

**DECISION OF THE SOCIAL SECURITY COMMISSIONER**

1. My decision is that the decision of the tribunal is erroneous in point of law. I set aside the tribunal's decision and, because I can do so without making fresh or further findings of fact, I give the decision which I consider the tribunal should have given. That decision is that the claimant was entitled to a retirement pension of £102.85 per week (subject to annual increases) from 28 February 2002.

2. The claimant is a post-operative male-female transsexual who was born on 28 February 1942. On 14 February 2002 she made a claim for retirement pension from 28 February 2002, which was the date of her 60th birthday. The claim was refused on 7 March 2002 on the ground that the claimant did not become entitled to a retirement pension until attaining the age of 65, and that the claim was therefore premature. The issue raised by the claim was therefore whether the claimant became entitled to a retirement pension at the age of 60, which is the retirement age applicable to women, or at the age of 65, which is the retirement age applicable to men.

3. The claimant appealed to the tribunal against the refusal of the award of retirement pension, on the ground that the refusal contravened her rights under Articles 8 and 14 of the European Convention on Human Rights. The tribunal rejected that argument following a hearing held on 23 October 2003, and on 2 February 2004 the claimant appealed against the tribunal's decision with the leave of a chairman. At an oral hearing of the appeal on 6 May 2004 I permitted the claimant to raise for the first time arguments of EC law with regard to article 4 of Council Directive 79/7/EEC of December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security. For the reasons given in a written direction dated 14 September 2004 I also directed a reference to the Court of Justice of the European Communities under article 234 (ex 177) of the Treaty establishing the European Communities for a preliminary ruling on the following questions:

- (1) Does Directive 79/7 prohibit the refusal of a retirement pension to a male-to-female transsexual until she reaches the age of 65 and who would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law?
- (2) If so, from what date should the Court's ruling have effect?

4. On 15 December 2005 Advocate General Jacobs presented his opinion to the Court (annexed as Schedule 1) expressing the view that the first question should be answered in the affirmative, and that it was unnecessary to limit the temporal effects of a judgment to that effect. By a judgment of the First Chamber dated 27 April 2006 (annexed as Schedule 2), the Court of Justice of the European Communities ruled as follows:

- (1) Article 4(1) 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 precluding legislation which denies a person who, in accordance with the conditions laid down in national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

(2) There is no need to limit the temporal effects of this judgment.

A certified copy of the judgment was received at the Office of the Social Security Commissioners on 8 May 2006.

5. In the light of the ruling of the Court of Justice of the European Communities and for the reasons given by the Court, I allow the claimant's appeal. Since I can do so without making fresh or further findings of fact, I substitute for the tribunal's decision my own decision that the claimant became entitled to a retirement pension of £102.85 (subject to annual increases) from 28 February 2002.

6. Having reached agreement on certain matters arising out of the ruling of the European Court of Justice, the parties consented to my draft decision in the above terms.

7. In response to the request by the Court, I direct that a copy of this decision be sent to the Registrar of the Court of Justice of the European Communities.

(signed on the original)

**E A L Bano**  
**Commissioner**

**27 November 2006**

## **Schedule 1**

OPINION OF ADVOCATE GENERAL  
JACOBS  
delivered on 15 December 2005 (1)

### **Case C-423/04**

**Sarah Margaret Richards**  
**v**  
**Secretary of State for Work and Pensions**

1. Transsexual people, in the words of the House of Lords, the United Kingdom's supreme court, 'are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex'. (2) The conviction of belonging to the other sex is so profound that the transsexual person is prompted to ask for the corresponding bodily 'correction' to be made, (3) by hormone treatment and gender reassignment surgery. (4) The condition is also known as gender dysphoria or gender identity disorder.

2. After Jan (formerly James) Morris, the Anglo-Welsh journalist and travel writer, had had gender reassignment surgery in 1972 to complete the alignment of her appearance with the woman she had always felt herself to be, (5) she recounts how 'a courteous functionary from the Ministry ... apologetically explained that the question of my retirement pension would have to be settled nearer the time'. (6) Over 30 years later, the United Kingdom has enacted the Gender Recognition Act 2004 regulating the civil situation of

transsexual persons with regard to, inter alia, pensions. (7) The Act entered into force on 4 April 2005 and is not retroactive.

3. The present reference from the Social Security Commissioner, London, made before the Gender Recognition Act 2004 entered into force, raises the question whether it is contrary to Directive 79/7 (8) for a Member State to refuse to grant a retirement pension before the age of 65 to a male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

### **Relevant Community legislation**

4. Article 1 of Directive 79/7 provides:

'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".'

