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OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 5 December 2017<sup>(1)</sup>

**Case C-451/16**

**MB, I**

**v**

**Secretary of State for Work and Pensions**

(Request for a preliminary ruling from the Supreme Court of the United Kingdom (United Kingdom))

(Reference for a preliminary ruling — Equal treatment for men and women in matters of social security — Directive 79/7/EEC — Refusal to award a State retirement pension at the age of 60 to a transgender person who has undergone male-to-female gender reassignment surgery — Conditions for recognition of gender reassignment — Condition related to the obligation to annul a previous marriage)

## I. Introduction

1. MB is a male-to-female transgender person. She has been married to a woman since 1974. She has lived as a woman since 1991 and underwent gender reassignment surgery in 1995. In 2008, she turned 60, the then legal retirement age for women in the United Kingdom. She applied for a State retirement pension. The application was rejected, because MB had not gone through the legal procedure for recognition of gender reassignment. Thus, under national law, she was still male.

2. MB decided not to apply for gender recognition under the procedure as it was under national law at the relevant time. Her reason for that was simple: one of the conditions for such legal recognition was that she would have to be 'unmarried', because the United Kingdom did not permit same-sex marriage at that time. For MB, that would mean obtaining an annulment of her marriage, to which she and her wife were opposed.

3. The question posed by the Supreme Court of the United Kingdom against this factual background is straightforward: is the condition to be unmarried contrary to the prohibition of discrimination on grounds of sex in matters of social security, as enshrined in Directive 79/7/EEC? <sup>(2)</sup>

4. The facts and claim in this case resemble those in *Richards*. <sup>(3)</sup> However, *Richards* concerned the *impossibility* for the applicant to have her gender reassignment legally recognised. Since the entry into force of the Gender Recognition Act 2004 that is no longer the case. However, while now rendering recognition possible, the adoption of the the Act of 2004 has also opened up a number of additional questions. Does Directive 79/7 apply to the *conditions* laid down in national law for the recognition of gender reassignment? From what moment in time does a transgender person benefit from the protection of Directive 79/7? Does the prohibition of discrimination on grounds of sex between transgender and cisgender persons only apply where the gender reassignment has been legally recognised under national law?

## II. Legal framework

### A. EU law

5. According to Article 4(1) of Directive 79/7:

'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.'

6. Article 7(1) of Directive 79/7 provides that:

'This Directive shall be without prejudice to the right of the Member States to exclude from its scope:

the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

...'

### B. UK law

#### 1. Retirement age

7. The United Kingdom has made use of the derogation allowed by Article 7(1)(a) of Directive 79/7.

8. As stated in the order for reference, the combined effect of (i) section 44 of the Social Security Contributions and Benefits Act 1992 with the definition of 'pensionable age' in section 122 of that act, and (ii) Schedule 4(1) of the Pensions Act 1995, is that women born before 6 April 1950 are eligible for a State retirement pension at the age of 60, whereas men born before 6 December 1953 become eligible at the age of 65.

## **2. Gender Recognition Act**

9. The Gender Recognition Act ('the GRA') was adopted in 2004. It entered into force on 4 April 2005.

10. Section 1 of the GRA, in the version applicable to the facts in the present case, provides that a person who is at least 18 can apply to a Gender Recognition Panel for a full gender recognition certificate recording a change of his or her birth gender 'on the basis of ... living in the other gender'.

11. The criteria for determining whether a change of gender has occurred are established in sections 2 and 3 of the GRA. According to section 2, the Gender Recognition Panel must grant the application if it is satisfied that the applicant has or has had gender dysphoria, has lived in the acquired gender for at least two years up to the date of the application, intends to live in the acquired gender until death and satisfies the evidential requirements laid down by section 3. The evidential requirements provided for in section 3 consist of a report from two medical practitioners or from a medical practitioner and a psychologist.

12. According to Section 9 of the GRA, where a full gender recognition certificate is issued, the acquired gender becomes the person's gender for all purposes. Schedule 5, paragraph 7 of the GRA regulates the effect of a full gender recognition certificate on eligibility for State retirement pensions: once the certificate has been issued, any question of entitlement to a State retirement pension is to be decided as if the person's gender had always been the acquired gender.

13. The GRA made special provision for married applicants because at the time the GRA was passed a valid marriage could subsist in law only between a man and a woman. (4) According to section 4(2) of the GRA, an unmarried applicant who satisfies the criteria for gender recognition in sections 2 and 3 is entitled to a full gender recognition certificate. Conversely, section 4(3) of the GRA provides that a married applicant who satisfies the same criteria is entitled only to an *interim* gender recognition certificate. The interim gender recognition certificate allows a married applicant to apply to have the marriage annulled by a court, according to section 12(g) of the Matrimonial Causes Act 1973 (as amended by the GRA). Applicants become entitled to a full gender recognition certificate only after obtaining a decree of nullity (in England and Wales).

## **3. Civil partnerships and same-sex marriage**

14. The Civil Partnership Act was adopted in 2004 and came into force on 5 December 2005. That act provided for the legal recognition of same-sex partnerships upon registration.

15. The Marriage (Same Sex Couples) Act 2013 came into force on 10 December 2014. It allows same-sex couples to marry. Schedule 5 of that act amended section 4 of the GRA to provide that a Gender Recognition Panel must issue a full gender recognition certificate to a married applicant if the applicant's spouse consents.

## **III. Facts, procedure, and the question referred**

16. MB was born in 1948, registered at birth as a man, and married in 1974. In 1991, MB began to live as a woman. In 1995, she underwent gender reassignment surgery.

17. Although the GRA entered into force in 2005, MB has not applied for a gender recognition certificate. This is because she continues to live together with her wife and they wish to remain married. Even if their marriage can be replaced by a civil partnership, they are unwilling to annul it for religious reasons.

