

JUDGMENT OF THE COURT (Sixth Chamber)

12 May 2021 (*)

(Reference for a preliminary ruling – Equal treatment for men and women in matters of social security – Directive 79/7/EEC – Article 4(1) – Discrimination on ground of sex – National legislation providing for a pension maternity supplement to be granted to women who have had a certain number of children – Exclusion from entitlement to that pension supplement of women who have requested early retirement – Scope of Directive 79/7/EEC)

In Case C-130/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de lo Social No 3 de Barcelona (Social Court No 3, Barcelona, Spain), made by decision of 4 March 2020, received at the Court on 9 March 2020, in the proceedings

YJ

v

Instituto Nacional de la Seguridad Social (INSS),

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, C. Toader and M. Safjan (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- YJ, by L. Ripoll Sans, abogada,
- the Instituto Nacional de la Seguridad Social (INSS), by A.R. Trillo García and P. García Perea, acting as Agents,
- the Spanish Government, by M.J. Ruiz Sánchez, acting as Agent,
- the European Commission, by C. Valero and I. Galindo Martín, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 (OJ 1979 L 6, p. 24).

2 The request has been made in proceedings between YJ and the Instituto Nacional de la Seguridad Social (National Institute for Social Security, Spain; ‘the INSS’) concerning the latter’s refusal to grant

YJ a maternity supplement to her early retirement pension.

Legal context

EU law

3 The first and second recitals of Directive 79/7 state:

‘Whereas Article 1(2) of 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)] provides that, with a view to ensuring the progressive implementation of the principle of equal treatment in matters of social security, the Council [of the European Communities], acting on a proposal from the Commission [of the European Communities], will adopt provisions defining its substance, its scope and the arrangements for its application; whereas the [EEC] Treaty does not confer the specific powers required for this purpose;

Whereas the principle of equal treatment in matters of social security should be implemented in the first place in the statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work, occupational diseases and unemployment, and in social assistance in so far as it is intended to supplement or replace the abovementioned schemes[.]’

4 Article 1 of that directive 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 4 of that directive reads as follows:

‘1. 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.

2. The principle of equal treatment shall be without prejudice to the provisions relating to the protection of women on the grounds of maternity.’

6 According to Article 7(1) of that directive:

‘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;

...’

Spanish law

7 Article 60 of the Ley General de la Seguridad Social (General Law on Social Security), in the consolidated version approved by Real Decreto Legislativo 8/2015 por el que se aprueba el texto refundido de la Ley General de la Seguridad Social (Royal Legislative Decree 8/2015 approving the revised text of the General Law on Social Security) of 30 October 2015 (BOE No 261 of 31 October 2015, p. 103291; ‘the LGSS’), entitled ‘Maternity supplement for contributory pensions under the social security system’ is worded as follows:

‘1. Women who have had biological or adopted children and are recipients of a contributory retirement, widow’s or permanent incapacity pension under any scheme within the social security system shall be granted a pension supplement on account of their demographic contribution to social security.

That supplement, which shall have the legal nature of a contributory State pension for all purposes, shall consist of an amount equivalent to the result of applying to the initial amount of the pensions referred to a specified percentage which shall be based on the number of children in accordance with the following scale:

- (a) two children: 5%.
- (b) three children: 10%.
- (c) four or more children: 15%.

For the purpose of establishing entitlement to the supplement and the amount thereof, only children born or adopted before the operative event for the pension concerned shall be taken into account.

2. Where the amount of the pension initially granted exceeds the limit laid down in Article 57 without application of the supplement, the total of the pension and the supplement may not exceed that limit increased by 50% of the supplement allocated.

Similarly, if the amount of the pension granted reaches the limit laid down in Article 57 as a result of applying the supplement only in part, the person concerned shall also be entitled to receive 50% of the portion of the supplement which exceeds the maximum limit in force at that time.

Where, by legislative or regulatory means, the limit may be exceeded for other reasons, the supplement shall be calculated in accordance with this paragraph, taking as the initial amount of the pension the amount of the limit in force at that time.

If the pension to be supplemented is the result of aggregating periods of insurance on a pro rata basis, in accordance with international legislation, the supplement shall be calculated on the basis of the resulting theoretical pension and the appropriate proportion shall be applied to the result obtained.

...