5. Article 2 provides that the directive is to apply to the working population.

6. Article 3(1)(a) states that the directive is to apply to statutory schemes which provide protection against, inter alia, old age.

7. Article 4(1) provides:

'The principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly ... , in particular as concerns:

...

– the calculation of benefits including ... the conditions governing the duration and retention of entitlement to benefits'.

8. Article 7(1) provides:

'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 ...

...'

## **Relevant national legislation before *Goodwin***

9. In England and Wales, section 1 of the Births and Deaths Registration Act 1953 requires that the birth of every child be registered by the Registrar of Births and Deaths for the area in which the child is born. The sex of the child must be entered on the birth certificate. The 1953 Act provides for the correction by the Registrar of clerical or factual errors; the official position is that an amendment may be made only if the error occurred when the birth was registered. The fact that it may become evident later in a person's life that his or her 'psychological' sex is in conflict with the sex as registered is not considered to imply that the initial entry at birth was a factual error. It is in particular not accepted that there is any error in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

10. The Department for Work and Pensions (formerly the Department of Social Security ('DWP')) registers every British citizen for national insurance purposes on the basis of the information in their birth certificate. A person's sex for the purposes of pensionable age is thus determined according to biological sex at birth.

11. National insurance contributions are made by way of deduction from an employee's pay by the employer and then by payment to the Inland Revenue (for onward transmission to the DWP). Employers at present will make such deductions for a female employee until she reaches the pensionable age of 60 and for a male employee until he reaches the pensionable age of 65. The DWP operates a policy for male-to-female transsexuals whereby they may enter into an undertaking with the DWP to pay direct to the DWP any national insurance contributions due after the transsexual has reached the age of 60 which have ceased to be deducted by the employer in the belief that the employee is female. In the case of female-to-male transsexuals, any deductions which are made by an employer after the age of 60 may be reclaimed directly from the DWP by the employee. (9)

12. Paragraph 1 of Schedule 4 to the Pensions Act 1995 provides that a man attains pensionable age when he attains the age of 65; paragraph 2 of that schedule provides that a woman born before 6 April 1950 attains pensionable age when she attains the age of 60. (10)

## ***Goodwin* and the Gender Recognition Act 2004**

13. On 11 July 2002 the European Court of Human Rights delivered its judgment in *Goodwin*. (11) The applicant in that case, a post-operative male-to-female transsexual, had alleged violations of the European Convention on Human Rights in respect of the legal status of transsexuals in the United Kingdom and particularly their treatment in the sphere of employment, social security, pensions and marriage.

14. The European Court of Human Rights ruled that there had been a violation of Articles 8 (respect for private life) and 12 (right to marry). With regard to Article 8, the Court referred to the lack of legal recognition given to the applicant's gender reassignment and noted in particular that the fact that the applicant remained a male for legal purposes had effects on her life 'where sex is of legal relevance and distinctions are made between men and women, as, inter alia, in the area of pensions and retirement age'. With regard to Article 12, the Court found no justification for barring transsexuals from enjoying the right to marry in their assigned gender in all circumstances. (12)

15. The legislative solution adopted by the United Kingdom to give effect to the judgment in *Goodwin* is the Gender Recognition Act 2004, which came into force on 4 April 2005. That Act permits transsexual persons (whether they have had gender reassignment surgery or not) to apply for a 'gender recognition certificate' which, in the words of the referring court, 'provides the key to near complete recognition of his or her acquired gender'.

16. Specifically, the Act provides for the setting up of a Gender Recognition Panel. Section 2 of the Act provides that the Panel must grant a gender recognition certificate if it is satisfied that the applicant:

- (a) has or has had gender dysphoria,
- (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,
- (c) intends to continue to live in the acquired gender until death'

and complies with certain requirements as to the provision of sufficient evidence set out in section 3 of the Act.

17. Section 13 of and Schedule 5 to the Gender Recognition Act 2004 regulate access to social security benefits and pensions. Paragraph 7(3) of Schedule 5 provides:

'if (immediately before the certificate is issued) the person –

- (a) is a man who has attained the age at which a woman of the same age attains pensionable age, but
  - (b) has not attained the age of 65,
- the person is to be treated ... as attaining pensionable age when it is issued'. (13)

### **The facts and the main proceedings**

18. The applicant was born in 1942; her sex at birth was recorded as male.

19. Having been diagnosed as suffering from gender dysphoria, the applicant underwent gender reassignment surgery on 3 May 2001. She is accordingly described by the referring court as a post-operative male-to-female transsexual.