18. In 2008 MB reached the age of 60, the pensionable age for women born before 6 April 1950. She applied for a State retirement pension. That application was rejected because as she did not have a full gender recognition certificate, she could not be treated as a woman in respect of the age at which she was eligible for her pension.

19. MB ('the Applicant') challenged that decision before the national courts. She claimed that the condition to be unmarried amounts to discrimination contrary to Directive 79/7: it prevents her from accessing her retirement pension at the age she is entitled to as a woman.

20. In those circumstances, the Supreme Court of the United Kingdom has asked the Court 'whether Council Directive 79/7 precludes 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'.

21. Written submissions have been made by the Applicant, the United Kingdom Government, and the European Commission. Those interested parties also made oral submissions at the hearing held on 26 September 2017.

## **IV. Assessment**

### **A. A preliminary remark: which question?**

22. 'Two in one' is a turn of phrase more likely to be encountered in advertising than in introductions to judicial opinions. However, that expression is quite pertinent in the context of the present reference. Behind and beyond the apparent simplicity of the question asked by the Supreme Court of the United Kingdom is a second, more profound question. Thus, the present case can be approached from two quite different angles.

23. First, a narrow approach focuses on access to social security benefits: does Directive 79/7 preclude a national law 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 to qualify for a State pension?

24. Second, there is the more intricate approach posing an underlying question, which is different but still connected to the narrower approach. That question is about compatibility with the fundamental rights of privacy, private life, and the right to marry, if a Member State (i) refuses to allow for same-sex marriages and consequently,

(ii) refuses to recognise gender reassignment if it were to lead to a situation in which two persons of the same sex find themselves in a valid (same-sex) marriage.

25. The real difficulty of the present case does not lie, to my mind, in providing the answer to either of those two questions. It lies rather in selection of the question. Once that choice has been made, an additional difficulty may arise in trying to reconcile the answers to each of the questions.

26. This issue is clearly visible in the submissions made to this Court. In a way, each of the parties argued a different case. The Applicant and the Commission focused on a narrow understanding of the issue. They concluded that the condition to be unmarried amounts to discrimination which is precluded by Article 4(1) of Directive 79/7. The Applicant was invited at the oral hearing also to address the broader implications of the case. However, the response was an insistence that the narrow approach, as shown in the question of the Supreme Court of the United Kingdom, was the true case before the Court. By contrast, the arguments advanced by the United Kingdom Government relied on arguments that pertain to a broader question on fundamental rights. In support of their position, that government also frequently invoked and relied on recent case-law of the European Court of Human Rights (ECtHR). (5)

27. The question posed by the Supreme Court of the United Kingdom clearly reflects the narrow approach. Despite the broader implications surrounding the questions raised by this case, to which the referring court also helpfully refers in its order, the referring court has chosen to frame its question with a focus on the compatibility of a requirement to be unmarried with Directive 79/7.

28. In addition, it is worth highlighting that in its order for reference and in the text of the question itself, the referring court has also carried out a number of factual assessments. First, the referring court clearly states in its question that the requirement at issue is imposed on a person who *has changed* gender. Second, the referring court also confirms that the requirement to be unmarried is imposed *in addition* to satisfying the physical, social and psychological criteria for recognising a change of gender.

29. In such factual circumstances and answering the narrow question submitted to this Court by the referring court, I cannot but conclude that the requirement to be unmarried, applicable in fact only to transgender persons in order for them to access a State pension, is contrary to Article 4(1) of Directive 79/7 (B). Nonetheless, I shall also respond to the arguments put forward by the United Kingdom Government as to the broader understanding of the question, even if it cannot change the answer provided to the narrow question (C). I will underline why this case is in fact also rather narrow in its impact and more circumscribed than the broader fundamental rights arguments suggest (D).

## **B. The narrow question**

30. It is not disputed that the benefit at issue in this case, a State retirement pension, falls within the scope of Directive 79/7. That directive prohibits any discrimination whatsoever on grounds of sex concerning the conditions of access to social security schemes providing protection, *inter alia*, against the risk of old age. (6)

31. Is there a prohibited discrimination in the present case? According to the standard line of case-law of this Court, (7) for there to be direct discrimination, there must be an unequal treatment of a comparable group of persons to the detriment of the protected group. This must occur on the basis of one of the protected grounds, without any possible objective justification for such a difference in treatment.

32. For presentational purposes, in this section, I first assess whether there is a protected ground (1). I shall then turn to the comparability of transgender (8) and cisgender(9) persons (2), and the existence of unequal treatment (3). I shall conclude this section by looking at the impossibility of justifying direct discrimination in the legislative context of Directive 79/7 (4).

### **1. The protected ground**

33. It is by now established case-law that the EU law prohibition of discrimination on grounds of sex covers discrimination on the basis of gender reassignment. (10) Moreover, the EU legislature has explicitly recognised this important development by confirming that the scope of the principle of equal treatment for men and women 'also applies to discrimination arising from the gender reassignment of a person'. (11)

34. The first case dates back to 1996. In *P. v S.* the Court rejected the understanding of sex discrimination as a binary concept based on the opposition of two mutually exclusive categories. (12) This outcome was inspired by the purpose and the nature of the rights safeguarded by the sex discrimination directives and the fact that the right not to be discriminated against on grounds of sex was a fundamental human right. (13) The inclusion of gender reassignment in the concept of sex discrimination was, moreover, linked to the duty to respect the dignity and freedom of transsexual persons. (14)

35. The Court has thus confirmed that the scope of the prohibition of discrimination on grounds of sex cannot be confined 'simply to discrimination based on the fact that a person is of one or the other sex'. (15) Discrimination arising from gender reassignment is discrimination based, 'essentially if not exclusively, on the sex of the person concerned'. (16) This Court has been consistent in subsequent case-law in acknowledging the specificity of discrimination based on gender reassignment as a manifestation of sex-based discrimination. (17)

