

[2018] AACR 37

(*MB v SSWP*)

Case C-451/16)

Judge Wright
18 June 2013

CP/2758/2011

CJEU K Lenaerts (President), A Tizzano (Vice President), M Ilešič, T von Danwitz, (Rapporteur), A Rosas, J Malenovský (Presidents Chambers), E Juhász, A Borg Barthet, M Berger, C Lycourgos, and M Vilaras (Judges) and M Bobek (Advocate General)

26 June 2018

Discrimination — sex — equal treatment — married prior to gender reassignment — gender recognition certificate dependent on annulment of marriage — applicant not wishing to annul marriage — application made for state pension at pensionable age for women — refusal of pension on ground of not having attained male pensionable age — whether requirement to annul marriage direct discrimination — whether contrary to European Union principle of equal treatment

The applicant, MB, was born a male in 1948 and married a woman in 1974. In 1991, MB started to live as a woman and underwent sex reassignment surgery in 1995. She was then entitled to apply for a gender recognition certificate under section 1(1) of the Gender Recognition Act 2004 but under section 4(3) the issue of a full certificate, by which her acquired gender would be recognised for all legal rights, was conditional on the annulment of her marriage and she and her wife had chosen to remain married for religious reasons. Under section 4(2) an unmarried applicant was entitled to a full gender recognition certificate. In 2008, MB reached the age of 60 which was the age at which women born before the 6 April 1950 were eligible under the national law to receive a ‘Category A’ retirement pension from the state. Men were not eligible until they had reached the age of 65. The Secretary of State for Work and Pensions refused her application on the ground that without a full gender recognition certificate she could not be treated as a woman for the purposes of determining her statutory pensionable age. MB appealed to the United Kingdom Supreme Court following unsuccessful appeals to the First-tier Tribunal, the Upper Tribunal and the Court of Appeal (Civil Division) on the ground that the refusal was unlawful because it was contrary to the principle of equal treatment in article 4(1) of Council Directive 79/7/EEC. The Supreme Court requested a preliminary ruling from the Court of Justice of the European Union on the question whether article 4(1), read in conjunction with the derogation in article 7(1)(a), which gave member states the right to determine pensionable age, precluded the imposition of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who changed gender had also to be unmarried to qualify for a state retirement pension.

Held, that:

1. The national legislation at issue in the main proceedings before the Supreme Court accorded less favourable treatment, directly based on sex, to a person who changed gender after marrying, than that accorded to a person who has kept his or her birth gender and is married, even if those persons were in comparable situations. The objective invoked by the United Kingdom Government did not correspond to any of the derogations allowed under Directive 79/7 and consequently the national legislation constituted direct discrimination on grounds of sex prohibited by Directive 79/7 (paragraphs 48-52).
2. The answer to the question referred was that Directive 79/7, in particular the first indent of Article 4(1) requiring member states to comply with the principle of non discrimination on grounds of sex in regard to social security, read in conjunction with the third indent of Article 3(1)(a) and Article 7(1)(a), was interpreted as precluding national legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she had acquired as a result of that change and, lived with for many years, in order to be able to claim a State retirement pension from the statutory pensionable age applicable to persons of his or her acquired gender (paragraph 53).

JUDGMENT OF THE COURT
(Grand Chamber)
(Advocate General's Opinion given 5 December 2017)

K. Bretherton QC and D. Pannick QC instructed by C. Stothers and J. Mulryne, Solicitors appeared for the appellant

C. Crane and S. Brandon, acting as Agents, B. Lask, Barrister and J. Coppel QC appeared for the United Kingdom Government

C. Valero and J. Tomkin, acting as Agents appeared for the European Commission

Judgment

1. This request for a preliminary ruling concerns the interpretation 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 MB and the Secretary of State for Work and Pensions concerning the refusal to grant MB a State retirement pension as from the statutory pensionable age for persons of the gender that she acquired as a result of a change of gender.

Legal context

EU law

3. The third indent of Article 3(1)(a) of Directive 79/7 provides that that directive is to apply to statutory schemes which provide protection against old age.

4. Under Article 4(1) of that directive:

‘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,

...’

