JUDGMENT OF THE COURT

26 October 1999 (1)

(Equal treatment for men and women Refusal to employ a woman as a chefin the Royal Marines)

In Case C-273/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article234 EC) by the Industrial Tribunal, Bury St Edmunds, United Kingdom, for apreliminary ruling in the proceedings pending before that tribunal between

Angela Maria Sirdar

and

The Army Board,

Secretary of State for Defence,

on the interpretation of the EC Treaty, in particular Article 224 thereof (nowArticle 297 EC), and of Council Directive 76/207/EEC of 9 February 1976 on theimplementation of the principle of equal treatment for men and women as regardsaccess to employment, vocational training and promotion, and working conditions(OJ 1976 L 39, p. 40), in particular Article 2 thereof,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn,J.-P. Puissochet (Rapporteur), G. Hirsch, P. Jann and H. Ragnemalm, Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mrs Sirdar, by P. Duffy QC and D. Rose, Barrister, instructed by H. Slater,Solicitor, The Equal Opportunities Commission,

- the United Kingdom Government, by J.E. Collins, Assistant TreasurySolicitor, acting as Agent, R. Plender QC, S. Richards, Barrister, andR. McManus, Barrister,

- the French Government, by K. Rispal-Bellanger, Head of the Subdirectoratefor International Economic Law and Community Law in the Legal AffairsDirectorate of the Ministry of Foreign Affairs, and A. de Bourgoing, Headof Mission in that directorate, acting as Agents,

- the Portuguese Government, by L. Fernandes, Director of the Legal Servicein the Directorate-General for European Community Affairs in the Ministryof Foreign Affairs, and Â. Seiça Neves, a member of that service, acting asAgents,

- the Commission of the European Communities, by P.J. Kuijper andM. Wolfcarius, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Sirdar, represented by P. Duffy andD. Rose; of the United Kingdom Government, represented by J.E. Collins,R. Cranston QC, and R. Plender; of the French Government,

represented by A. deBourgoing; and of the Commission, represented by P.J. Kuijper, at the hearing on27 October 1998,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1999,

gives the following

Judgment

1. By decision of 28 April 1997, received at the Court on 29 July 1997, the IndustrialTribunal, Bury St Edmunds, referred for a preliminary ruling under Article 177 ofthe EC Treaty (now Article 234 EC) six questions on the interpretation of thatTreaty, in particular Article 224 thereof (now Article 297 EC), and of CouncilDirective 76/207/EEC of 9 February 1976 on the implementation of the principleof equal treatment for men and women as regards access to employment,vocational training and promotion, and working conditions (OJ 1976 L 39, p. 40)(hereinafter 'the Directive'), in particular Article 2 thereof.

2. Those questions have arisen in a dispute between Mrs Sirdar, on the one hand, andthe Army Board and the Secretary of State for Defence, on the other, concerningthe refusal to employ Mrs Sirdar as a chef in the Royal Marines.

Legal framework

3. Article 224 of the Treaty provides as follows:

'Member States shall consult each other with a view to taking together the stepsneeded to prevent the functioning of the common market being affected bymeasures which a Member State may be called upon to take in the event of seriousinternal disturbances affecting the maintenance of law and order, in the event ofwar, serious international tension constituting a threat of war, or in order to carryout obligations it has accepted for the purpose of maintaining peace andinternational security.'

4. Article 2(1) and (2) of the Directive provides as follows:

'1. For the purposes of the following provisions, the principle of equaltreatment shall mean that there shall be no discrimination whatsoever on groundsof sex either directly or indirectly by reference in particular to marital or familystatus.

2. This Directive shall be without prejudice to the right of Member States toexclude from its field of application those occupational activities and, whereappropriate, the training leading thereto, for which, by reason of their nature or thecontext in which they are carried out, the sex of the worker constitutes adetermining factor.'

5. Article 9(2) of the Directive provides that 'Member States shall periodically assessthe occupational activities referred to in Article 2(2) in order to decide, in the lightof social developments, whether there is justification for maintaining the exclusionsconcerned. They shall notify the Commission of the results of this assessment.'

