

JUDGMENT OF THE COURT

7 January 2004 (1)

(Article 141 EC - Directive 75/117/EEC - Equal treatment for men and women - Transsexual partner not entitled to a survivor's pension payable solely to a surviving spouse - Discrimination on grounds of sex)

In Case C-117/01,

REFERENCE to the Court under Article 234 EC by the Court of Appeal (England and Wales) (Civil Division) for a preliminary ruling in the proceedings pending before that court between

K.B.

and

National Health Service Pensions Agency,

Secretary of State for Health,

on the interpretation of Article 141 EC and of 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 COURT,

composed of: V. Skouris, President, C.W.A. Timmermans, J.N. Cunha Rodrigues (Rapporteur) and A. Rosas (Presidents of Chambers), D.A.O. Edward, J.-P. Puissechet, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- K.B., by C. Hockney and L. Cox QC, and by T. Eicke, Barrister,
- the United Kingdom Government, by J.E. Collins, acting as Agent, and N. Paines QC,
- the Commission of the European Communities, by N. Yerrel, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of K. B., represented by L. Cox and T. Eicke, of the United Kingdom Government, represented by J.E. Collins and N. Paines QC, and of the Commission, represented by J. Sack and L. Flynn, acting as Agents, at the hearing on 23 April 2002,

after hearing the Opinion of the Advocate General at the sitting on 10 June 2003,

gives the following

Judgment

1.

By order of 14 December 2000, received at the Court on 15 March 2001, the Court of Appeal (England and Wales) (Civil Division) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 141 EC and of 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).

2.

That question was raised in proceedings between (i) K.B., a member of the National Health Service (NHS) Pension Scheme, and (ii) the NHS Pensions Agency and the Secretary of State for Health concerning the refusal to award a widower's pension to K.B.'s transsexual partner.

Legal background

Community legislation

3.

Article 141 EC provides:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

... .

4.

Article 1(1) of Directive 75/117 provides:

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

... .

5.

Article 3 of the Directive provides:

Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.

National legislation

6.

It follows from sections 1 and 2 of the Sex Discrimination Act 1975 (the 1975 Act) that it is unlawful to discriminate directly against a person of one sex by treating her or him less favourably than a member of the opposite sex is, or would be, treated. Those sections also forbid indirect sex discrimination, which they define essentially as the application of a uniform condition or requirement which has a disproportionate and unjustified adverse impact on one sex.

7.

Following the decision of the Court in Case C-13/94 *P. v S.* [1996] ECR I-2143, the United Kingdom of Great Britain and Northern Ireland introduced the Sex Discrimination (Gender Reassignment) Regulations 1999, which amended the 1975 Act so as to bring direct discrimination on the ground of an employee's gender reassignment within the Act.

8.

Section 11(c) of the Matrimonial Causes Act 1973 provides that a marriage is void if the parties are not respectively male and female.

9.

Section 29(1) and (3) of the Births and Deaths Registration Act 1953 does not allow for any alteration of the register of births except in the case of a clerical error or an error of fact.

10.

The NHS Pension Scheme Regulations 1995 provide, at regulation G7(1), that, if a female member dies in certain circumstances, prescribed by the Regulations, and leaves a surviving widower, the widower shall, in principle, be entitled to a survivor's pension. Widower is not defined. However, it is not disputed that under English law the term refers to a person married to the scheme member.

The dispute before the national court and the question referred for a preliminary ruling

11.

K.B., the claimant in the main proceedings, is a woman who has worked for approximately 20 years for the NHS, *inter alia* as a nurse, and is a member of the NHS Pension Scheme.

12.

K.B. has shared an emotional and domestic relationship for a number of years with R., a person born a woman and registered as such in the Register of Births, who, following surgical gender reassignment, has become a man but has not, however, been able to amend his birth certificate to reflect this change officially. As a result, and contrary to their wishes, K.B. and R. have not been able to marry. K.B. stated in her pleadings and confirmed at the hearing that their union was celebrated in an adapted church ceremony approved by a Bishop of the Church of England and that they exchanged vows of the kind which would be used by any couple entering marriage.

13.