4. The pension supplement shall not be applicable where the person concerned voluntarily takes early retirement or takes partial retirement, referred to in Articles 208 and 215 respectively.

However, the appropriate pension supplement shall be paid where partial retirement is followed by full retirement, once the required age has been reached.

...’

8 Article 208 of the LGSS, entitled ‘Voluntary early retirement of the person concerned’, provides:

‘1. Access to voluntary early retirement by the person concerned shall be subject to the following conditions:

- (a) Having reached an age which is no more than two years below the applicable age in each case in accordance with Article 205(1)(a), without the reduction coefficients referred to in Article 206 being applicable for that purpose.

- (b) Proof of a minimum period of actual contribution for 35 years, without the proportional part relating to premiums being taken into account for that purpose. For those exclusive purposes, only the duration of compulsory military service or alternative social service shall be taken into account, subject to a maximum limit of one year.
- (c) Once the general and specific conditions of that type of retirement are established, the amount of the pension to be received must be greater than the amount of the minimum pension to which the person concerned would be entitled on account of their family situation at the age of 65. Otherwise, it is impossible to take advantage of that form of early retirement.

...'

The dispute in the main proceedings and the question referred for a preliminary ruling

- 9 At her request, YJ obtained, by decision of the INSS of 11 December 2017, confirmation that she could take early retirement and receive a pension with effect from 4 December 2017. YJ lodged a complaint against that decision, arguing that the INSS should have granted her the pension maternity supplement provided for in Article 60 of the LGSS because she had had three children.
- 10 After the INSS rejected that complaint by decision of 9 May 2018, on the ground that that pension maternity supplement was not applicable where the person concerned had opted for early retirement, YJ brought an action before the Juzgado de lo Social No 3 de Barcelona (Social Court No 3, Barcelona, Spain). Before the referring court, she claims, in essence, that Article 60 of the LGSS leads to discrimination against women who, on the ground that they have opted for early retirement, are not entitled to that pension maternity supplement.
- 11 The referring court notes that, by the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075), the Court held that Article 60 of the LGSS, which does not fall within the scope of either the derogation provided for in Article 4(2) of Directive 79/7 or the derogation provided for in Article 7(1)(b) of that directive, constitutes direct discrimination on ground of sex prohibited by that directive.
- 12 The referring court adds that there is no reason not to apply *mutatis mutandis* the reasoning adopted by the Court in that judgment to women who are all in the same situation, irrespective of the form and date of access to the pension scheme, and entitled to the same pension maternity supplement.
- 13 Thus, the referring court is uncertain as to whether the scheme provided for in Article 60 of the LGSS, under which women who, as is the case for YJ, opt for early retirement, are excluded from entitlement to the pension maternity supplement provided for in that article, unlike those who retire at the statutory age or who take early retirement on account of the work performed during their working life, on account of a disability or as a result of the termination of their employment during the period immediately preceding retirement through no fault of their own, complies with the EU law principle guaranteeing equal treatment in the broad sense, that is to say, between men and women, and also between women, and whether that scheme thus constitutes direct discrimination for the purposes of Directive 79/7.
- 14 In those circumstances, the Juzgado de lo Social No 3 de Barcelona (Social Court No 3, Barcelona) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Can a provision such as Article 60(4) of the [LGSS], which excludes the maternity supplement for women who retire early voluntarily, as opposed to those who retire, also voluntarily, at the normal age provided for, or who retire early but on the basis of work performed throughout their working lives, by reason of disability, or because they ceased employment before taking retirement through no fault of their own, be considered to constitute direct discrimination for the purposes of Directive 79/7?’

