

Whether additional conditions for woman claiming addition for dependant husband for retirement pension in breach of 79/7 EEC or whether covered by art 7(1)(d).

Commissioner's File: CP/17/1991

REFERENCE TO THE EUROPEAN COURT OF JUSTICE BY THE SOCIAL SECURITY COMMISSIONER

In the matter of a claim for a Category A Retirement Pension Increase

Article 177 of the EEC Treaty

Name: Elizabeth Bramhill (Mrs)

Appeal Tribunal: Liverpool

Case No: 606:28506

1. Before giving my definitive decision on this appeal, I refer to the Court of Justice of the European Communities for a preliminary ruling pursuant to Article 177 of the EEC Treaty the questions set out at the end of this reference.

2. The appeal raises the issue whether a claimant wife is entitled to an increase of pension in respect of her husband, despite not satisfying certain of the relevant statutory provisions, on the ground that those provisions contravene Council Directive No 79/7/EEC of 19 December 1978 (OJ 1979 L6 P.24) on the progressive implementation of the principle of equal treatment for men and women in matters of social security ("Directive 79/7").

3. The facts of the case are short and are not in dispute. The claimant was born on 30 May 1930 and, accordingly, was 60 on 30 May 1990. She ceased to be employed from 1st June 1960. She submitted a claim, which was received on 20 February 1990, for a retirement pension payable from her 60th birthday. She stated on the claim form that her husband was unemployed and was signing on quarterly at her local unemployment benefit office but was not in receipt of any benefit. On 4 May 1990, a further form was received from her seeking an increase in the retirement pension payable to her in respect of her dependent husband. She stated on the form that her husband, aged 60, was in receipt of an occupational pension from his former employers at the rate of £108.04 per month. In the result, a retirement pension was awarded to the claimant payable from 4 June 1990, but the adjudication officer disallowed her claim for an increase in respect of her husband. He decided that the claimant was not

entitled to such an increase because she did not satisfy both of the following statutory conditions of entitlement -

" 1. That her retirement pension began immediately upon termination of the period for which she was entitled to an increase of unemployment, sickness or invalidity benefit for her husband; and

2. That she is residing with her husband or she is contributing to his maintenance at a rate not less than the amount of the increase she would be entitled to receive."

4. The provisions governing the conditions of entitlement to increases in retirement pensions in respect of dependant spouses, as in force at the date of this claim, are to be found in section 45 and section 45A of the Social Security Act 1975, as amended. I set out the provisions of those sections which are material to this case -

" 45. - (1) This section applies to -

(a) a Category A or Category C retirement pension

(b) an invalidity pension.

(2) Subject to the following provisions, the weekly rate of a pension to which this section applies, when payable to a man, shall be increased by the amount respectively specified in relation to the relevant pension in Schedule 4, Part IV, column (3) -

(a) for any period during which the pensioner is residing with his wife; or

(b) for any period during which the pensioner is contributing to the maintenance of his wife at a weekly rate not less than that amount, and his wife does not have weekly earnings which exceed that amount.

(2A) Regulations may provide that, for any period during which the pensioner is residing with his wife and his wife ... has earnings -

(a) the increase of benefit under this section shall be subject to a reduction in respect of the wife's earnings; or

(b) there shall be no increase

of benefit under this section.

(3)-(4)

45A .- (1) Where a Category A retirement pension is payable to a woman for any period -

(a) which began immediately upon the termination of a period for which the pensioner was entitled to an increase in unemployment benefit, sickness benefit or invalidity pension by virtue of section 44(3)(a) or 47(1)(a) of this Act (increases in respect of adult dependants); and

(b) during which the requirements of either paragraph (a) or (b) of subsection (2) below are satisfied (without interruption),

then the weekly rate of the pensioner's Category A retirement pension shall be increased by the amount specified in relation thereto in Schedule 4, Part IV, column 3 ("the specified amount").

(2) The requirements referred to in subsection (1)(b) above are -

(a) that the pensioner is residing with her husband;

(b) that the pension is contributing to the maintenance of her husband at a weekly rate not less than the specified amount, and her husband does not have weekly earnings which exceed that amount.

(3) Regulations may provide that, for any period during which the pensioner is residing with her husband and her husband ... has earnings -

(a) the increase of benefit under this section shall be subject to a reduction in respect of the husband's earnings; or

(b) there shall be no increase of benefit under this section."

5. It is mentioned here that, with effect from 1 July 1992, section 45 and section 45A of the Social Security Act 1975 were repealed by the Social Security (Consequential Provisions) Act 1992 and replaced by sections 83 and 84 of the Social Security Contributions and Benefits Act 1992 which are in similar terms to the repealed sections.