20. In February 2002, the applicant applied for a retirement pension to be paid from her 60<sup>th</sup> birthday.

21. That application was refused on the ground that it had been made more than four months before the applicant reached 65, which is the pensionable age for men in the United Kingdom.

22. The applicant appealed to the Social Security Appeal Tribunal. The appeal, which proceeded on the basis of domestic law alone, was dismissed.

23. On further appeal to the Social Security Commissioner, the applicant argued that the denial of her pension at the age at which any other woman would be eligible for a pension amounted to unlawful discrimination contrary to Directive 79/7.

24. It is common ground that the applicant is within the personal scope of Directive 79/7 and that the State pension scheme in question is within the material scope of that directive.

25. The Social Security Commissioner has accordingly stayed the proceedings and referred the following questions to the Court:

- (1) Does Directive 79/7 prohibit the refusal of a retirement pension to a male-to-female transsexual until she reaches the age of 65 [if she] would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law?

(2) If so, from what date should the Court's ruling on question 1 have effect?'

26. Written observations have been lodged by the applicant, the United Kingdom Government and the Commission, all of whom were represented at the hearing.

### **The Court's case-law on transsexuals and discrimination**

27. The Court has delivered judgment in two cases in which a transsexual claimed to have been discriminated against on the ground of sex. Both cases were references from the United Kingdom.

28. In *P v S* (14) the Court was asked essentially whether dismissal of a transsexual employee for a reason related to a gender reassignment was discrimination on grounds of sex within the meaning of the Equal Treatment Directive. (15)

29. The Court responded to the call of Advocate General Tesouro to make a 'courageous' decision. It ruled as follows:

'The principle of equal treatment "for men and women" to which the directive refers in its title, preamble and provisions means ... that there should be "no discrimination whatsoever on grounds of sex".

Thus, the directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law.

Moreover, as the Court has repeatedly held, the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure ... .

Accordingly, the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of the directive is also such as to apply to discrimination arising, as in this case, from the gender reassignment of the person concerned.

Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard.’ (16)

30. The Court accordingly concluded that the directive precluded dismissal of a transsexual for a reason related to a gender reassignment.

31. The applicant in *KB* (17) was a woman who lived with, but was unable lawfully to marry, a female-to-male transsexual R. KB was informed that, if she were to pre-decease R, R would not be entitled to a widower’s pension under KB’s pension scheme, since that pension was payable only to a surviving spouse and national law did not recognise a person as a ‘spouse’ in the absence of a lawful marriage. KB brought proceedings alleging sex discrimination; the question before the Court was whether by so excluding a person in R’s situation the pension scheme discriminated on grounds of sex contrary to Community law. (18)

32. The Court, having found that a survivor’s pension paid under an occupational pension scheme such as that in question constituted ‘pay’ within the meaning of Article 141 EC and the Equal Pay Directive, ruled as follows:

‘Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the ECHR, prevents a couple such as KB and R from fulfilling the marriage requirement which must be met for one of them to be able to benefit from part of the pay of the other. It is for the national court to determine whether in a case such as that in the main proceedings a person in KB’s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor’s pension.’ (19)

### **The first question**

33. By its first question the referring court asks whether it is contrary to Directive 79/7 for a Member State to refuse to grant a retirement pension before the age of 65 to a male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

34. The applicant and the Commission submit that that question should be answered in the affirmative; the United Kingdom Government takes the contrary view.

35. The applicant and the Commission refer to *P v S* (20) and *KB* (21) in support of their submissions.

36. In *P v S*, the Court ruled essentially that dismissal 'for a reason related to a gender reassignment' amounted to discrimination on grounds of sex contrary to Article 5(1) of the Equal Treatment Directive. (22)

37. It is clear that the 'principle of equal treatment' which finds expression in Article 4(1) of Directive 79/7 in matters of social security has the same scope and effect as the 'principle of equal treatment' which finds expression in Article 5(1) of the Equal Treatment Directive with regard to working conditions. Article 4(1) of Directive 79/7 states that that principle precludes in particular direct or indirect discrimination on grounds of sex concerning inter alia the conditions governing the duration of entitlement to benefits under statutory old-age pension schemes.