5. Article 7(1)(a) of that directive provides:

‘This Directive shall be without prejudice to the right of the 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.’

6. Article 2(1)(a) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23), provides:

‘For the purposes of this Directive, the following definitions shall apply:

- (a) “direct discrimination”: where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.’

United Kingdom law

7. In accordance with section 44 of the Social Security Contributions and Benefits Act 1992, read in conjunction with section 122 of that Act and with Schedule 4, paragraph 1, of the Pensions Act 1995, a woman born before 6 April 1950 becomes eligible for the State retirement pension (referred to in the legislation as a ‘Category A retirement pension’) at the age of 60, and a man born before 6 December 1953 becomes eligible at the age of 65.

8. Section 1 of the Gender Recognition Act 2004 (‘the GRA’) provided, in its version applicable to the dispute in the main proceedings, that a person who was aged at least 18 could apply to a Gender Recognition Panel (‘GRP’) for a full gender recognition certificate recording a change of his or her gender on the basis of living as a person of the other gender. According to that provision, the new gender of the person requesting such a certificate was to be referred to as ‘the acquired gender’.

9. Section 2(1) of that Act provided that the GRP was required to grant a recognition certificate where the applicant:

- ‘(a) has or has had gender dysphoria,
- (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,
- (c) intends to continue to live in the acquired gender until death, and
- (d) complies with the requirements imposed by and under section 3 [of the GRA].’

10. In order to obtain that certificate, according to section 3 of that Act, entitled ‘Evidence’, the applicant was required to provide a report from two medical practitioners or from a medical practitioner and a psychologist.

11. Subsection (2) of section 4 of the GRA, entitled ‘Successful applications’, provided that an unmarried applicant was entitled to a full gender recognition certificate, whereas, pursuant to section 4(3), a married applicant was entitled only to an interim gender recognition certificate.

12. Section 9(1) of that Act provided that, where a full gender recognition certificate was issued, the acquired gender thereafter became the person's gender for all purposes. According to Schedule 5, paragraph 7, of the GRA, which dealt specifically with the effect of a full gender recognition certificate on eligibility for State retirement pensions, once the certificate had been issued, any question of entitlement to a State retirement pension was to be decided as if the person's gender had always been the acquired gender.

13. An interim gender recognition certificate allowed a married applicant to apply to have his or her marriage annulled by a court. According to section 5(1) of the GRA, the court granting the decree of nullity was then required to issue a full gender recognition certificate.

14. Section 11(c) of the Matrimonial Causes Act 1973, in its version applicable during the period at issue in the main proceedings, provided that a valid marriage could legally exist only between a male and a female.

15. The Marriage (Same Sex Couples) Act 2013, which came into force on 10 December 2014, allows persons of the same sex to marry. Schedule 5 of that Act amended section 4 of the GRA so as to provide that a GRP must issue a full gender recognition certificate to a married applicant if the applicant's spouse consents. However, The Marriage (Same Sex Couples) Act 2013 is not applicable to the dispute in the main proceedings.

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

16. MB was born a male in 1948 and married in 1974. She began to live as a woman in 1991 and underwent sex reassignment surgery in 1995.

17. MB does not, however, hold a full certificate of recognition of her change of gender, since, pursuant to the national legislation at issue in the main proceedings, in order for that certificate to be granted her marriage had to be annulled. She and her wife wish to remain married for religious reasons.

18. In 2008 MB, having reached the age of 60 — that is to say, the age at which women born before 6 April 1950 may, under national law, receive a 'Category A' retirement pension from the State — applied for such a pension as from that age by virtue of the contributions paid into the State pension scheme while she was working.

19. Her application was rejected by a decision of 2 September 2008 on the ground that, in the absence of a full gender recognition certificate, MB could not be treated as a woman for the purposes of determining her statutory pensionable age.

20. The action brought by MB against that decision was dismissed by the First-tier Tribunal, the Upper Tribunal and the Court of Appeal.

21. MB brought an appeal before the Supreme Court of the United Kingdom, claiming that the national legislation at issue in the main proceedings is discriminatory on grounds of sex, which is prohibited by Article 4(1) of Directive 79/7.