The NHS Pensions Agency informed K.B. that, as she and R. were not married, if she were to pre-decease R., R. would not be able to receive a widower's pension, since that pension was payable only to a surviving spouse and that no provision of United Kingdom law recognised a person as a spouse in the absence of a lawful marriage.

14.

K.B. brought proceedings in the Employment Tribunal, arguing that the national provisions restricting the pension to widowers and widows of members of the scheme amounted to discrimination based on sex, contrary to the provisions of Article 141 EC and Directive 75/117. For K.B., the Community provisions require that in such a context widower should be interpreted in such a way as to encompass the surviving member of a couple, who would have achieved the status of widower had his sex not resulted from surgical gender reassignment.

15.

Both the Employment Tribunal, by decision of 16 March 1998, and the Employment Appeal Tribunal, London (United Kingdom), in its judgment on appeal of 19 August 1999, found that the pension scheme at issue was not discriminatory.

16.

K.B. took her case to the Court of Appeal (England and Wales) (Civil Division), which decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

Does the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme, which limits the material dependant's benefit to her widower, constitute sex discrimination in contravention of Article 141 EC and Directive 75/117?

The question referred for a preliminary ruling

Observations submitted to the Court

17.

For K.B., the decision denying her the right to nominate R. as the beneficiary of the widower's pension was made solely for a reason related to R.'s gender reassignment. If R. had not undergone

gender reassignment and if that did not prevent R. from marrying, R. would be entitled to a survivor's pension as a surviving spouse.

18.

K.B. submits that the judgment in *P. v S.*, according to which Community law prohibits discrimination arising from the fact that a person has undergone gender reassignment, applies in the present case, given that the referring court regarded K.B. and R. as a heterosexual couple where the only distinguishing feature was that the gender of one partner had been reassigned. Consequently, the unfavourable treatment is based solely on the fact that R. has undergone gender reassignment, which constitutes direct discrimination on grounds of sex contrary to Article 141 EC and Directive 75/117.

19.

In the alternative, K.B. submits that the marriage requirement amounts to indirect discrimination against transsexuals since, unlike a heterosexual couple neither of the partners to which is a transsexual, in the case of a heterosexual couple one of whose members has undergone gender reassignment surgery, the marriage requirement can never be met.

20.

The United Kingdom Government contends that both male and female workers with partners to whom they are not married are unable to benefit from the survivor's benefits provided for by the NHS Pension Scheme. That is true whatever the reason for the parties not being married. It does not make any difference whether the reason why a particular employee cannot satisfy the requirement is because the employee has a homosexual partner, as in Case C-249/96 *Grant* [1998] ECR I-621, or is because he has a transsexual partner, as in the present case, or is some other reason.

21.

The United Kingdom Government also submits that the judgment in Joined Cases C-122/99 P and C-125/99 P *D. and Sweden v Council* [2001] ECR I-4319 is applicable to the present case, since in that case the contested provision of the Staff Regulations of Officials of the European Communities contained, as in this case, a requirement of marriage and not merely of a stable relationship of a certain character for the purpose of the grant of the household allowance.

22.

The Commission submits that the decisive factor in the case of *P. v S.* was the fact that the unfavourable treatment suffered by P. was directly caused by, and flowed from, her gender reassignment, since P. would not have been dismissed had it not been for the gender reassignment.

23.

However, in the present case, the unfavourable treatment complained of is one step removed from R.'s gender reassignment and arises instead from the fact that it is impossible for the couple to marry. In those circumstances, the Commission submits that *P. v S.* is not applicable to the present case.

24.

The Commission also contends that K.B. cannot rely on Community law on the basis that the indirect relationship between R.'s gender reassignment and the refusal to pay him a survivor's pension is sufficient to bring that refusal within the definition of sex discrimination. First, the judgment in *Grant* implicitly recognised that the definition of marriage was a matter of family law, which remains within the competence of the Member States. Second, the European Court of Human Rights has held that the barrier to marriage arising from the fact that English law does not allow a transsexual who has undergone gender reassignment to amend his or her birth certificate does not constitute an infringement of Articles 8, 12 or 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (□the ECHR□).

Findings of the Court

25.