38. The applicant in the present case is denied her pension in circumstances where, had she been registered as female at birth, she would have been entitled to it. The alleged discrimination accordingly lies in the United Kingdom's failure to recognise a transsexual person in their acquired gender on equal terms with persons recorded as of that gender at birth.

39. The Court stated in *P v S* that, where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. (23)

40. If that approach were applied in the present case, the correct comparator for the applicant would thus be 'persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'. That class would comprise male pension claimants, who are not entitled to a pension until they reach the age of 65, so that there would be no discrimination.

41. I agree with the Commission however that the reasoning to be used in applying sex discrimination law to the case of transsexual persons should differ from the classical model which is always based on a straightforward comparison between men and women.

42. *P v S* was a particularly clear case of discrimination, since it was accepted that the dismissal was 'for a reason related to a gender reassignment'. Whether the comparator was a man who was not proposing to have gender reassignment surgery or a woman who had not had such surgery, the result would have been the same: in

comparison with such a person, the applicant had been disadvantaged.

43. The same can be said of the decision of the House of Lords in *A v Chief Constable of West Yorkshire Police*, (24) where in determining the correct comparator the approach of the Court of Justice in *P v S* was followed. (25) That case also concerned direct discrimination because of gender reassignment.

44. In *KB* the situation was different. In arriving at its conclusion that the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme constituted sex discrimination contrary to Article 141 EC, the Court compared the couple to 'a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and the couple are therefore able to marry'. (26) The correct comparator in the case of the female-to-male transsexual was therefore a male person whose identity was not the result of gender reassignment surgery.

45. In the present case also that seems to me to be the correct basis of comparison. The applicant is denied her pension in circumstances where, had she been registered as female at birth, she would have been entitled to it. The alleged discrimination accordingly lies in the United Kingdom's failure to recognise a transsexual person in their acquired gender on equal terms with persons recorded as of that gender at birth, precisely the issue in *KB*. I consider therefore that the correct comparator in the present case concerning a male-to-female transsexual person is a female person whose identity is not the result of gender reassignment surgery.

46. On that basis, I am of the view that it is contrary to Article 4(1) of Directive 79/7 for a Member State to refuse to grant a retirement pension before the age of 65 to a male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

47. The United Kingdom Government submits however that Article 4(1) of Directive 79/7 is not applicable since the United Kingdom has chosen to make use of the option conferred by Article 7(1)(a) to exclude from the scope of the directive its provisions concerning the determination of pensionable age.

48. The applicant and the Commission counter that the applicant is not complaining that there are different pensionable ages for men and women but that she, as a woman, is prevented from receiving her pension at the appointed age solely because the United Kingdom will not recognise her acquired gender.

49. I agree that in the present case Article 7(1)(a) is not relevant.

50. The Court has stated that discrimination which is in principle contrary to Article 4(1) falls within the scope of the derogation in Article 7(1)(a) only if it is 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. (27)

51. That is not the subject-matter of the present case, in which the applicant is essentially challenging the basis on which the United Kingdom categorises a person as belonging to a given sex for the purpose of then determining whether that person has attained pensionable age. The derogation in Article 7(1)(a) covers legislation concerned with determining the different pensionable ages of men and women. It does not cover legislation concerned with the separate question of determining the sex of the person concerned.

52. The United Kingdom Government submits that the applicant cannot argue on the one hand that sex discrimination for the purposes of Article 4(1) includes discrimination on grounds of gender reassignment and on the other hand that the United Kingdom's derogation from the prohibition on 'discrimination ... on grounds of sex' in Article 7 does not apply to the form of discrimination which she alleges.

53. It does not however seem to me that that position is, as the United Kingdom Government describes it, 'inherently flawed'. Contrary to the submission of that government, a matter can both fall within a general prohibition on discrimination and fall outside a specific derogation from that prohibition.

54. It is clear from its terms that the prohibition on discrimination in Article 4(1) of Directive 79/7, which states 'that there shall be no discrimination whatsoever on grounds of sex either directly, or indirectly by reference in particular to marital or family status', is intended to be all-encompassing. The Court has ruled that the provision 'precludes, generally and unequivocally, all discrimination on grounds of sex'. (28) Article 4(1) mentions some specific examples of contexts in which discrimination is prohibited, namely the scope of statutory social security schemes, the conditions of access thereto, the obligation to contribute, the calculation of contributions, the calculation of benefits and the conditions governing the duration and retention of entitlement to benefits.