22. According to the information provided in the order for reference, MB fulfils the physical, social and psychological criteria provided by the national legislation on civil status

at issue in the main proceedings for the purposes of a legal recognition of a change of gender. The referring court points out, however, that, at the time of the facts giving rise to the dispute in the main proceedings, the national legislation made such recognition, as well as the issuing of the certificate referred to in paragraph 17 above, conditional on the annulment of any marriage entered into before such a change took place. According to the referring court, such annulment was also required in order for a person who had changed gender, such as MB, to access the State retirement pension as from the statutory pensionable age of persons of the gender acquired by that person.

23. Before the referring court, the Secretary of State for Work and Pensions submitted that, according to the Court's case-law resulting from the judgments of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7, paragraph 35) and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraph 21), it is for the Member States to determine the conditions under which a person's change of gender may be legally recognised. He submitted that those conditions cannot be limited to social, physical and psychological criteria but may also include criteria relating to marital status.

24. In that context, the Secretary of State for Work and Pensions noted that the European Court of Human Rights has recognised that Member States may make recognition of a change of gender conditional on the annulment of that person's marriage (ECtHR, 16 July 2014, *Hämäläinen v. Finland*, [2014] ECHR 787, 37 BHRC 55, [2015] 1 FCR 379. He submitted that, although the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, requires States that are party to it to recognise the acquired gender of transsexual persons, it does not require them to allow marriages between same-sex couples. Indeed, the objective of maintaining the traditional concept of marriage as being a union between a man and a woman could, it was argued, justify making recognition of a change of gender subject to such a condition.

25. In those circumstances, the Supreme Court of the United Kingdom decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Council Directive 79/7/EEC preclude the imposition in national law of a requirement that, in addition to satisfying the physical, social and psychological criteria for recognising a change of gender, a person who has changed gender must also be unmarried in order to qualify for a State retirement pension?'

Consideration of the question referred

26. By its question, the referring court asks, in essence, whether Directive 79/7, in particular the first indent of Article 4(1), read in conjunction with the third indent of Article 3(1)(a) and Article 7(1)(a) thereof, must be interpreted as precluding national legislation that requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of that acquired gender.

27. As a preliminary point, it must be noted that the case in the main proceedings and the question referred to the Court concern only the conditions for entitlement to the State retirement pension at issue in the main proceedings. Accordingly, the Court is not being asked

to consider, generally, whether the legal recognition of a change of gender may be conditional on the annulment of a marriage entered into before that change of gender.

28. The United Kingdom Government claims that marriage and the legal recognition of change of gender are matters which fall within the competence of the Member States with regard to civil status. In its view, in exercising that competence, Member States not permitting marriage between persons of the same sex may, therefore, make the payment of a State retirement pension dependent on the annulment of an earlier marriage between such persons.

29. In that regard, it must be noted that, although EU law does not detract from the competence of the Member States in matters of civil status and legal recognition of the change of a person's gender, Member States must, when exercising that competence, comply with EU law and, in particular, with the provisions relating to the principle of non-discrimination (see, to that effect, *inter alia*, judgments of 27 April 2006, *Richards*, C-423/04, EU:C:2006:256, paragraphs 21 to 24; of 1 April 2008, *Maruko*, C-267/06, EU:C:2008:179, paragraph 59; and of 5 June 2018, *Coman and Others*, C-673/16, EU:C:2018:385, paragraphs 37 and 38 and the case-law cited).

30. Thus, it is clear, *inter alia*, from the Court's case-law that national legislation making eligibility for a pension benefit subject to a condition relating to civil status cannot be placed outside the scope of the principle of non-discrimination on grounds of sex set out in Article 157 TFEU in the area of workers' remuneration (see, to that effect, concerning Article 141 EC, judgment of 7 January 2004, *K. B.*, C-117/01, EU:C:2004:7, paragraphs 34 to 36).

31. It follows that Article 4(1) of Directive 79/7, which implements the principle of non-discrimination on grounds of sex as regards social security, must be complied with by the Member States when they exercise their powers in the area of civil status.