6. The claimant appealed to the social security appeal tribunal ("the appeal tribunal") against the decision of the adjudication officer. Before the appeal tribunal, it was common ground that the claimant did not satisfy the conditions in question. It was also common ground that section 45A of the 1975 Act discriminated against women and placed them in a less favourable position to men as regards increases of retirement pension for spouses by reason of the extra requirements prescribed by section 45A(1). However, it was agreed that the appeal tribunal was bound by the decision of the Commissioner in case R(P) 3/88 in which it was decided that the inequality of treatment between married men and women in this respect did not breach Directive 79/7. On that basis, the appeal tribunal by their decision dated 7 February 1991 disallowed the appeal and affirmed the decision of the adjudication officer that the claimant was not entitled to an increase to a retirement pension in respect of her husband. However, leave to appeal to the Commissioner was granted.

7. It remains common ground in the present appeal that the provisions of section 45A discriminate against women claimants as a married woman seeking an increase in respect of her dependent husband has to fulfil additional conditions over and above the conditions that a married man seeking increase in respect of his dependent wife has to fulfil under section 45 of the Act. It also remains common ground that the claimant does not satisfy those additional conditions. Accordingly, the question at issue is whether such difference in treatment is, or is not, covered by the derogation contained in Article 7(1)(d) of Directive 79/7.

8. The most important Articles of Directive 79/7 for the purposes of this appeal are the following -

"Article 1

'The purpose of this 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'.

Article 4

1. The principle of equal treatment means that there shall be no discrimination whatsoever on grounds 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."
2. The principle of equal treatment shall be without prejudice to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.

Article 7

1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:
 - (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 rights or incur obligations under a statutory scheme.

2. Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.

Article 8

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification. They shall immediately inform the Commission thereof.
2. Member States shall communicate to the Commission the text of laws, regulations and administrative provisions which they adopt in the field covered by this Directive, including measures adopted pursuant to Article 7 (2).

They shall inform the Commission 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."

9. In his decision in case R(P) 3/83, the Commissioner dealt in the following terms with the submission, which he did not accept, that section 45A of the 1975 Act was discriminatory against women and in breach of Directive 79/7 -

" 9. I now turn to the discrimination point. It is contended on behalf of the claimant that section 45A is discriminatory against women and places them in a less favourable position to men in the matter of increases of retirement pension for spouses. Clearly such contention is correct. In order to obtain an addition for a husband a married woman has to satisfy similar conditions to those specified in section 45 for a married man, seeking an increase for his wife, in addition she has to get over another hurdle, the condition provided for in section 45A(1). It is further maintained on behalf of the claimant that this discrimination is inconsistent with the Directive and in breach of it. If this is so, then she may rely on the Directive to obtain entitlement to benefit. But is it so? Article 4 of the Directive provides that the principle of equal treatment means that there should be no discrimination whatsoever on grounds of sex, either directly or indirectly, by reference in particular to marital or family status, in particular as concerns the scope of schemes and the conditions of access thereto and 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. Clearly if States were not allowed to derogate from that Article section 45A would be inconsistent with the

requirements of the Directive. But Member States are permitted to derogate from this general obligation to the extent provided for by Article 7. Article 7(1)(d) allows, inter alia, the difference between the treatment of men and women in the matter of old age benefit in that the law of a Member State may provide for a husband to be awarded an increase for a wife in circumstances where a wife would not be awarded a comparable increase for a husband. In my judgment the Directive itself provides for a derogation from the principle of equal treatment laid down in Article 4(1) to that extent, and the inequality of treatment illustrated by section 45 and section 45A of the Social Security Act 1975 does not breach the Directive."

10. Before me, it is contended on behalf of the claimant that, in the light of the later decision of the Court of Appeal in *Thomas & Others v. Chief Adjudication Officer & Secretary of State for Social Security* [1991] 2 Q.B.164, case R(P) 3/83 was wrongly decided and that the discriminatory provisions of section 45A are indeed in breach of Directive 79/7 and that, accordingly, the claimant is entitled to the increase which she claims. Basing himself on the judgments, especially that of Sir Denys Buckley in that decision of the Court of Appeal (which, it should be mentioned, is, at the date of this reference, under appeal to the House of Lords, which has itself referred certain questions to the European Court of Justice), Mr Taylor for the claimant submits that the proper construction of Directive 79/7 is governed not by English principles of statutory interpretation but by those of Community law. On that footing, Article 7(1)(d) of Directive 79/7 is a derogation from the general principle of equal treatment for men and women in matters of social security therein set out and, accordingly, must be construed in accordance with the principle of proportionality which requires that such a derogation, including the national legislation in respect of which it is invoked must be construed strictly and in terms that keep it within the limits of what is appropriate and necessary for achieving the aim in view. That aim is the implementation of the principle of equal treatment for men and women in social security matters (Article 1). In particular, the argument runs, that aim expressly embraces -

"The calculation of benefits including increases due in respect of a spouse and for dependants and for conditions governing the duration and retention of entitlement to benefits." (Article 4(1)).