### **2. Comparable groups**

36. The fact that gender reassignment was explicitly included as one of the protected grounds (or statuses) did not render the correlating issue of comparability any easier, rather the contrary. Gender reassignment is a process involving a considerable degree of dynamism challenging the more traditional and static comparison between men and women. It effectively turns the comparator into a mobile target or even renders the identification of any clearly defined comparable group impossible. (18)

37. The Court has already tackled this conceptual difficulty. By recognising that gender reassignment is covered by sex discrimination, it has confirmed that the particular situation of transgender persons does not isolate them from

protection by rendering them incomparable. (19) Recognising gender reassignment, a subcategory of sex discrimination, as a prohibited ground leads to a necessary flexibility in the comparability framework. (20)

38. The case-law of the Court has reflected the complexity in this field by adjusting the framework of reference depending on the discrimination alleged and the legal context. The dynamic nature of reassignment means that the protection awarded by EU law is not inextricably linked to the 'end destination' — full legal recognition under national law of the legal effects of that reassignment. (21)

39. As a result, depending on the particular context and the nature of the claims at issue, the choice of the comparators may vary. The situation of a transgender person may be compared with the situation of a cisgender person of the gender she previously belonged to, such as for example in the case of a discriminatory dismissal. (22) But it may be also compared with a cisgender person of the 'new' gender, when it comes, for example, to access to benefits under conditions that would correspond to the reassigned gender. (23)

40. In other words, depending on the context of the case and bearing in mind the inherent dynamism in gender reassignment, the comparison might be carried out either with regard to the 'point of departure' or with regard to the 'point of arrival'.

41. The present case falls within the latter category. The Applicant claims a right to access a retirement pension as from the age applicable to women. Similarly to *Richards*, which also concerned Directive 79/7 and access to retirement benefits, (24) in this case the subjects of comparison (*comparators*) are male-to-female transgender persons, on the one hand, and cisgender women, on the other. The purpose of the comparison (the *tertium comparationis*) is access to a retirement pension, as a type of social security scheme.

42. The United Kingdom Government has however contested the comparability of transgender with cisgender women. That government maintains that the former are not in a comparable situation. This is because cisgender women cannot be married to women, but transgender women could find themselves in a same-sex marriage after recognition of gender reassignment. Therefore, those two categories and the conditions attached to them are wholly incomparable.

43. I do not agree. By this argument, the United Kingdom Government attempts to single out one of the ancillary, non-essential characteristics of the subjects of comparison — the issue of civil status — and to turn it into the decisive element that determines comparability. Put differently, the United Kingdom Government effectively wants to redefine the purpose of the comparison from the question of access to retirement benefits to the issue of civil status. The civil status in itself is not however relevant for access to a State retirement pension, either for cisgender women or men.

44. It is quite telling that in construing the comparability in this way, the United Kingdom Government relies primarily on a recent decision of the ECtHR. (25) That decision concerned, however, precisely and specifically, the issue of civil status as a condition for gender reassignment recognition, and not access to social security schemes. Thus, the subjects of comparison and its purpose were understandably construed in a different way. By contrast, in the present case, for the purposes of access to a State retirement pension, the elements which determine the relevance of the differences and similarities with regard to the benefit in question are primarily age and the amount of contributions paid into the system. (26)

45. On that latter point, the United Kingdom Government argued at the hearing that, together with age and contributions, the sex of the person concerned is another relevant element for the issue of access to social security. That argument runs, in the specific context of this case, into another difficulty: different treatment based on sex with regard to old-age and retirement pensions is only exceptionally allowed by Directive 79/7 on the basis of the derogation explicitly allowed in its Article 7(1)(a). But this does not cover, as the Court has already declared in *Richards*, different treatment on the basis of gender reassignment. (27) Aside from the exceptions provided for in the directive, a conclusion of 'non-comparability' can thus not be based on the protected ground (in this case gender reassignment).

46. In conclusion, I am of the view that for the purpose of access to social security schemes, cisgender and transgender women are comparable in the context of the present case.

47. I wish to make two more general concluding remarks on this issue. First, in assessing comparability of two or more elements (persons, groups of persons) when considering the prohibition of (direct) discrimination, the level of abstraction inherent in that mental exercise is likely to be higher than that in the national legislation. On the whole, in relation to the purpose of comparison, do the subjects of comparison show more commonalities than differences? If it were otherwise and the issue of comparability were intellectually predetermined by the categories established by the national legislation, then in most cases, as in the present one, (28) the national legislation will itself define the set of possible comparisons by its scope of application. Such an assessment is bound to become circular, with no review in fact possible. (29)

48. Second, such a necessary degree of abstraction is further underlined by the fact that 'transgenderism' is a unique status. It was precisely that unique nature that made it necessary to adopt specific legislation in the first place, providing for recognition and its conditions. However, it would be rather peculiar if that fact were to be taken as amounting to a complete exclusion of all elements covered by that legislation from any (non-)discrimination assessment, or if it were used for the creation of rather singular or odd elements of comparison. Again, because of that recognised, unique and transitional status, a reasonably higher level of abstraction in assessing comparability is called for.

### **3. Unequal treatment**

49. The United Kingdom Government denies that there has been unequal treatment. Cisgender and transgender women alike can benefit from a State retirement pension at the age of 60. Though neither of those categories can be married to a woman.

50. This argument is unconvincing.

51. First, to certain extent, that argument represents a rerun or a prolongation of the comparability issue. It confuses unequal treatment in access to a State retirement pension with the issue of the right to marry. Second, it ignores the difference between a ban on same-sex marriages with an obligation to annul a previously validly concluded marriage, which is the true content of the condition at issue in the present case. Third, connected to the second issue is the fact that each of those bans is simply applicable at different points of time, to different people, and for different purposes.