32. In particular, the first indent of Article 4(1), read in conjunction with the third indent of Article 3(1)(a) of that directive, prohibits all discrimination on grounds of sex as regards, *inter alia*, the conditions for access to statutory schemes ensuring protection against the risks of old age.

33. It is not disputed by the parties to the main proceedings that the State retirement pension scheme at issue is such a scheme.

34. As is clear from Article 2(1)(a) of Directive 2006/54, there is direct discrimination based on sex if one person is treated less favourably on grounds of sex than another person is, has been or would be treated in a comparable situation. That concept must be understood in the same way in the context of Directive 79/7.

35. In accordance with the Court's settled case-law, the scope of the latter directive, in view of its purpose and the nature of the rights which it seeks to safeguard, is also such as to apply to discrimination arising from gender reassignment (see, to that effect, judgment of 27 April 2006, *Richards*, C-423/04, EU:C:2006:256, paragraphs 23 and 24 and the case-law cited). In that regard, although, as it was noted in paragraph 29 of the present judgment, it is for the Member States to establish the conditions for legal recognition of a person's change of gender, the fact remains that, for the purposes of the application of Directive 79/7, persons who have lived for a significant period as persons of a gender other than their birth gender

and who have undergone a gender reassignment operation must be considered to have changed gender.

36. In the present case, the national legislation at issue in the main proceedings makes access by persons who have changed gender to a State retirement pension as from the statutory pensionable age for persons of the acquired gender subject to, inter alia, the annulment of any marriage into which they may have entered before that change. By contrast, according to the information in the file before the Court, that marriage annulment condition does not apply to persons who have retained their birth gender and are married, who accordingly may receive a State retirement pension as from the statutory pensionable age for persons of that gender irrespective of their marital status.

37. It appears, therefore, that that national legislation treats less favourably a person who has changed gender after marrying than it treats a person who has retained his or her birth gender and is married.

38. Such less favourable treatment is based on sex and may constitute direct discrimination within the meaning of Article 4(1) of Directive 79/7.

39. It is further necessary to establish whether the situation of a person who changed gender after marrying and the situation of a person who has retained his or her birth gender and is married are comparable.

40. The United Kingdom Government takes the view that those situations are not comparable on the ground that the marital statuses of the persons in question are different. A person who has changed gender after marrying finds himself or herself married to a person of the gender that he or she has acquired, in contrast to a person who has retained his or her birth gender and is married to a person of the opposite sex. According to the United Kingdom Government, having regard to the purpose of the marriage annulment condition at issue in the main proceedings — which is to avoid the existence of marriages between persons of the same sex — such a difference means that the situations of those persons are not comparable.

41. In that regard, it must be noted that the requirement relating to the comparability of situations does not require those situations to be identical, but only similar (see, to that effect, judgments of 10 May 2011, *Römer*, C-147/08, EU:C:2011:286, paragraph 42, and of 19 July 2017, *Abercrombie & Fitch Italia*, C-143/16, EU:C:2017:566, paragraph 25 and the case-law cited).

42. The comparability of situations must be assessed not in a global and abstract manner, but in a specific and concrete manner having regard to all the elements which characterise them, in the light, in particular, of the subject matter and purpose of the national legislation which makes the distinction at issue, as well as, where appropriate, in the light of the principles and objectives pertaining to the field to which that national legislation relates (see, to that effect, judgments of 16 December 2008, *Arcelor Atlantique et Lorraine and Others*, C-127/07, EU:C:2008:728, paragraphs 25 and 26; of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraphs 89 and 90; and of 9 March 2017, *Milkova*, C-406/15, EU:C:2017:198, paragraphs 56 and 57 and the case-law cited).

43. In the present case, it is clear from the information provided in the order for reference that the subject matter of the national legislation at issue in the main proceedings is the

granting of a ‘Category A’ State retirement pension which can be claimed by persons who have reached the statutory pensionable age. The parties to the main proceedings clarified, during the hearing before the Court, that national law grants such a retirement pension to all persons who have reached that age and who have made adequate contributions to the United Kingdom’s State pension scheme. Accordingly, it appears that the State statutory retirement pension scheme at issue in the main proceedings protects against the risks of old age by conferring on the person concerned the right to a retirement pension acquired in relation to the contributions paid by that person during his or her working life, irrespective of marital status.