55. In contrast, the Court has ruled that, in view of the fundamental importance of the principle of equal treatment, the exception to the prohibition of discrimination on grounds of sex provided for in Article 7(1)(a) must be interpreted strictly. (29) As explained above, that provision permits the maintenance of a specific instance of different

treatment of men and women, namely in the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits. That type of sex discrimination is not in issue in the present case.

56. In the present case the conduct complained of falls within the general prohibition in Article 4(1) of the Equal Treatment Directive and outside the derogation therefrom in Article 7(1)(a).

57. I would add that the question of the stage at which a transsexual person becomes entitled to equal treatment within the meaning of Directive 79/7 with persons of his or her acquired gender was debated at the hearing. There is however no need to resolve that issue in the present case, which concerns a post-operative transsexual person whose entitlement is therefore clear.

58. I accordingly conclude in answer to the first question that it is contrary to Article 4(1) of Directive 79/7 for a Member State to refuse to grant a retirement pension before the age of 65 to a post-operative male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

### **The second question**

59. The referring court's second question arises if the first question is answered as I suggest in point 58 above. In that case, the referring court asks in effect whether there should be any temporal limitation on the Court's ruling on the first question.

60. The referring court appears to have been prompted to refer the second question by a submission in the proceedings before it on behalf of the Secretary of State for Work and Pensions, summarised in the order for reference as follows:

'If ... the Court of Justice should conclude that Community law precludes the discrimination of which the appellant complains, the Secretary of State will invite that Court to limit its temporal effect following its judgment in Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, paragraphs 40 to 44, and to rule that its judgment in this case may not be relied upon in order to claim entitlement to a pension with effect from a date prior to that of its judgment, except in the case of those who, with effect from a date prior to that of the Court's judgment[, ] have ... initiated legal proceedings or raised an equivalent claim under the applicable national law.'

61. In fact, however, the United Kingdom Government states in its written observations, and repeated at the hearing, that it does not seek any temporal limitation upon the effect of the Court's judgment.

62. In any event, it is clear from the Court's case-law that a temporal limitation will be imposed only in very specific circumstances which include the existence of 'a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force'. (30)

63. In the present case there are several factors the combined effect of which is to minimise the economic repercussions from a judgment in the present case which answers the referring court's first question in the affirmative. First, the number of transsexual persons in the United Kingdom is, on that Government's own figures, small: in 2000 it was estimated at some 2 000 to 5 000 (31) (which of course includes transsexual persons of all ages) out of a population of nearly 60 million. Second, the United Kingdom is currently phasing out the difference in pensionable ages between men and women for all persons born after 5 April 1955. (32) Third, a male-to-female transsexual person who has been issued with a gender recognition certificate under the Gender Recognition Act 2004 and who has attained the age at which a woman of the same age is entitled to a pension is treated as attaining pensionable age when the certificate is issued. It is therefore evident that the number of persons in the applicant's position will not be liable to create a risk of serious economic repercussions in the United Kingdom. Such repercussions will be even less significant in the European Union as a whole, given that many Member States already provide for men and women to retire at the same age and for transsexual persons to have full legal recognition in their acquired gender. (33)

64. I accordingly consider that, if the Court answers the referring court's first question in the affirmative, there is no need for it to limit the temporal effects of the judgment.

### **Conclusion**

65. For the reasons given above I am of the view that the questions referred by the Social Security Commissioner, London, should be answered as follows:

- (1) It is contrary to Article 4(1) 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 for a Member State to refuse to grant a

retirement pension before the age of 65 to a post-operative male-to-female transsexual where that person would have been entitled to a pension at the age of 60 had she been regarded as a woman as a matter of national law.

- (2) It is not necessary to limit the temporal effects of a judgment to that effect.

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1 – Original language: English.

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2 – *Bellinger v Bellinger* [2003] 2 AC 467, per Lord Nicholls of Birkenhead.

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3 – Council of Europe Recommendation 1117 (1989) on the condition of transsexuals, 29 September 1989.

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4 – The terminology used tends to differentiate between sex, determined by the physical aspects of the body, and gender, namely the other sex to which transsexual persons are convinced they belong. ‘Gender reassignment surgery’, and the notion of the ‘gender’ acquired thereby, are thus perhaps misnomers, but since the terms appear to be generally used I will follow suit.

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5 – After eight years of hormone treatment, involving an estimated minimum of 12 000 oestrogen pills (Jan Morris, *Conundrum* (1974, Coronet), p. 102).

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6 – *Conundrum*, p. 149.

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7 – See points 15 to 16 below.

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8 – 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).