52. Under the national legislation at issue, full legal recognition of gender reassignment is made conditional on civil status. This has a specific and concrete consequence, which matters in this case: for transgender persons only, access to a State retirement pension is tied either to being 'single' or to the ending of a marriage. Conversely, access to retirement pensions for cisgender women does not in any way relate to their marital status. It concerns only contributions made and eligibility based on age. Of course, they are not required to end a marriage in order to qualify for retirement pension. As already outlined, (30) civil status is therefore not the criteria against which the unequal treatment is being measured, but the condition which leads to a dissimilar treatment regarding access to retirement pensions.

53. Thus, looking at the issue of treatment from the point of view of access to a State retirement pension, the difference in treatment in this case can be put in quite simple terms: marital status does not play any role for cisgender persons in order to access a State retirement pension. On the other hand, previously married transgender persons are subject to a requirement to annul their marriage.

#### **4. Justification**

54. The requirement to be unmarried creates a difference in treatment *directly* on grounds of sex. That requirement is applicable only to persons having undergone gender reassignment. As the Court declared in *P. v S.*, a difference in treatment based on gender reassignment is based 'essentially if not exclusively, on the sex of the person concerned'. (31)

55. Direct discrimination on the basis of sex is allowed only and exclusively in the specific cases listed in Article 7 of Directive 79/7. (32) In particular, Article 7(1)(a) allows Member States to maintain different retirement ages for eligibility to a retirement pension between men and women. However, the different treatment in the present case cannot be subsumed either under that exception or within the other possible grounds for derogation from the principle of equal treatment allowed for in the directive. (33) In particular, the Court has already dismissed the use of the derogation contained in Article 7(1)(a) to justify a difference in treatment between transsexual persons and those persons whose gender is not the result of gender reassignment. (34)

56. In those circumstances, the unequal treatment at issue in the present case amounts to direct discrimination on the basis of sex which is not open to objective justification (that is reserved for instances of indirect discrimination). (35)

#### **5. Interim conclusion**

57. As a result of the foregoing, it appears that Article 4(1) of Directive 79/7 must be interpreted as precluding the application 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 be unmarried in order to qualify for a State retirement pension.

#### **C. The broader landscape**

58. The previous assessment, straightforward as it might be, does not do full justice to the complexities underlying the legal arguments in the present case.

59. Indeed, it may be argued that the real crux of the present case is not access to social security benefits but, rather, the conditions for the recognition of gender reassignment which exist under national law. The condition 'to be unmarried' is not a condition for access to the State retirement pension, but one of the conditions for obtaining the gender reassignment certificate. That certificate is nonetheless a decision on civil status, one step removed and independent of potential later application for an old-age retirement pension. In other words, by omitting this intermediate step, a false causality is being created: it is not a condition to not be in a same-sex marriage for the retirement pension, but it is for a gender reassignment certificate to be issued.

60. This line of argument, put forward by the United Kingdom Government, relies on several elements. First, the establishment of conditions for recognition of gender reassignment falls within the competence of the Member States (1). Second, the condition to be unmarried is designed to prevent same-sex marriage. That is a public order objective which Member States are legitimately entitled to pursue, given that they have exclusive competence regarding civil status (2). Third, precluding a condition to be unmarried only for the purposes of Directive 79/7 will undermine the clarity and consistency of the national rules concerning civil status and gender reassignment (3). Fourth, the condition to be unmarried is in compliance with the European Convention on Human Rights ('the Convention') as interpreted by the ECtHR (4).

61. Those arguments merit detailed consideration. They capture the unique complexity and sensitivity of the issues raised by this case. However, as relevant as they are in general, for the reasons I set out in more detail below, those arguments run into significant difficulties in the specific context of the present case. That is from the point of view of the assessment of the narrow question concerning the compatibility of the condition at issue with Directive 79/7.

#### **1. Argument 1: Member States' discretion to establish the conditions for the recognition of gender reassignment**

62. It is generally acknowledged by the interested parties that have lodged submissions that Member States are compelled to set up procedures under national law which allow for the full legal recognition of gender reassignment.

That requirement arises not only from the obligations of Member States as parties to the Convention, (36) but also, more specifically, from EU law and Directive 79/7. (37)

63. Thus, the laying down of some conditions is intrinsic to the set-up of such a procedure. The complexity of this case arises from the fact that it concerns one of the specific conditions provided for by the procedure already put in place by a Member State. This case invites the Court, for the first time to my knowledge, to examine the prohibition of discrimination on grounds of sex with regard to the preconditions for the recognition of gender reassignment. The previous cases concerning transgender persons all addressed situations in which national recognition procedures were not in place, or were not applicable to the circumstances of the case. (38)

64. *Richards* is the relevant precedent in this regard. There, the Court found that there had been discrimination based on sex (reassignment) relating to access to an old-age pension. That was because Ms Richards (a male-to-female post-operative transsexual) could not have her change of gender legally recognised in the United Kingdom. Thus, *Richards* concerned the impossibility for a transsexual person to have her acquired gender legally recognised. Following *Richards* and *Goodwin*, the United Kingdom put in place a procedure for the recognition of gender reassignment.

65. As the United Kingdom Government submits, the Court explicitly declared in *Richards* 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'. (39)

66. Having those considerations in mind, it could be argued that, in contrast with the *impossibility* in *Richards*, when a procedure for recognition of gender reassignment exists, Member States have discretion to establish the pertinent *conditions*. The discretion to establish the conditions of legal recognition of gender reassignment would entail that, once a procedure is in place, persons undergoing gender reassignment will only fall within the protective scope of the prohibition of sex discrimination once their acquired gender has been legally recognised according to the national procedure.

