Ruling

Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as meaning that a Union citizen minor has sufficient resources not to become an unreasonable burden on the social assistance system of the host Member State during his period of residence, despite his resources being derived from income obtained from the unlawful employment of his father, a third-country national without a residence card and work permit.

ECJ 3 October 2019, case C-302/18 (X), Work and residence permit

X – v – Belgische Staat, Belgian case

Question

Must Article 5(1)(a) of Directive 2003/109 be interpreted as meaning that the concept of 'resources', which is referred to in that provision, concerns only the 'own resources' of the applicant for long-term resident status or whether this concept also covers the resources made available to that applicant by a third party and, if so, is a commitment of cost bearing entered into by that third party sufficient to provide proof that the applicant has stable, regular and sufficient resources within the meaning of that provision?

Ruling

Article 5(1)(a) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as meaning that the concept of 'resources' referred to in that provision does not concern solely the 'own resources' of the applicant for long-term resident status, but may also cover the resources made available to that applicant by a third party provided that, in the light of the individual circumstances of the applicant concerned, they are considered to be stable, regular and sufficient.

ECJ 7 October 2019, case C-171/18 (Safeway), Gender discrimination, Pension

Safeway Ltd – v – Andrew Richard Newton, Safeway Pension Trustees Ltd, UK case

Legal background

At the material time, Article 119 of the EC Treaty (now Article 157 TFEU) provided that Member States maintained the principle that men and women should receive equal pay for equal work.

Facts

Safeway Ltd established a pension fund in 1978. At the time, it had fixed a normal retirement age (Normal Pension Age, 'NPA') that was 65 years of age for men and 60 years of age for women. In its *Barber* judgment (17 May 1990, C-262/88) the ECJ held that fixing an NPA differentiated by gender constituted discrimination under Article 119 of the EC Treaty.

Following that judgment, Safeway and the Safeway Pension Trustees made two announcements in 1991. They informed members of the pension scheme that as of 1 December 1991, the scheme would be amended by the introduction of a uniform NPA of 65 for all members. On 2 May 1996, a trust deed amending the pension scheme was adopted. This trust deed fixed the uniform NPA of 65, with effect as of 1991.

In 2009, questions were raised about the validity of the retroactive amendments of the pension scheme. Safeway therefore instigated proceedings seeking a finding that a uniform NPA of 65 had been validly established. However, the High Court of Justice (England & Wales) Chancery Division held that the retroactive amendments had infringed Article 119 of the EC Treaty. Consequently, the pension rights of the members had to be calculated based on a uniform NPA of 60 between 1 December 1991 and 2 May 1996. Upon appeal, the Court of Appeal (England & Wales) (Civil Division) asked a preliminary question.

Question

Must Article 119 of the EC Treaty be interpreted as precluding a pension scheme from adopting, in order to end discrimination contrary to that provision resulting from the fixing of an NPA differentiated by gender, a

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measure which equalises, with retroactive effect, the NPA of members of that scheme to that of the persons within the previously disadvantaged category, in respect of the period between the announcement of that measure and its adoption, where such a measure is authorised under national law and under the trust deed governing that pension scheme?

Considerations

As the issue concerns the period between 1 December 1991 and 2 May 1996, the question must be examined in the light of Article 119 of the EC Treaty, which was in force during that period.

In *Barber* (17 May 1990, C-262/88), the ECJ held that fixing an NPA differentiated by gender constitutes discrimination prohibited under Article 119 of the EC Treaty. In later case law (*Coloroll Pension Trustees*, C-200/91; *Avdel Systems*, C-408/92; *Van den Akker*, C-28/93), the ECJ ruled on the consequences of such finding, which differ depending on the periods of services concerned. In respect of periods of service prior to 17 May 1990, the date of the *Barber* judgment, pension schemes are not required to apply a uniform NPA. As regards the periods of service between 17 May 1990 and the adoption of measures reinstating equal treatment by the pension scheme, the disadvantaged persons must be granted the same advantages as the favoured persons. After the adoption of the measures, Article 119 of the EC Treaty does not preclude the advantages of the previously favoured persons from being reduced to the level of advantages of the disadvantaged category.

In the present case, the dispute concerns whether the pension rights of the members of the pension scheme at issue in the period between 1 December 1991 and 2 May 1996 must be calculated on the basis of a uniform NPA of 60 or 65. Essentially, the question is whether the trust deed of 2 May 1996 could validly retroactively equalise the NPA to the previously disadvantaged category, namely male workers. In the first place, this implies that the question is based on the premise that measures reinstating equal treatment were not adopted until 2 May 1996. Safeway called that premise into question, as it asserted that the announcements in 1991 must be regarded as measures. Article 119 of the EC Treaty produces direct effects by creating rights for individuals which the national courts are responsible for safeguarding. The application of that Article, once discrimination has been found to exist, must be immediate and full. Measures taken to reinstate equal treatment cannot be made subject to conditions which maintain discrimination, even on a transitional basis. Furthermore, the principle of legal certainty, which must be observed strictly when there may be financial consequences, requires that the rights conferred on individuals by EU law must be implemented in a way which is sufficiently precise, clear and foreseeable to enable the persons concerned to know precisely their rights and their obligations, to take steps accordingly and to rely on those rights, if necessary, before the national courts. The introduction of a mere practice, which has no binding legal effect with regard to the persons concerned, does not meet these requirements. In the present case, it appears that the measures taken by the pension scheme prior to the adoption of the trust deed of 2 May 1996 do not satisfy those requirements. In this case, under UK law, only the trust deed could validly amend the pension scheme. The mere practice as communicated by the 1991 announcements do not.