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9 – This and the preceding paragraphs are taken more or less verbatim from paragraphs 23, 25, 28, 37 and 40 of the judgment of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 447, set out by the national court in the order for reference as a summary of the relevant legislation.

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10 – A woman born on or before 5 April 1950 attains pensionable age at 60 and a woman born on or after 6 April 1955 at 65. There is a sliding scale for women born between those dates.

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11 – Cited in footnote 9.

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12 – Paragraphs 71, 76 and 103.

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13 – Paragraph 7(2) contains a mirror-image provision dealing with the position of female-to-male transsexual persons.

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14 – Case C-13/94 [1996] ECR I-2143.

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15 – Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40).

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16 – Paragraphs 17 to 22.

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17 – Case C-117/01 [2004] ECR-I-541.

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18 – Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19) ('the Equal Pay Directive').

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19 – Paragraph 36 and operative part.

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20 – Cited in footnote 14.

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21 – Cited in footnote 17.

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22 – Cited in footnote 15.

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23 – Paragraph 21.

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24 – [2005] 1 AC 51.

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25 – See the opinion of Baroness Hale, and in particular paragraphs 56 to 58.

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26 – Paragraph 31.

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27 – See Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297, paragraph 13.

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28 – Case 71/85 *Federatie Nederlands Vakbeweging* [1986] ECR 3855, paragraph 18.

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29 – Case C-328/91 *Thomas* [1993] ECR I-1247, paragraph 8.

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30 – See most recently Case C-209/03 *Bidar* [2005] ECR I-0000, paragraph 69.

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31 – See the United Kingdom Home Office Report of the Interdepartmental Working Group on Transsexual People (April 2000), referred to in *Goodwin*, paragraph 87.

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32 – See footnote 10.

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33 – According to the MISSOC (Mutual information system on social protection) tables *Social Protection in the Member States of the European Union, of the European Economic Area and in Switzerland* (2004) published by the Commission, in Cyprus, Denmark, Finland, France, Germany, Hungary, the Netherlands, Ireland, Luxembourg, Portugal, Spain and Sweden the retirement ages for men and women are the same. Advocate General Ruiz-Jarabo in his Opinion in *KB* notes that before the 2004 enlargement all the Member States apart from the United Kingdom and Ireland permitted amendment of birth records after gender reassignment surgery (see point 28 of the Opinion). The European Court of Human Rights in *Goodwin*, cited in footnote 9, noted that out of 37 Member States of the Council of Europe only four did not permit such amendment (see paragraph 55 of the judgment). Those four are Albania, Andorra, Ireland and the United Kingdom.

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**SCHEDULE 2**

**JUDGMENT OF THE COURT (First Chamber)**

27 April 2006 (\*)

(Equal treatment for men and women in matters of social security –  
Directive 79/7/EEC – Refusal to award a retirement pension at the  
age of 60 to a transsexual who has undergone male-to-female gender  
reassignment surgery)

In Case C-423/04,

REFERENCE for a preliminary ruling under Article 234 EC from the  
Social Security Commissioner (United Kingdom) made by decision of  
14 September 2004, received at the Court on 4 October 2004, in the  
proceedings

Sarah Margaret Richards

v

Secretary of State for Work and Pensions,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Schiemann,  
N. Colneric, J.N. Cunha Rodrigues (Rapporteur) and E. Juhász,  
Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on  
20 October 2005,

after considering the observations submitted on behalf of:

- Ms Richards, by J. Sawyer and T. Eicke, Barristers,
- the United Kingdom Government, by R. Caudwell, acting as  
Agent, and T. Ward, Barrister,
- the Commission of the European Communities, by D. Martin  
and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following

### **Judgment**

- 1 The reference for a preliminary ruling concerns the interpretation of Articles 4 and 7 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 This reference was made in the course of proceedings between Ms Richards, a transsexual who has undergone a gender reassignment operation, and the Secretary of State for Work and Pensions ('the Secretary of State') regarding the latter's refusal to award her a retirement pension as from her 60<sup>th</sup> birthday.

### **Legal context**

#### *Community law*

- 3 Article 4(1) of Directive 79/7 provides:

'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.'

- 4 Article 7(1) of Directive 79/7 provides that the directive is to 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;

...'