44. Thus, in the light of the subject matter of the retirement pension and the conditions under which it is granted, as set out in the previous paragraph, the situation of a person who changed gender after marrying and that of a person who has kept his or her birth gender and is married are comparable.

45. As the Advocate General observed in point 43 of his Opinion, the United Kingdom Government’s argument, which emphasises the difference in the marital status of those persons, has the effect of making that difference the decisive element in determining the comparability of the situations at issue, whereas marital status, in itself, is not relevant for the purposes of the granting of the State retirement pension at issue in the main proceedings, as has been noted in paragraph 43 above.

46. Moreover, the purpose of the marriage annulment condition invoked by that Government — namely, to avoid marriage between persons of the same sex — is unrelated to that retirement pension scheme. As a result, that purpose does not affect the comparability of the situation of a person who changed gender after marrying and that of a person who kept his or her birth gender and is married, in the light of the subject matter and the conditions under which that retirement pension is granted, as set out in paragraph 43 of this judgment.

47. That interpretation is not invalidated by the case-law of the European Court of Human Rights, to which the United Kingdom Government also refers in order to contest the comparability of the situation of those persons. As the Advocate General stated in point 44 of his Opinion, the European Court of Human Rights, in its judgment of 16 July 2014, *Hämäläinen v. Finland* (CE:ECHR:2014:0716JUD003735909, §111 and §112), assessed whether or not the situation of a person who had undergone gender reassignment surgery after marrying was comparable to the situation of a married person who had not changed gender, in the light of the subject matter of the national legislation at issue, which concerned the legal recognition of a change of gender with regard to civil status. By contrast, as has been noted in paragraph 27 of the present judgment, what is at issue in the present case is the comparability of the situations of the persons concerned in the light of legislation the subject matter of which is specifically entitlement to a State retirement pension.

48. Therefore, it must be held that the national legislation at issue in the main proceedings accords less favourable treatment, directly based on sex, to a person who changed gender after marrying, than that accorded to a person who has kept his or her birth gender and is married, even though those persons are in comparable situations.

49. The United Kingdom Government submits, nevertheless, that the purpose of avoiding the existence of a marriage between persons of the same sex could justify the application only to persons who have changed gender of a requirement to annul any marriage previously

entered into by such a person when national law did not, at the time of the facts giving rise to the main proceedings, allow marriage between persons of the same sex.

50. However, according to the case-law of the Court, a derogation from the prohibition, set out in Article 4(1) of Directive 79/7, of all direct discrimination on grounds of sex is possible only in the situations exhaustively set out in the provisions of that directive (see, to that effect, judgments of 21 July 2005, *Vergani*, C-207/04, EU:C:2005:495, paragraphs 34 and 35, and of 3 September 2014, *X*, C-318/13, EU:C:2014:2133, paragraphs 34 and 35). As it is, the objective invoked by the United Kingdom Government does not correspond to any of the derogations allowed by that directive.

51. With more specific regard to the derogation provided for in Article 7(1)(a) of Directive 79/7, the Court has already held that it does not allow Member States to treat differently persons who have changed gender after marrying and persons who have kept their birth gender and are married, with regard to the age of entitlement to a State retirement pension (see, to that effect, judgment of 27 April 2006, *Richards*, C-423/04, EU:C:2006:256, paragraphs 37 and 38).

52. Consequently, the national legislation at issue in the main proceedings constitutes direct discrimination on grounds of sex and is, therefore, prohibited by Directive 79/7.

53. Having regard to all of the foregoing considerations, the answer to the question referred is that Directive 79/7, in particular the first indent of Article 4(1), read in conjunction with the third indent of Article 3(1)(a) and Article 7(1)(a) thereof, must be interpreted as precluding national legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender.

Costs

54. 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 (Grand 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, in particular the first indent of Article 4(1), read in conjunction with the third indent of Article 3(1)(a) and Article 7(1)(a) thereof, must be interpreted as precluding national legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change, in order to be able to claim a State retirement pension as from the statutory pensionable age applicable to persons of his or her acquired gender.