The main proceedings

6. In the United Kingdom, application of the principle of equal treatment for menand women is governed by the provisions of the Sex Discrimination Act 1975. Section 85(4) of that Act provides: 'Nothing in this Act shall render unlawful anact done for the purpose of ensuring the combat effectiveness of the naval, militaryor air forces'.

7. According to the decision referring the case, the responsible authorities in theRoyal Marines have a policy of excluding women from service on the ground thattheir presence is incompatible with the requirement of 'interoperability□, that is tosay, the need for every Marine, irrespective of his specialisation, to be capable offighting in a commando unit. This policy was set out in a report of 10 June 1994entitled 'Revised Employment Policy for Women in the Army □ Effect on theRoyal Marines□. Paragraph 2(b) of that report, which is cited in paragraph 42 ofthe referring decision, states in particular that: 'In a small corps, in times of crisisand manpower shortage, all Royal Marines must be capable at any time of servingat their rank and skill level in a commando unit. ... Employment of women in theRoyal Marines will not allow for interoperability.□

8. Mrs Sirdar had been in the British Army since 1983 and had served as a chef since1990 in a commando regiment of the Royal Artillery, when she was informed, inFebruary 1994, that she was to be made redundant for economic reasons witheffect from February 1995. This redundancy, which was the result of a studyconducted into defence costs, affected a total of more than 500 chefs.

9. In July 1994 Mrs Sirdar received an offer of transfer to the Royal Marines, whohad a shortage of chefs, in a letter which specified that, in order to transfer, shewould be required to pass an initial selection board and follow a commandotraining course. However, when the responsible authorities in the Royal Marinesbecame aware that she was a woman and realised that the offer had been madeto her in error, they informed Mrs Sirdar that she was ineligible by reason of thepolicy of excluding women from that regiment.

10. After she had been made redundant, Mrs Sirdar brought the matter before theIndustrial Tribunal, Bury St Edmunds, arguing that she had been the victim ofdiscrimination based on sex. Since it formed the view that resolution of the disputerequired an interpretation of the provisions of the Treaty and the Directive, theIndustrial Tribunal decided to refer the following questions to the Court for apreliminary ruling:

'1. Are policy decisions which a Member State takes during peace time and/orin preparation for war in relation to access to employment in, vocationaltraining for, working conditions in, or the deployment of its armed forceswhere such policy decisions are taken for the purposes of combat

effectiveness outside the scope of the EC Treaty and/or its subordinatelegislation, in particular Council Directive 76/207/EEC?

2. Are the decisions which a Member State may take in preparation for warand during peace time with regard to the engagement, training anddeployment of soldiers in marine commando units of its armed forcesdesigned for close engagement with enemy forces in the event of waroutside the scope of the EC Treaty or its subordinate legislation where suchdecisions are taken for the purpose of ensuring combat effectiveness in suchunits?

3. Does Article 224 of the EC Treaty, on its proper construction, permitMember States to exclude from the ambit of Council Directive 76/207/EECdiscrimination on grounds of sex in relation to access to employment,vocational training [and] working conditions, including the conditionsgoverning dismissal, in the armed forces during peace time and/or inpreparation for war for the purpose of ensuring combat effectiveness?

4. Is the policy adopted by a Member State of excluding all women duringpeace time and/or in preparation for war from service as interoperablemarines capable of being excluded from the ambit of Council Directive76/207/EEC by virtue of the operation of Article 224? If so, what guidelinesor criteria should be applied in order to determine whether the said policymay properly be so excluded from the ambit of Directive 76/207/EEC byreason of Article 224?

5. Is the policy adopted by a Member State of excluding all women duringpeace time and/or in preparation for war from service as interoperablemarines capable of being justified under Article 2(2)

of Council Directive76/207/EEC?

6. If so, what is the test to be applied by a national tribunal when consideringwhether or not the application of the policy is justified?

The first and second questions

11. By its first two questions, the national tribunal is asking whether decisions taken byMember States with regard to access to employment, vocational training andworking conditions in the armed forces for the purpose of ensuring combateffectiveness, particularly with regard to marine commando units, fall outside thescope of Community law.