*National legislation*

- 5 Section 29(1) and (3) of the Births and Deaths Registration Act 1953 prohibits any alteration to the Register of Births, except in cases of clerical or factual error.
- 6 Section 44 of the Social Security Contributions and Benefits Act 1992 provides that a person is to be entitled to a Category A retirement pension (the 'normal' retirement pension) if he is over pensionable age and satisfies various conditions regarding contributions.
- 7 According to paragraph 1 of Part I of Schedule 4 to the Pensions Act 1995, a man attains pensionable age at 65 and a woman born before 6 April 1950 attains pensionable age at 60.
- 8 On 1 July 2004, the Gender Recognition Act 2004 (hereinafter 'the 2004 Act'), which came into force on 4 April 2005, was adopted.
- 9 That Act permits persons who have already undergone gender reassignment or who intend to undergo gender reassignment surgery to apply for a gender recognition certificate, on the basis of which near-complete recognition of their change of gender can be obtained.
- 10 Under section 2(1) of the 2004 Act, a gender recognition certificate must be issued if the applicant fulfils, inter alia, the following conditions:
  - '(a) [the applicant] has or has had gender dysphoria,
  - (b) [the applicant] has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,...
- 11 Section 9(1) of the 2004 Act provides that:

'Where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man, and if it is the female gender, the person's sex becomes that of a woman).'
- 12 Under section 9(2) of the 2004 Act, the gender recognition certificate does not affect things done, or events occurring, before the certificate is issued.
- 13 As regards retirement benefits, paragraph 7(3) of Part 2 of Schedule 5 to the 2004 Act provides:

'... if (immediately before the certificate is issued) the person –

(a) is a man who has attained the age at which a woman of the same age attains pensionable age, but

(b) has not attained the age of 65,

the person is to be treated ... as attaining pensionable age when it is issued.'

### **The main proceedings and the questions referred for a preliminary ruling**

- 14 Ms Richards was born on 28 February 1942 and her birth certificate registered her gender as male. Having been diagnosed as suffering from gender dysphoria, she underwent gender reassignment surgery on 3 May 2001.
- 15 On 14 February 2002 she applied to the Secretary of State for Work and Pensions for a retirement pension to be paid as from 28 February 2002, the date on which she turned 60, the age at which, under national law, a woman born before 6 April 1950 is eligible to receive a retirement pension.
- 16 By decision of 12 March 2002, that application was refused on the ground that 'the claim was made more than 4 months before the claimant reaches age 65', which is the retirement age for men in the United Kingdom.
- 17 As the appeal which Ms Richards brought before the Social Security Appeal Tribunal was dismissed, she appealed to the Social Security Commissioner, claiming that, following the ruling in Case C-117/01 *K.B.* [2004] ECR I-541, the refusal to pay her a retirement pension as from the age of 60 was a breach of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as well as discrimination contrary to Article 4 of Directive 79/7.
- 18 In that appeal, the Secretary of State for Work and Pensions submitted that the claim by the appellant in the main proceedings did not fall within the scope of Directive 79/7. According to him, Community law provides only for a measure of coordination for old-age benefits but does not confer a right to receive such benefits. Moreover, Ms Richards had not been discriminated against having regard to those who constitute the correct comparator, namely men who have not undergone gender reassignment surgery.

19 In order to be able to dispose of the case, the Social Security Commissioner decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Does Directive 79/7 prohibit the refusal of a retirement pension to a male-to-female transsexual until she reaches the age of 65 and who would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law?
- (2) If so, from what date should the Court's ruling on Question 1 have effect?

### **The first question**

- 20 By its first question, the national court is essentially asking whether Article 4(1) of Directive 79/7 precludes legislation which denies a person who has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.
- 21 First of all, it should be noted that it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person (see to that effect *K.B.*, paragraph 35).
- 22 In order to answer the first question, it is necessary to state at the outset that Directive 79/7 is the embodiment in the field of social security of the principle of equal treatment of men and women which is one of the fundamental principles of Community law.
- 23 Moreover, in accordance with settled case-law, the right not to be discriminated against on grounds of sex is one of the fundamental human rights the observance of which the Court has a duty to ensure (see Case 149/77 *Defrenne* [1978] ECR 1365, paragraphs 26 and 27, and Case C-13/94 *P. v S.* [1996] ECR I-2143, paragraph 19).
- 24 The scope of Directive 79/7 cannot thus be confined simply to discrimination based on the fact that a person is of one or other sex. In view of its purpose and the nature of the rights which it seeks to safeguard, the scope of that directive is also such as to apply to discrimination arising from the gender reassignment of the person concerned (see, as regards Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment,

vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40), *P. v S.*, paragraph 20).

