

# JUDGMENT OF THE COURT

11 November 1997<sup>(1)</sup>

□[234s(Equal treatment of men and women □ Equally qualified male and female candidates □ Priority for female candidates □ Saving clause)□[s

In Case C-409/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Verwaltungsgericht Gelsenkirchen (Germany) for a preliminary ruling in the proceedings pending before that court between

**Hellmut Marschall**

and

**Land Nordrhein-Westfalen**

on the interpretation of Article 2(1) and (4) 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),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and M. Wathelet (Presidents of Chambers), G.F. Mancini, J.C. Moitinho de Almeida, P.J.G. Kapteyn (Rapporteur), J.L. Murray, D.A.O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- *Land Nordrhein-Westfalen*, represented by the Bezirksregierung Arnsberg, by Juliane Kokott, Professor at Heinrich Heine University, Düsseldorf,
- the Spanish Government, by Alberto José Navarro González, Director-General of Legal Coordination and Community Affairs, assisted by Gloria Calvo Díaz, Abogado del Estado, of the State Legal Service, acting as Agents,
- the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Chargé de Mission in the same directorate, acting as Agents,
- the Austrian Government, by Wolf Okressek, Ministerialrat in the Constitutional Service of the Federal Chancellor's Office, acting as Agent,
- the Finnish Government, by Tuula Pynnä, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,
- the Swedish Government, by Lotty Nordling, Under-Secretary for Legal Affairs at the Department of Foreign Trade of the Ministry of Foreign Affairs, acting as Agent,

- the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by Eleanor Sharpston, Barrister,
- the Norwegian Government, by Beate B. Ekeberg, Head of Service acting for the Minister for Foreign Affairs, acting as Agent,
- the Commission of the European Communities, by Jürgen Grunwald, Legal Adviser, and Marie Wolfcarius, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of *Land* Nordrhein-Westfalen, represented by Juliane Kokott; of the Netherlands Government, represented by Hans van den Oosterkamp, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; of the Finnish Government, represented by Holger Rotkirch, Head of the Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agent; of the Swedish Government, represented by Lotty Nordling; of the United Kingdom Government, represented by Lindsey Nicoll, Eleanor Sharpston and Michael Beloff, QC; and of the Commission, represented by Jürgen Grunwald and Marie Wolfcarius, at the hearing on 11 March 1997,

after hearing the Opinion of the Advocate General at the sitting on 15 May 1997,

gives the following

## Judgment

1. By order of 21 December 1995, received at the Court on 29 December 1995, the Verwaltungsgericht (Administrative Court) Gelsenkirchen referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 2(1) and (4) 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, hereinafter 'the Directive').
2. That question has been raised in proceedings between Hellmut Marschall and Land Nordrhein-Westfalen (*Land* of North Rhine-Westphalia, hereinafter 'the *Land*') concerning his application for a higher grade post at the Gesamtschule (comprehensive school) Schwerte in Germany.
3. The second sentence of Paragraph 25(5) of the Beamten-gesetz für das Land Nordrhein-Westfalen (Law on Civil Servants of the *Land*), in the version published on 1 May 1981 (GVNW, p. 234), as last amended by Paragraph 1 of the Seventh Law amending certain rules relating to the civil service, of 5 February 1995 (GVNW, p. 102, hereinafter 'the provision in question'), provides:
 

'Where, in the sector of the authority responsible for promotion, there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to an individual [male] candidate tilt the balance in his favour.'
4. According to the observations of the *Land*, the rule of priority laid down by that provision introduced an additional promotion criterion, that of being a female, in order to counteract the inequality affecting female candidates as compared with male candidates applying for the same post: where qualifications are equal, employers tend to promote men rather than women because they apply traditional promotion criteria which in practice put women at a disadvantage, such as age, seniority and the fact that a male candidate is a head of household and sole breadwinner for the household.
5. In providing that priority is to be given to the promotion of women 'unless reasons specific to an individual [male] candidate tilt the balance in his favour', the legislature deliberately chose, according to the *Land*, a legally imprecise expression in order to ensure sufficient flexibility and, in particular, to allow the administration latitude to take into account any reasons which may be specific to

individual candidates. Consequently, notwithstanding the rule of priority, the administration can always give preference to a male candidate on the basis of promotion criteria, traditional or otherwise.