67. Following the logic of that argument, the conclusion in the present case would be that the condition to be unmarried is not a *direct* requirement for access to the State retirement pension, but a requirement for gender reassignment recognition. The unequal treatment would be 'one step removed' from access to a pension. It would arise from the fact that the Applicant does not comply with the requirements for recognition of gender reassignment.

68. Such a line of reasoning runs, however, into at least three difficulties.

69. First, the Court has already rejected a similar 'remoteness' argument in *K. B.* (40) That case concerned a transsexual person who could not have access to a survival pension because (1) he was not married, (2) it was impossible for a transsexual to marry a person of the sex to which he or she belonged prior to reassignment surgery, and (3) a change of gender was not legally possible. In that case, the Court was therefore faced with a situation in which the inequality of treatment did not relate to the award of the pension itself, but to a necessary *precondition* for the grant of such a pension: the capacity to marry. (41) This fact did not prevent the Court from examining the issue of the compatibility of the national legislation with Article 157 TFEU (ex Article 141 EC). The Court therefore concluded 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 [EU] law must be regarded as being, in principle, incompatible with the requirements of [EU] law'. (42)

70. Second, on the more conceptual level, such an approach would make the scope of application of EU law related to the prohibition of discrimination on grounds of sex entirely dependent on the various nationally established conditions. The enjoyment of rights conferred by EU law would be made contingent on the unfettered discretion of the Member States. Such conditions could not only regulate the technical issues of a physio/medical and psycho/social nature, but also include various requirements aimed at protecting morals or values. Unrestrained discretion in this regard would mean running the risk that discrimination on the basis of gender reassignment, forbidden by the directive, could return through the back door in the form of prerequisites or conditions attached to the recognition of status, no matter what their content. (43)

71. Taking that logic to the point of absurdity, a legal requirement to wear a pink dress at least two days a week in order to be (socially and culturally) recognised as a woman would be fine if it was a legal precondition for the recognition of gender reassignment. I readily acknowledge that the condition in the present case is of a very different nature. But where and how would a line for 'acceptable' conditions (those excluded from any review) and those 'unacceptable' ones (those susceptible to review) be drawn? In addition, per se and abstractly seen 'acceptable' conditions might, in certain factual or legal contexts, still lead to quite unacceptable results.

72. Third, it must be borne in mind that a logic according to which conditions for gender reassignment would be excluded from any review would also disregard the dynamism of gender recognition as a process, as already discussed in points 36 to 38 of the present Opinion. In other words, because of the inherent transgender dynamics, protection is needed not only once one has full gender recognition, but also (and sometimes rather in particular) with regard to the trajectory of getting there.

73. I emphasise that the establishment of conditions for legal recognition of gender reassignment remains a task for the Member States. (44) This does not mean, however, that when adopting such procedures and designing the conditions, Member States act completely outside the scope of EU law and therefore escape any kind of scrutiny. Member States must, after all, exercise their competences in a way which complies with EU law, in particular the provisions relating to the principle of non-discrimination. (45)

74. That brings me to the last issue, connected to the previous discussion: the stage or the moment at which a transgender person becomes entitled to equal treatment and prohibition of discrimination under EU law. (46) Yet again, there is no general or ironclad rule. Each individual case must be examined in the light of the particular situation and the question being asked.

75. As to the particular situation at issue, the referring court clearly stated in the preliminary reference that it concerns a person who has already *de facto* changed gender. Moreover, the national court also held that the Applicant has *satisfied* all the physical, social, and psychological criteria for recognition of the change of gender.

76. Looking at the particular question in the present case, it must be underscored that what is at issue is not the requirement to be unmarried as a general condition for recognition of status, but its effect on access to a State retirement pension covered by Directive 79/7. If, as argued above in points 69 to 73 of this Opinion, the need to subject the conditions of gender reassignment to review for the purposes of its compliance with EU law is acknowledged, the possibility to invoke the protection of the directive necessarily covers those individuals who claim that it is precisely those conditions that hinder their access to the rights conferred on them by EU law.

77. Consequently, in the context of the present case, neither the power of Member States to define conditions for gender reassignment, nor the remoteness of such conditions to access to a social security pension leads to conclusions that are different from those reached in Part B of the present Opinion.

## **2. Argument 2: civil status is a matter for national law**

78. The United Kingdom Government has argued that the finding of incompatibility of the condition to be unmarried with Directive 79/7 would compel the Member States to recognise same-sex marriages even where such marriages were not (at that time) permitted under national law.

79. I do not agree. From a practical point of view, if the condition at issue were to be declared incompatible with Directive 79/7, all that would be required would be to make access to the particular benefit at issue independent of this particular condition. This certainly does not mean that such a requirement could no longer be part of national law. Clearly it may. But it could not be applied as a precondition for access to the benefits covered by the directive and unrelated to civil status, such as an old-age retirement pension.

80. The case at issue is concerned with a benefit (a State retirement pension) which is in no way conditional upon marital status or legal ties between partners. As already explained above, (47) the entitlement for State retirement pensions is generally substantiated, within the regimes for either men or women, on contributions and the age of the applicants.

81. This result does not contradict the proposition that issues of civil status are a competence of the Member States. The Court declared in *Parris* that 'civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and that [EU] law does not detract from that competence'. (48) Member States remain free to allow or not to allow same-sex marriage, or, if they wish, to provide for an alternative form of legal recognition of same-sex relationships. (49) However, it shall be recalled once more that when exercising the competences relating to civil status, Member States must still comply with EU law. (50)

82. Thus, to the extent that the answer to this argument has not already been provided in answer to the previous argument, with which it partially overlaps, I am of the view that the answer to be given by this Court, in accordance with the Applicant's and the Commission's submissions, does not prejudice issues relating to the marital status of the persons concerned.