Consideration of the question referred for a preliminary ruling

- 15 As a preliminary point, it must be noted that, in its request for a preliminary ruling, the referring court refers generally to Directive 79/7 without indicating the provision(s) of that directive which it seeks to have interpreted.
- 16 That said, it is apparent, both from the wording of the question referred and from the explanations provided by the referring court in the request for a preliminary ruling, that that question seeks, in fact, to determine whether there has been direct discrimination on ground of sex within the meaning of Directive 79/7, as prohibited by Article 4(1) of that directive, which provides that the principle of equal treatment for men and women in matters of social security means that there must be no discrimination whatsoever on ground of sex either directly, or indirectly by reference in particular to the marital or family status of the person concerned.
- 17 In that regard, it should be noted that, in accordance with settled case-law, it is for the Court, in the procedure laid down by Article 267 TFEU providing for cooperation with national courts, to provide the national court with an answer which will be of use to it and enable it to decide the case before it and, to that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 27 and the case-law cited).
- 18 Accordingly, in order to give a useful answer to the referring court, the question referred must be understood as seeking, in essence, to determine whether Article 4(1) of Directive 79/7 must be interpreted as precluding national legislation which provides that women who have had at least two biological or adopted children are entitled to a pension maternity supplement in the event of retirement at the statutory age or early retirement on certain grounds laid down by law, but not if the person concerned voluntarily takes early retirement.
- 19 In that regard, it must be noted that the concept of ‘direct discrimination on ground of sex’, referred to in Article 4(1) of Directive 79/7, must be understood as covering any situation in which one person is treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation (judgment of 26 June 2018, *MB (Change of gender and retirement pension)*, C-451/16, EU:C:2018:492, paragraph 34). It follows that, in order for direct discrimination to be ‘on ground of sex’, a person must be treated unfavourably on account of being male or female.
- 20 It should also be noted that, in accordance with the title of Directive 79/7 and Article 1, read in conjunction with the first and second recitals, that directive seeks to achieve the progressive implementation of the principle of equal treatment for men and women in matters of social security. Furthermore, the defined term in Article 1 of that directive shows that the expression ‘principle of equal treatment’ used in the rest of that directive must be understood as referring in an abbreviated manner to the ‘principle of equal treatment for men and women in matters of social security’.
- 21 Consequently, the concept of ‘discrimination on ground of sex’ in Article 4(1) of Directive 79/7 can apply only to cases of discrimination between male workers, on the one hand, and female workers, on the other.
- 22 In those circumstances, Article 4(1) of Directive 79/7 cannot be understood as constituting a provision of EU law guaranteeing equal treatment in the broad sense, that is to say, also between persons belonging to the same sex. On the contrary, the concept of ‘direct discrimination on ground of sex’ referred to in that provision means a situation in which workers are treated less favourably, due to being male or female, than other workers of the opposite sex in a comparable situation.
- 23 In the present case, the situation at issue in the main proceedings concerns a woman who, because she opted for early retirement, is not entitled to a pension maternity supplement and thus considers herself to be treated less favourably than women who, because they have retired at the statutory age or have taken early retirement on certain grounds laid down by law, are entitled to that pension supplement.
- 24 Directive 79/7 cannot apply to such a situation, since the criterion on the basis of which the grant of the relevant pension maternity supplement is denied to women voluntarily taking early retirement relates not to the sex of the worker concerned but to the detailed rules for that worker’s entitlement to retirement, the alleged discriminatory treatment thus not being ‘on ground of sex’. Moreover, the

situation in question does not relate to discrimination between male workers, on the one hand, and female workers, on the other, but to an alleged unequal treatment between female workers.

25 That conclusion is not called into question by the judgment of 12 December 2019, *Instituto Nacional de la Seguridad Social (Pension supplement for mothers)* (C-450/18, EU:C:2019:1075), even though the case which gave rise to that judgment concerned the same national legislation as that at issue in the main proceedings. In that case, the applicant in the main proceedings was a male worker who considered that he had been treated less favourably than female workers, since he was refused the pension maternity supplement in question on the ground that he was male. In that judgment, the Court was thus able to base its reasoning on Directive 79/7 in so far as the alleged unequal treatment concerned male workers when compared with female workers and was, consequently, based on the sex of the worker concerned, which is not the case here.

26 In those circumstances, it must be held that the situation at issue in the main proceedings does not fall within the scope of Directive 79/7.

27 In the light of all the foregoing considerations, the answer to the question referred is that Directive 79/7 does not apply to national legislation which provides that women who have had at least two biological or adopted children are entitled to a pension maternity supplement in the event of retirement at the statutory age or early retirement on certain grounds laid down by law, but not if the person concerned voluntarily takes early retirement.

Costs

28 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 (Sixth Chamber) hereby rules:

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 does not apply to national legislation which provides that women who have had at least two biological or adopted children are entitled to a pension maternity supplement in the event of retirement at the statutory age or early retirement on certain grounds laid down by law, but not if the person concerned voluntarily takes early retirement.

[Signatures]

* Language of the case Spanish.