- 25 The United Kingdom Government submits that the facts which gave rise to the dispute in the main proceedings stem from the choice made by the national legislature to prescribe differential pensionable ages for men and women. As such a right was expressly granted to the Member States under Article 7(1)(a) of Directive 79/7, they are permitted to derogate from the principle of equal treatment for men and women in the field of retirement pensions. It is irrelevant that, as in the main proceedings, the distinction made by the pension scheme on the basis of gender affects the rights of transsexuals.
- 26 That line of argument cannot be accepted.
- 27 Ms Richards argues that she was precluded from obtaining a retirement pension on reaching the age of 60, the age at which women who were born before 6 April 1950 are entitled to such a pension in the United Kingdom.
- 28 The unequal treatment at issue in the main proceedings is based on Ms Richards' inability to have the new gender which she acquired following surgery recognised with a view to the application of the Pensions Act 1995.
- 29 Unlike women whose gender is not the result of gender reassignment surgery and who may receive a retirement pension at the age of 60, Ms Richards is not able to fulfil one of the conditions of eligibility for that pension, in this case that relating to retirement age.
- 30 As it arises from her gender reassignment, the unequal treatment to which Ms Richards was subject must be regarded as discrimination which is precluded by Article 4(1) of Directive 79/7.
- 31 The Court has already found that national legislation which precludes a transsexual, in the absence of recognition of his new gender, from fulfilling a requirement which must be met in order to be entitled to a right protected by Community law must be regarded as being, in principle, incompatible with the requirements of Community law (see *K.B.*, paragraphs 30 to 34).
- 32 The United Kingdom Government submits that no Community right has been breached by the decision of 12 March 2002 refusing to award Ms Richards a pension, as entitlement to a retirement pension derives only from national law.
- 33 In that regard, it is enough to remember that, according to settled case-law, Community law does not affect the power of the Member States to organise their social security systems, and that in the

absence of harmonisation at Community level it is therefore for the legislation of each Member State to determine, first, the conditions governing the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits. Nevertheless, the Member States must comply with Community law when exercising that power (Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 44 to 46, and Case C-92/02 *Kristiansen* [2003] ECR I-14597, paragraph 31).

- 34 Furthermore, discrimination contrary to Article 4(1) of Directive 79/7 falls within the scope of the derogation provided for by Article 7(1)(a) of that directive only if it is 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 for women (Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297, paragraph 13).
- 35 Although the preamble to Directive 79/7 does not state the reasons for the derogations which it lays down, it can be inferred 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 same directive (*Equal Opportunities Commission*, paragraph 15).
- 36 According to settled case-law, 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 Case 152/84 *Marshall* [1986] ECR 723, paragraph 36; Case 262/84 *Beets-Proper* [1986] ECR 773, paragraph 38; and Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 8).
- 37 Consequently, that provision must be interpreted as relating only to the determination of different pensionable ages for men and for women. However, the action in the main proceedings does not concern such a measure.
- 38 It is clear from the foregoing that Article 4(1) of Directive 79/7 must be interpreted as precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.

## **The second question**

- 39 By its second question the national court asks whether, if the Court finds that Directive 79/7 precludes the national legislation at issue in the main proceedings, the temporal effects of such a judgment must be limited.
- 40 It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision it has interpreted with a view to calling in question legal relations established in good faith (Case 24/86 *Blaizot* [1988] ECR 379, paragraph 28, and Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 39).
- 41 Moreover, it is settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling (Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 52, and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 68).
- 42 The Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission of the European Communities may even have contributed (*Bidar*, paragraph 69).
- 43 In this case, the entry into force of the 2004 Act on 4 April 2005 is liable to lead to the disappearance of disputes such as that which gave rise to the case in main proceedings. Furthermore, in both the written observations which it submitted to the Court and at the hearing, the United Kingdom Government did not maintain the claim which it had submitted in the action in the main proceedings seeking a limitation as to the temporal effect of the judgment.
- 44 Consequently, the answer to the second question must be that there is no need to limit the temporal effect of this judgment.

## **Costs**

- 45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court,

the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

- 1. Article 4(1) 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 precluding legislation which denies a person who, in accordance with the conditions laid down by national law, has undergone male-to-female gender reassignment entitlement to a retirement pension on the ground that she has not reached the age of 65, when she would have been entitled to such a pension at the age of 60 had she been held to be a woman as a matter of national law.**
- 2. There is no need to limit the temporal effects of this judgment.**

[Signatures]

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\* Language of the case: English.