## **3. Argument 3: clarity and consistency**

83. The United Kingdom Government has submitted that if the Applicant's arguments were to be upheld, the Member State concerned would be required to legally recognise the Applicant's acquired gender, even if she remained married, for all the purposes covered by Directive 79/7. The power of Member States to impose and to enforce those conditions would then effectively become area dependent: it would be limited in those areas covered by EU law, and in particular by Directive 79/7, but would remain the same in others, such as those outside the scope of EU law. This would clearly undermine the ability of Member States to seek clarity and consistency of national legislation and to have one (universally applicable) regime in their legislation concerning gender reassignment recognition and civil status.

84. I fully subscribe to the desire of a Member State to fulfil its regulatory duties as clearly and consistently as possible. However, in the particular case before this Court, I fail to see how the conclusion that the condition in the present case is precluded by Directive 79/7 would hinder such endeavours.

85. It seems that the legal situation of transgender persons in the United Kingdom is characterised by a particularly flexible approach towards gender manifestations in different fields of law and administration.

86. As stated by the Applicant and not contradicted by the United Kingdom Government, the Applicant has been recognised as a woman in her passport and driving licence, which were issued by the United Kingdom authorities from 1991. At the hearing, that government nonetheless maintained that the issuance of those documents is a mere internal 'administrative practice' without any legal significance. Without wishing to be perceived as a personal ID loving formalist, I must admit that I have some intellectual difficulty with the proposition that official documents issued by a Member State would have no legal significance.

87. Moreover, as the applicant submits, she legally underwent gender reassignment surgery in England under the National Health Service. (51)

88. It is also apparent that the GRA regulates separately, in different schedules, the legal regime and specific consequences of gender reassignment depending on the subject matter. (52) Moreover, from the explanations to this Court it follows that the gender recognition procedure, when applied to married persons, is split into two. The first phase leads to an interim recognition certificate, whereby all the medical, psychological and social requirements are assessed. That would already amount to full recognition to unmarried persons. The second step leads to the annulment of the marriage (in England and Wales). Thus, the technical/scientific elements regarding recognition of gender reassignment are assessed independently of the additional requirement of marital status. This disassociation in two clearly differentiated administrative phases of the procedure shows the possibility to arrive at separate administrative phases of assessment regarding different conditions without detriment to clarity or consistency.

89. All these observations underline that it is difficult to maintain that there would be one universal regime on which all the other effects in national law depend. Rather, it would appear that there are in fact a number of parallel and somewhat independent legal regimes. Again, it is solely for the Member State to decide how it wishes to regulate matters of civil status internally. If however the (normally quite laudable and understandable) area-dependent flexibility is the rule, then it is difficult to maintain, at the same time, the paramount importance and the imperative of a unique regime and overall coherence of it.

90. Lastly, on a closing and rather ancillary note, there is the temporal element. The requirement in the present case has not been carved in stone. It has changed several times. This is demonstrated by the fact that the Applicant, despite being married, would have been eligible for her retirement pension at the age of 60 before the entry into force of the GRA in 2005 (as a consequence of the application of *Richards*). But that would also be the case after the entry into force of the Marriage Act 2013. As a result, it is only one (age-dependent) set of transgender persons that, in a way, fall in a crack between two different regulatory regimes. This again does not strengthen the proposition of the crucial overall coherence of the system, this time concerning its temporal dimension.

91. In sum, the concerns of clarity and consistency articulated by the United Kingdom Government, compelling as they are on the level of principle, fail to convince in the context of this particular case.

#### **4. Argument 4: the requirement is not contrary to fundamental rights**

92. In its submissions, the United Kingdom Government has relied extensively on considerations of human rights and on the case-law of the ECtHR. It does so to support the proposition that the condition to be unmarried is not contrary to EU law. In particular, that government has invoked the judgments of the ECtHR in *Parry v. United Kingdom* and *R. and F. v. United Kingdom* (53) and in *Hämäläinen v. Finland*. (54) In those cases, the marriage condition has been declared compatible with Article 8 (right for respect to private and family life) and Article 12 (right to marry) of the Convention.

93. In *Parry v. United Kingdom* and *R. and F. v. United Kingdom*, the ECtHR specifically examined the requirement to be unmarried as provided for in the GRA. The applications were declared manifestly ill-founded. In its interpretation of Article 8 of the Convention in the context of those cases, the ECtHR gave great importance to the fact that the applicants could continue their relationship through a civil partnership with almost the same legal rights and obligations. As a consequence, a fair balance had been struck between the interests at stake. The effects of the requirement to be unmarried laid down by the GRA were not considered to be disproportionate. With regard to the alleged violation of Article 12 of the Convention, the ECtHR recalled that that provision enshrines the traditional concept of marriage as being between a man and a woman. It concluded that the matter of same-sex marriages falls within the discretion of the Contracting Parties.

94. The subject of a requirement similar to the one at issue reached the Grand Chamber of the ECtHR in *Hämäläinen v. Finland*. That case concerned a post-operative male-to-female transgender who was married to a woman. Under Finnish law, she was obliged to transform her marriage into a civil partnership in order to have her gender reassignment legally recognised. The ECtHR noted the lack of European consensus and the sensitive moral and ethical issues involved. It granted the State a wide margin of discretion, (55) and carefully considered the possibilities for the applicant to have the marriage converted into a civil partnership. The ECtHR nonetheless concluded that the Finnish system was not disproportionate and that a fair balance had been struck between the competing interests at stake. The ECtHR reached the same conclusion with regard to Article 12 of the Convention. The complaint of the applicant concerning Article 14 of the Convention (non-discrimination) in conjunction with Articles 8 and 12 of the Convention was also dismissed, since for those purposes, the situation of cissexuals and transsexuals was not considered sufficiently similar for a comparison.

