

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 60th 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]

* Language of the case: English.