12. Mrs Sirdar submits that the Court's answer should be in the negative. She arguesthat there is no provision which specifically excludes the armed forces from the

scope of the Treaty and that no such general exclusion can be inferred from thespecific derogations provided for different reasons by the Treaty or the Directive.

13. The French, Portuguese and United Kingdom Governments submit, on thecontrary, that decisions concerning the organisation and administration of thearmed forces, particularly those taken for the purpose of ensuring combateffectiveness in preparation for war, fall outside the scope of the Treaty. ThoseGovernments rely primarily on general considerations derived from the objectivesof the Treaty or on specific provisions thereof, such as Article 48(4) (now, afteramendment, Article 39(4) EC) and Article 224.

14. The Commission takes the view that decisions relating to the organisation andadministration of the armed forces are not excluded from the scope of the Treatybut may come within the derogation set out in Article 224 thereof.

15. It is for the Member States, which have to adopt appropriate measures to ensuretheir internal and external security, to take decisions on the organisation of theirarmed forces. It does not follow, however, that such decisions must fall entirelyoutside the scope of Community law.

16. As the Court has already held, the only articles in which the Treaty provides forderogations applicable in situations which may affect public security are Articles 36,48, 56, 223 (now, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and224, which deal with exceptional and clearly defined cases. It is not possible toinfer from those articles that there is inherent in the Treaty a general exceptioncovering all measures taken for reasons of public security. To recognise theexistence of such an exception, regardless of the specific requirements laid downby the Treaty, might impair the binding nature of Community law and its uniformapplication (see, to that effect, Case 222/84 *Johnston* v *Chief Constable of the RoyalUlster Constabulary* [1986] ECR 1651, paragraph 26).

17. The concept of public security, within the meaning of the Treaty articles cited inthe preceding paragraph, covers both a Member State's internal security, as in themain proceedings in *Johnston*, and its external security (in this connection, see CaseC-367/89 *Richardt and 'Les Accessoires Scientifiques* [1991] ECR I-4621, paragraph22, and Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 26).

18. Furthermore, some of the derogations provided for by the Treaty concern only therules relating to the free movement of goods, persons and services, and not thesocial provisions of the Treaty, of which the principle of equal treatment of menand women on which Mrs Sirdar relies forms part. In accordance with settled case-law, this principle is of general application and the Directive applies to

employmentin the public service (Case 248/83 *Commission* v *Germany* [1985] ECR 1459,paragraph 16, and Case C-1/95 *Gerster* v *Freistaat Bayern* [1997] ECR I-5253,paragraph 18).

19. It follows that application of the principle of equal treatment for men and womenis not subject to any general reservation as regards measures for the organisationof the armed forces taken on grounds of the protection of public security, apartfrom the possible application of Article 224 of the Treaty, which concerns a whollyexceptional situation and is the subject-matter of the third and fourth questions(*Johnston*, paragraph 27).

20. The answer to the first and second questions must therefore be that decisions takenby Member States in regard to access to employment, vocational training andworking conditions in the armed forces for the purpose of ensuring combateffectiveness do not fall altogether outside the scope of Community law.

The fifth and sixth questions

21. By these questions, which should be examined before the third and fourthquestions, the national tribunal asks whether, and if so under what conditions, theexclusion of women from service in combat units such as the Royal Marines maybe justified under Article 2(2) of the Directive.

22. Mrs Sirdar and the Commission, as well as, by way of alternative argument, theGovernments which have submitted observations, take the view that the justificationprovided for such an exclusion must be assessed by reference to the criteria whichthe Court set out in *Johnston*, ensuring in particular compliance with the principleof proportionality. The United Kingdom Government, however, takes the view thatjudicial review in this area is necessarily limited and must confine itself to thequestion of whether the national authorities could reasonably have formed the viewthat the policy in issue was necessary and appropriate.

23. Under Article 2(2) of the Directive, Member States have the option of excludingfrom the scope of that directive occupational activities for which, by reason of theirnature or the context in which they are carried out, sex constitutes a determiningfactor; it must be noted, however, that, as a derogation from an individual right laiddown in the Directive, that provision must be interpreted strictly (*Johnston*,paragraph 36).