95. The relevance of the above case-law of the ECtHR from a general point of view is not disputed. According to Article 52(3) of the Charter of Fundamental Rights of the European Union ('the Charter'), in so far as the Charter contains rights that correspond to rights guaranteed by the Convention, their meaning and scope shall be the same.

96. However, as clearly underlined in Part B above, the question examined in the present case does *not* concern the right to family life (Article 7 of the Charter) or the right to marry (Article 9 of the Charter), which are the equivalent rights to those enshrined in Articles 8 and 12 of the Convention.

97. As a result, it is not necessary to enter into the debate of whether the EU law standard is more protective than that of the Convention, or whether the broad margin of discretion left by the ECtHR in the face of the 'lack of a European consensus' in the wider Europe regarding same-sex marriage is fully transposable in the context of the EU. The question of whether the condition to be unmarried is compatible with those fundamental rights is simply not the question asked in this case.

98. The present case is concerned with the prohibition of discrimination on grounds of sex in the field of social security, as provided for by Directive 79/7. The right not to be discriminated against on grounds of sex is, granted, one of the fundamental rights provided for by both the Charter and the broader system of EU law. (56) It has been given specific expression in a number of acts of secondary law, in particular, for the purposes of the present case, by Directive 79/7. That is the legal framework of analysis for this case, as carried out in the previous sections.

99. The arguments put forward by the United Kingdom Government relied on different fundamental rights: the right to private and family life and the right to marry. The debate concerning the compliance with those fundamental rights is certainly relevant for the potential assessment of national legislation as regards marriage and civil status. However, it is simply not relevant for the narrow question posed in this case, which concerns the issue of access to State retirement pensions under Directive 79/7.

100. In sum, the fact that a provision is compatible with certain fundamental rights (in this case, arguably, the right to family life and the right to marry) is of limited relevance for the assessment of the compliance of those provisions with



instruments of EU secondary law which regulate specific rights and entitlements of individuals (in this case, the right not to be discriminated against on grounds of sex in matters of social security).

#### **D. A coda**

101. I wish to add five concluding remarks.

102. First, from the discussion in previous parts of this Opinion, it became (hopefully) clear that this case is not about same-sex marriage. As recalled above, according to the case-law of the Court, Member States remain free as to whether or not they wish to recognise same-sex marriages. The problem in this particular case is, simply put, that a number of various conditions, if bundled up together, end up creating a rather peculiar (and from the point of view of EU law, problematic) configuration.

103. Second, the answer provided only affects the benefits covered by Directive 79/7. It only applies to benefits unrelated to marital status.

104. Third, this case concerns a unique and singular reality, which fits with difficulty into the traditionally binary divisions on which the prohibition of sex discrimination relies. The circumstances of the case must be placed in that perspective. It concerns a rather limited number of individuals facing profound challenges often in situations of vulnerability. It has to do with a complex human reality with which individual legal orders have struggled to catch up over time, and in which individuals often see their personal situation profoundly affected by constant legislative changes.

105. Fourth, at the cross-section between the first and third point is also the nature of the requirement in question. Much has been said in this Opinion about comparability. But that, at times rather technical, discussion should not obfuscate the profound impact that the necessity to have one's marriage annulled, in order to be recognised in a new situation that was hardly of one's free will and choice, is likely to have on one's privacy and personality, already probably shaken as the consequence of those changes.

106. Fifth and lastly, but perhaps for the future the most important, the difficult issues of the present case arise precisely because, in the particular field at hand, namely that of retirement pensions, a derogation from the equal treatment principle persists, according to Article 7(1)(a) of Directive 79/7. This is not only exceptional because it entails derogation from one of the most fundamental principles of EU law, allowing for direct discrimination based on sex, but also because it had already been expected to progressively disappear 38 years ago, through the convergence of the retirement ages for men and woman.

107. As the referring court has stated, in the United Kingdom, the retirement age for men and women will gradually converge and be the same. Thus, there as well as in other Member States, the root of the problem is bound to disappear as well.

#### **V. Conclusion**

108. As a result of the foregoing, I propose that the question referred by the Supreme Court of the United Kingdom be answered as follows:

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, must be interpreted as precluding the application 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 be unmarried in order to qualify for a State retirement pension.

Original language: English.

2 Council Directive 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).

3 Judgment of 27 April 2006 (C-423/04, EU:C:2006:256).

4 As confirmed by the Matrimonial Causes Act 1973, section 11(c).

5 Discussed in detail below in points 92 to 94 of this Opinion.

6 Article 3(1)(a) and Article 4(1), first indent of Directive 79/7.

7 See, generally, and concerning different instruments, for example, judgments of 21 July 2005, Vergani (C-207/04, EU:C:2005:495); of 18 November 2010, *Kleist* (C-356/09, EU:C:2010:703); of 12 September 2013, *Kuso* (C-614/11, EU:C:2013:544); and of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823).

8 The terminology in the complex field of gender identity is not simple. Literature identifies 'transgender persons' generally as those who make a transition from one gender role to another but not necessarily changing their physiological sex (by surgery). The concept of 'transsexual' is used to refer to those who adjust their gender to their gender identity through physiological transformation by sex-changing medical practices. See, for terminological clarification, Zimman, L., 'Transsexuality', *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies*, 2016, pp. 2360 to 2362. This opinion generally uses the term 'transgender'. However, when referring to the specific facts of this case and in view of the terminology employed by the referring court, the term 'transsexual' shall be employed. The latter term is also reproduced when quoting the case-law of this Court which uses that notion.

