the answer given to the first question, it is unnecessary to answer the other three questions.

### Costs

- 22 The costs incurred by the Government of the Federal Republic of Germany, the United Kingdom 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 (Sixth Chamber)

in answer to the questions referred to it by the House of Lords, by judgment of 17 December 1991, hereby rules:

Where, pursuant to Article 7(1)(a) of Directive 79/7, a Member State prescribes different retirement ages for men and women for the purposes of granting

old-age and retirement pensions, the scope of the permitted derogation, defined by the words 'possible consequences thereof for other benefits', contained in Article 7(1)(a) is limited to the forms of discrimination existing under the other benefit schemes which are necessarily and objectively linked to the difference in retirement age.

Kakouris

Mancini

Schockweiler

Diez de Velasco

Kapteyn

Delivered in open court in Luxembourg on 30 March 1993.

J.-G. Giraud

C. N. Kakouris

Registrar

President of the Sixth Chamber