As stated above, this in principle means that for 1991–1996 the disadvantaged group should receive the same benefits as the advantaged group. The referring court nevertheless raised the issue whether the cited case law also applies to situations where the pension rights concerned are defeasible. While the ECJ has not expressly settled that issue, the case law does not support equalising all rights to those of the disadvantaged category. On the contrary, this would deprive the case law of its effect to a broad extent. Furthermore, any measure seeking to eliminate discrimination contrary to EU law constitutes an implementation of EU law, which must observe its requirements. It is not possible to rely upon national law or provisions in order to circumvent those requirements. As a general rule, the principle of legal certainty precludes a measure implementing EU law from having retroactive effect, unless there are exceptional circumstances.

Moreover, Article 119 of the EC Treaty requires that its requirements must be regarded as soon as discrimination contrary to that provision has been found to exist. The ECJ has already decided that, pending the adoption of measures reinstating equal treatment, the disadvantaged category must receive the same benefits as the previously advantaged category. This is justified, *inter alia*, by the fact that Article 119 of the EC Treaty is connected to the objective of the harmonisation of working conditions while maintaining improvement, which follows from the preamble to that Treaty and Article 117 thereof. It would be contrary to that objective to adopt a measure equalising, with retroactive effect, the NPA to the NPA of the previously disadvantaged category. To accept such an approach would relieve those authorities of the obligation, after the finding of discrimination, to eliminate it immediately and in full. Also, it would create doubts contrary to the principle of legal certainty, as regards the scope of the rights of the members. That is still the case if there has been communication, like in the present case.

That said, it is possible that measures seeking to end discrimination may, exceptionally, be adopted with retroactive effect, provided that, in addition to respecting the legitimate expectations of the persons concerned, those measures are in fact warranted by an overriding reason in the public interest. The risk of seriously undermining the pension scheme's financial balance may constitute such a reason. In the present case, although the referring court mentions that the financial consequences amount to approximately GBP 100 mil-

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lion, it does not state that the retroactive equalisation of the NPA was necessary to prevent the financial balance of that scheme from being seriously undermined. The case file does not include other information which suggests this. Therefore, there seems to be no objective justification for that measure, but this is nevertheless for the referring court to verify.

Ruling

Article 119 of the EC Treaty (now, after amendment, Article 141 EC) must be interpreted as precluding, in the absence of an objective justification, a pension scheme from adopting, in order to end discrimination contrary to that provision resulting from the fixing of a normal pension age differentiated by gender, a measure which equalises, with retroactive effect, the normal pension age of members of that scheme to that of the persons within the previously disadvantaged category, in respect of the period between the announcement of that measure and its adoption, even where such a measure is authorised under national law and under the Trust Deed governing that pension scheme.

ECJ 24 October 2019, case C-35/19 (Belgische Staat), Free movement

BU – v – État Belge, Belgian case

Question

Must Article 45 TFEU be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State?

Ruling

Article 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, without providing justification in that regard, a matter which is however for the referring court to verify, provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State, even where the recipient of those allowances is a resident of the Member State concerned.

ECJ 5 November 2019, case C-192/18 (Commission – v – Poland), Gender Discrimination, Fair Trial

European Commission – v – Republic of Poland, EU Case

Legal background

Article 157 TFEU prohibits any discrimination with regard to pay as between men and women, whatever mechanism by which the inequality arises.
Article 5(a) of Directive 2006/54 provides that there is to be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards the scope of such schemes and the conditions of access to them.
Article 9(1) of Directive 2006/54 identifies a number of provisions which, when they are based on sex, either directly or indirectly, are to be included among the provisions contrary to the principle of equal treatment. Article 9(1)(f) applies in particular in the case of provisions based on sex for fixing different retirement ages.

Facts

The Republic of Poland introduced a law which distinguished between women and men as regards (i) the retirement age for judges of the ordinary Polish courts and public prosecutors in Poland and (ii) the age from which early retirement is possible concerning judges of the *Sąd Najwyższy* (Supreme Court). Moreover, the retirement age of judges of the ordinary Polish courts was lowered to 60 years for women and 65 years for men and the Minister for Justice in Poland received the right to authorise the extension of the period of active service as a judge from the age of 60 to 70 for women and the age of 65 to 70 for men.

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