6. According to the order for reference, Mr Marschall works as a tenured teacher for the *Land*, his salary being that attaching to the basic grade in career bracket A 12.
7. On 8 February 1994 he applied for promotion to an A 13 post ('teacher qualified for teaching in a first-grade secondary school and so employed ) at the Gesamtschule Schwerte. The Bezirksregierung (District Authority) Arnsberg informed him, however, that it intended to appoint a female candidate to the position.
8. Mr Marschall lodged an objection which the Bezirksregierung rejected by decision of 29 July 1994 on the ground that, in view of the provision in question, the female candidate must necessarily be promoted to the position since, according to their official performance assessments, both candidates were equally qualified and since at the time when the post was advertised there were fewer women than men in career bracket A 13.
9. Mr Marschall then brought legal proceedings before the Verwaltungsgericht Gelsenkirchen for an order requiring the *Land* to promote him to the post in question.
10. The Verwaltungsgericht, finding that Mr Marschall and the woman candidate selected were equally qualified for the post, decided that the outcome of the proceedings depended on the compatibility of the provision in question with Article 2(1) and (4) of the Directive.
11. Relying on the judgment of this Court in Case C-450/93 *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051, the Verwaltungsgericht considers that the priority which the provision in question accords in principle to women seems to constitute discrimination within the meaning of Article 2(1) of the Directive and that such discrimination is not eliminated by the possibility of giving preference, exceptionally, to male candidates.
12. That court also doubts whether the provision in question is covered by the exception provided for in Article 2(4) of the Directive concerning measures to promote equality of opportunity between men and women. The basis for assessing candidates is unduly narrowed since only the numerical proportion of men to women at the level concerned is taken into account. Furthermore, the provision in question does not improve women's ability to compete on the labour market and to pursue a career on an equal footing with men but prescribes a result, whereas Article 2(4) of the Directive allows only measures for promoting equality of opportunity.
13. The Verwaltungsgericht therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does Article 2(1) and (4) 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, preclude a rule of national law which provides that, in sectors of the public service in which fewer women than men are employed in the relevant higher grade post in a career bracket, women must be given priority where male and female candidates for promotion are equally qualified (in terms of suitability, competence and professional performance), unless reasons specific to an individual male candidate tilt the balance in his favour ( sofern nicht in der Person eines männlichen Mitbewerbers liegende Gründe überwiegen)?'
14. The *Land*, the Spanish, Austrian, Finnish, Swedish and Norwegian Governments and the Commission consider that a national rule such as the provision in question constitutes a measure for promoting equality of opportunity between men and women which falls within the scope of Article 2(4) of the Directive.
15. The *Land* observes in this regard that the priority accorded to female candidates is intended to counteract traditional promotion criteria without, however, replacing them. The Austrian Government considers that a national rule such as that in question is designed to correct discriminatory procedures in

the selection of staff.

16. The Finnish, Swedish and Norwegian Governments add that the national rule in question promotes access by women to posts of responsibility and thus helps to restore balance to labour markets which, in their present state, are still broadly partitioned on the basis of gender in that they concentrate female labour in lower positions in the occupational hierarchy. According to the Finnish Government, past experience shows in particular that action limited to providing occupational training and guidance for women or to influencing the sharing of occupational and family responsibilities is not sufficient to put an end to this partitioning of labour markets.
17. Finally, the *Land* and all those governments take the view that the provision in question does not guarantee absolute and unconditional priority for women and that it is therefore within the limits outlined by the Court in *Kalanke*.
18. The French and the United Kingdom Governments, on the other hand, consider that the provision in question is not covered by the derogation provided for in Article 2(4) of the Directive.
19. Those two governments submit that in providing for priority to be accorded to female candidates the provision goes further than promoting equality of opportunity and aims to bring about equality of representation between men and women, so that the Court's reasoning in *Kalanke* applies.
20. Nor, in their view, does the presence of a saving clause make the provision in question any less discriminatory. That clause applies only exceptionally and therefore has no impact in a 'normal' case where there are no reasons specific to the male candidate which are such as to outweigh the general requirement to appoint the female candidate. Since, moreover, it is formulated in terms that are both general and imprecise the clause is contrary to the principle of legal certainty.
21. The Court observes that the purpose of the Directive, as is clear from Article 1(1), is to put into effect in the Member States the principle of equal treatment for men and women as regards, *inter alia*, access to employment, including promotion. Article 2(1) states that the principle of equal treatment means that 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly'.
22. According to Article 2(4), the Directive is to 'be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)'.
23. In paragraph 16 of its judgment in *Kalanke*, the Court held that a national rule which provides that, where equally qualified men and women are candidates for the same promotion in fields where there are fewer women than men at the level of the relevant post, women are automatically to be given priority, involves discrimination on grounds of sex.
24. However, unlike the provisions in question in *Kalanke*, the provision in question in this case contains a clause ('Öffnungsklausel', hereinafter 'saving clause') to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour.
25. It is therefore necessary to consider whether a national rule containing such a clause is designed to promote equality of opportunity between men and women within the meaning of Article 2(4) of the Directive.
26. Article 2(4) is specifically and exclusively designed to authorize measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life (Case 312/86 *Commission v France* [1988] ECR 6315, paragraph 15, and *Kalanke*, paragraph 18).
27. It thus authorizes national measures relating to access to employment, including promotion, which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men (*Kalanke*, paragraph 19).

28. As the Council stated in the third recital in the preamble to Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women (OJ 1984 L 331, p. 34), 'existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures' (*Kalanke*, paragraph 20).
29. As the *Land* and several governments have pointed out, it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding.
30. For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.
31. It follows that a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world.
32. However, since Article 2(4) constitutes a derogation from an individual right laid down by the Directive, such a national measure specifically favouring female candidates cannot guarantee absolute and unconditional priority for women in the event of a promotion without going beyond the limits of the exception laid down in that provision (*Kalanke*, paragraphs 21 and 22).
33. Unlike the rules at issue in *Kalanke*, a national rule which, as in the case in point in the main proceedings, contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.
34. It is for the national court to determine whether those conditions are fulfilled on the basis of an examination of the scope of the provision in question as it has been applied by the *Land*.
35. The answer to be given to the national court must therefore be that a national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service, and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Article 2(1) and (4) of the Directive, provided that:
- in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and
  - such criteria are not such as to discriminate against the female candidates.

## Costs

36. The costs incurred by the Spanish, French, Dutch, Austrian, Finnish, Swedish, United Kingdom and Norwegian Governments and by the Commission of the European Communities, 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 proceedings 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 Verwaltungsgericht Gelsenkirchen by order of 21 December 1995, hereby rules:

**A national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Article 2(1) and (4) 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, provided that:**

- in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and**
- such criteria are not such as to discriminate against the female candidates.**

Rodríguez Iglesias Gulmann

Ragnemalm

Wathelet Mancini

Moitinho de Almeida

Kapteyn Murray

Edward

Puissochet Hirsch Jann

Sevón

Delivered in open court in Luxembourg on 11 November 1997.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

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