Benefits granted under a pension scheme which essentially relates to the employment of the person concerned form part of the pay received by that person and come within the scope of Article 141 EC (see, in particular, Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 28, and Case C-351/00 *Niemi* [2002] ECR I-7007, paragraph 40).

26.

The Court has also recognised that a survivor's pension provided for by such a scheme falls within the scope of Article 141 EC. It has stated in that regard that the fact that such a pension, by definition, is not paid to the employee but to the employee's survivor does not affect that interpretation because, such a benefit being an advantage deriving from the survivor's spouse's membership of the scheme, the pension is vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the spouse's employment (Case C-109/91 *Ten Oever* [1993] ECR I-4879, paragraphs 12 and 13, and Case C-379/99 *Menauer* [2001] ECR I-7275, paragraph 18).

27.

So a survivor's pension paid under an occupational pension scheme such as the NHS Pension Scheme constitutes pay within the meaning of Article 141 EC and Directive 75/117.

28.

The decision to restrict certain benefits to married couples while excluding all persons who live together without being married is either a matter for the legislature to decide or a matter for the national courts as to the interpretation of domestic legal rules, and individuals cannot claim that there is discrimination on grounds of sex, prohibited by Community law (see, as regards the powers of the Community legislature, *D. v Council*, paragraphs 37 and 38).

29.

In this instance, such a requirement cannot be regarded *per se* as discriminatory on grounds of sex and, accordingly, as contrary to Article 141 EC or Directive 75/117, since for the purposes of awarding the survivor's pension it is irrelevant whether the claimant is a man or a woman.

30.

However, in a situation such as that before the national court, there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the grant of that right. As the Advocate General noted in point 74 of his Opinion, the inequality of treatment does not relate to the award of a widower's pension but to a necessary precondition for the grant of such a pension: namely, the capacity to marry.

31.

In the United Kingdom, by comparison with a heterosexual couple where neither partner's identity is the result of gender reassignment surgery and the couple are therefore able to marry and, as the case may be, have the benefit of a survivor's pension which forms part of the pay of one of them, a couple such as K.B. and R. are quite unable to satisfy the marriage requirement, as laid down by the NHS Pension Scheme for the purpose of the award of a survivor's pension.

32.

The fact that it is impossible for them to marry is due to the fact, first, that the Matrimonial Causes Act 1973 deems a marriage void if the parties are not respectively male and female; second, that a person's sex is deemed to be that appearing on his or her birth certificate; and, third, that the Births and Deaths Registration Act does not allow for any alteration of the register of births, except in the case of clerical error or an error of fact.

33.

The European Court of Human Rights has held that the fact that it is impossible for a transsexual to marry a person of the sex to which he or she belonged prior to gender reassignment surgery, which arises because, for the purposes of the registers of civil status, they belong to the same sex (United Kingdom legislation not admitting of legal recognition of transsexuals' new identity), was a breach of their right to marry under Article 12 of the ECHR (see Eur. Court H.R. judgments of 11 July 2002 in *Goodwin v United Kingdom* and *I. v United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, §§ 97 to 104 and §§ 77 to 84 respectively).

34.

Legislation, such as that at issue in the main proceedings, which, in breach of the ECHR, prevents a couple such as K.B. 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 must be regarded as being, in principle, incompatible with the requirements of Article 141 EC.

35.

Since it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person in R.'s situation - as the European Court of Human Rights has accepted (*Goodwin v United Kingdom*, § 103) - it is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'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.

36.

It follows from the foregoing that 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 K.B. 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 K.B.'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.

Costs

37.

The costs incurred by the United Kingdom Government and by the Commission, 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Court of Appeal (England and Wales) (Civil Division) by order of 14 December 2000, hereby rules:

Article 141 EC, in principle, precludes legislation, such as that at issue before the national court, which, in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, prevents a couple such as K.B. 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 K.B.'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.

Skouris
Timmermans
Cunha Rodrigues

Rosas

Edward
Puissochet

Macken

Colneric
von Bahr

Delivered in open court in Luxembourg on 7 January 2004.

R. Grass

Registrar

President

[1](#): Language of the case: English.