The Article 7(1)(d) derogation does not speak of excluding from the scope of the Directive the granting of benefit increases for a dependant spouse or for a dependant husband. It speaks only of permitting the exclusion of benefit increases for a dependent wife and, it is contended, that construed narrowly in the context of Directive 79/7 as a whole and in accordance with the principle of proportionality, it cannot be read as permitting Member States to exclude from the Directive's scope the granting of pension increases payable to a wife for a dependant husband on terms which are more onerous than apply to pension increases payable

to a husband for a dependant wife. Consequently, it is submitted section 45A of the 1975 Act goes beyond the limits of the derogation permitted by Directive 79/7 and to that extent is inconsistent with it and, therefore, cannot be relied upon by the United Kingdom.

11. On the other hand, Miss Sharpston for the respondent contends that, on a proper construction of the aims and the text of Directive 79/7, the action of the United Kingdom in maintaining section 45 of the 1975 Act for claims in respect of a dependent wife and in making separate provision, of a different nature and on different terms, under section 45A of the Act for claims in respect of a dependent husband is covered by the Article 7(1)(d) derogation. She pointed out that in accordance with Article 8(2) of Directive 79/7, the United Kingdom had notified the Commission that it was exercising its right to so derogate, and that derogation had been kept under review. The following is a summary of her main contentions -

- (1) The starting point for construing Directive 79/7 is that it aims at the progressive implementation of the principle of equal treatment for men and woman in matters of social security, which is a more limited purpose than the sweeping equality of treatment envisaged by Directive 76/207. Therefore, the caselaw on the interpretation of the latter Directive, such as Case 222/84, Johnston v RUC [1986] ECR 1651 do not assist in the present case;
- (2) Guidance on the construction of the Article 7 derogation is provided by the judgment, dated 22 July 1992, on Article 7(1)(a) Case C-9/91, Ex parte Equal Opportunities Commission at paragraphs 14 to 18. The Court there stressed that, derogations, in order not to be nugatory, may need to be interpreted in a way that is slightly wider than the express wording;
- (3) If the claimant's interpretation were right, then Article 7(1)(d) would become meaningless and would cease to be a derogation;
- (4) The United Kingdom could, in full compliance with the Directive, revoke the Article 7(1)(d) derogation and the claimant could not object. The greater power to terminate the derogation must include the lesser power to make separate and different provision in respect of a dependant wife and a dependant husband.
- (5) If the principle of proportionality applies, guidance as to how it should be applied in this case is not provided by the caselaw on the interpretation of Decree 76/207. Neither is it provided by the caselaw in a different area of Community law, such as Case 152/73, Sotgiu [1974] ECR 153.
- (6) If a proportionality test falls to be applied, support

for the contention that such a test is satisfied is to be found in the Opinion of A G Van GERVEN in Case C-9/91 Ex parte EOC where, in particular, the Advocate General considered that the principle plays a smaller role than normal in the context of a derogation under Article 7(1) of Directive 79/7 and that the provisions of the Directive themselves, especially Articles 7(2) and 8(2), lay down a procedure for the balancing of interests.

12. I consider it necessary, and both parties have agreed, that I should refer the following questions to the Court of Justice of the European Communities -

- " 1) Where a Member State has enacted separate provisions for a male pensioner claiming in respect of a dependent wife and for a female pensioner claiming in respect of a dependent husband, is the derogation contained in Article 7(1)(d) of Directive 79/7 to be interpreted as permitting the Member State to impose more stringent conditions on a female claimant than on a male claimant?
- 2) In particular, may the Member State impose a condition such as that contained in s.45A of the Social Security Act 1975, by which immediately prior to the date upon which the female pensioner became entitled to retirement pension, she must have been entitled to an increase of unemployment benefit, sickness benefit or invalidity pension for such husband, when no such requirement is imposed on a man seeking an increase of retirement pension for a dependent wife?
- 3) If, in the light of the answers to questions 1 and 2, it is necessary for the national judge to determine whether or not national legislation satisfies the requirements of proportionality under Community law, so as to be capable of benefiting from the derogation contained in Article 7(1)(d) of Directive 79/7, what are the specific criteria that the national judge must apply?"

(Signed) A.W.E. Wheeler
Commissioner

(Date) 27 November 1992