24. The Court has thus recognised, for example, that sex may be a determining factorfor posts such as those of prison warders and head prison warders (Case 318/86*Commission* v *France* [1988] ECR 3559, paragraphs 11 to 18), or for certainactivities such as policing activities where there are serious internal disturbances(*Johnston*, paragraph 37).

25. A Member State may restrict such activities and the relevant professional trainingto men or to women, as appropriate. In such a case, as is clear from Article 9(2)of the Directive, Member States have a duty to assess periodically the activities

concerned in order to decide whether, in the light of social developments, thederogation from the general scheme of the Directive may still be maintained(*Johnston*, paragraph 37).

26. In determining the scope of any derogation from an individual right such as theequal treatment of men and women, the principle of proportionality, one of thegeneral principles of Community law, must also be observed, as the Court pointedout in paragraph 38 of *Johnston*. That principle requires that derogations remainwithin the limits of what is appropriate and necessary in order to achieve the aimin view and requires the principle of equal treatment to be reconciled as far aspossible with the

requirements of public security which determine the context inwhich the activities in question are to be performed.

27. However, depending on the circumstances, national authorities have a certaindegree of discretion when adopting measures which they consider to be necessaryin order to guarantee public security in a Member State (*Leifer*, paragraph 35).

28. The question is therefore whether, in the circumstances of the present case, themeasures taken by the national authorities, in the exercise of the discretion whichthey are recognised to enjoy, do in fact have the purpose of guaranteeing publicsecurity and whether they are appropriate and necessary to achieve that aim.

29. As pointed out in paragraph 7 of this judgment, the reason given for refusing toemploy the applicant in the main proceedings as a chef with the Royal Marines isthe total exclusion of women from that unit by reason of the 'interoperability□ ruleestablished for the purpose of ensuring combat effectiveness.

30. It is clear from the documents in the case that, according to the findings alreadymade by the national court, the organisation of the Royal Marines differsfundamentally from that of other units in the British armed forces, of which theyare the 'point of the arrow head□. They are a small force and are intended to bethe first line of attack. It has been established that, within this corps, chefs areindeed also required to serve as front-line commandos, that all members of thecorps are engaged and trained for that purpose, and that there are no exceptionsto this rule at the time of recruitment.

31. In such circumstances, the competent authorities were entitled, in the exercise oftheir discretion as to whether to maintain the exclusion in question in the light ofsocial developments, and without abusing the principle of proportionality, to cometo the view that the specific conditions for deployment of the assault units of whichthe Royal Marines are composed, and in particular the rule of interoperability towhich they are subject, justified their composition remaining exclusively male.

32. The answer to the fifth and sixth questions must therefore be that the exclusion ofwomen from service in special combat units such as the Royal Marines may be

justified under Article 2(2) of the Directive by reason of the nature of the activitiesin question and the context in which they are carried out.

The third and fourth questions

33. In view of the answer to the fifth and sixth questions, it is unnecessary to reply tothe third and fourth questions.

Costs

34. The costs incurred by the United Kingdom, French and Portuguese Governmentsand by the Commission, which have submitted observations to the Court, are notrecoverable. Since these proceedings are, for the parties to the main proceedings,a step in the proceedings pending before the national court, the decision on costsis a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Industrial Tribunal, BurySt Edmunds, by decision of 28 April 1997, hereby rules:

1. Decisions taken by Member States in regard to access to employment,vocational training and working conditions in the armed forces for thepurpose of ensuring combat effectiveness do not fall altogether outside thescope of Community law.

2. The exclusion of women from service in special combat units such as theRoyal Marines may be justified under Article 2(2) of Council Directive76/207/EEC of 9 February 1976 on the implementation of the principle ofequal treatment for men and women as regards access to employment,vocational training and promotion, and working conditions, by reason of thenature of the activities in question and the context in which they are carriedout.

Rodríguez Iglesias
Moitinho de Almeida
Edward

Schintgen

Kapteyn
Puissochet

Hirsch

Jann
Ragnemalm

Delivered in open court in Luxembourg on 26 October 1999.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

1: Language of the case: English.