9 The terms 'cisgender' and 'cissexual' are referred to in opposition to transgender and transsexual, and are essentially used to refer to persons whose gender identity corresponds with their sex assigned at birth. See, for a discussion on the use of those terms, Cava, P., 'Cisgender and Cissexual', *The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies*, 2016, pp. 267 to 271.

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10 Judgments of 30 April 1996, *P. v S.P. v S.P. v S.*(C-13/94, EU:C:1996:170); of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7); and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256).

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11 Recital 3 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 (recast)(OJ 2006 L 204, p. 23).

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12 This case concerned 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). In the words of Advocate General Tesouro, the objection that 'it is not possible to speak of discrimination between the two sexes' in a case concerning gender reassignment is a 'quibbling formalistic interpretation', Opinion in *P. v S.P. v S.P. v S.* (C-13/94, EU:C:1995:444, point 20). Such a binary legal approach is furthermore broadly recognised as not fitting scientific reality. See, generally, Greenberg, J.A., 'Defining Male and Female: Intersexuality and the Collision between Law and Biology', *Arizona Law Review*, 1999, Vol. 41, pp. 265 to 328.

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13 Judgments of 30 April 1996, *P. v S.P. v S.P. v S.*(C-13/94, EU:C:1996:170, paragraph 20), and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraph 24).

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14 Judgment of 30 April 1996, *P. v S.P. v S.P. v S.*(C-13/94, EU:C:1996:170, paragraph 22).

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15 Judgments of 30 April 1996, *P. v S.P. v S.P. v S.*(C-13/94, EU:C:1996:170, paragraph 20), and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraph 24).

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16 Judgment of 30 April 1996, *P. v S.P. v S.P. v S.*(C-13/94, EU:C:1996:170, paragraph 21).

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17 Judgments of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7, paragraph 36), with regard to Article 157 TFEU (ex Article 141 EC), and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraph 38) with regard to Directive 79/7.

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18 The academic literature has identified as the source of those difficulties the fact that gender reassignment cases are treated under the provisions concerning sex discrimination, and not under a specific ground based on gender identity. See, for example, Tobler, C., 'Equality and Non-Discrimination under the ECHR and EU Law. A Comparison Focusing on Discrimination against LGBTI Persons', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2014, Vol. 74, pp. 521 to 561, at 543 et seq.

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19 Judgments of 30 April 1996, *P. v S.P. v S.P. v S.*(C-13/94, EU:C:1996:170); of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7); and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256). See on this debate, for example, Mulder, J., *EU Non-Discrimination Law in the Courts. Approaches to Sex and Sexualities Discrimination in EU Law*, Hart Publishing, Oxford, 2017, p. 49, or Agius, S., and Tobler, C., *Trans and Intersex People*, Luxembourg, Publications Office of the European Union, 2012, p. 35 et seq.

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20 The conceptual leap is similar to the one produced by the inclusion of pregnancy-related discrimination in the concept of sex discrimination, for example, judgment of 8 November 1990, *Dekker* (C-177/88, EU:C:1990:383, paragraph 17). However, instead of getting rid of the comparability element, in the case of transgender persons, comparability is rather extended. See on this debate for example, Skidmore, P., 'Sex, gender and Comparators in Employment Discrimination', *Industrial Law Journal*, 1997, Vol. 26, pp. 51 to 61, at p. 60; Wintemute, R., 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes', *Modern Law Review*, 1997, Vol. 60, pp. 334 to 359, at p. 340; Bell, M., 'Shifting conceptions of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*', *European Law Journal*, 1999, Vol. 5, pp. 63 to 81.

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21 For example, both in the judgments of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7), and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256), the applicants had not received legal recognition in the acquired gender.

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22 That was the case in the judgment of 30 April 1996, *P. v S.P. v S.P. v S.*(C-13/94, EU:C:1996:170, paragraph 21). In that case, discrimination on grounds of sex was found during the process of reassignment. The Court found that 'where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavorably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment'.

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23 That was the case in the judgment of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256).

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24 Judgment of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraph 29).

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25 Judgment of the ECtHR of 16 July 2014, *Hämäläinen v. Finland* (CE:ECHR:2014:0716JUD003735909, §§ 65 to 66).

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26 Indeed, the examination of comparability ought not to be carried out globally or abstractly, but with specific and concrete reference to the benefit concerned and with due regard to the purpose and conditions for granting such benefit. See, to that effect judgments of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraphs 42 and 43), and of 12 December 2013, *Hay*(C-267/12, EU:C:2013:823, paragraph 33).

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27 Judgment of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraphs 35 to 37).

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28 Then the assessment would be, in a way, rather quick: because the Gender Recognition Act 2004 is applicable *only* to transgender persons, their position cannot be naturally compared to the cisgender ones, because for the purpose of all the elements connected to or flowing from gender reassignment, as defined by national legislation, those two groups are clearly incomparable.

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29 This problem is not limited to the area of discrimination law, but inherent also in other fields of EU law where comparability is an element of assessment, such as within the notion of 'selectivity' in the area of State aid. See, for a discussion of similar problems, my Opinion in *Belgium v Commission* (C-270/15 P, EU:C:2016:289, points 40 to 46).

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30 Above, points 43 and 44 of this Opinion.

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31 Judgments of 30 April 1996, *P. v S.P. v S.P. v S.*(C-13/94, EU:C:1996:170, paragraph 21).

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32 According to the case-law of the Court, under Directive 79/7, discrimination directly based on sex can only be justified on the basis of the explicit derogations contained therein. See, to that effect, for example, judgments of 30 March 1993, *Thomas and Others*(C-328/91, EU:C:1993:117, paragraph 7); of 1 July 1993, *van Cant* (C-154/92, EU:C:1993:282, paragraph 12); of 30 January 1997, *Balestra* (C-139/95, EU:C:1997:45, paragraph 32); and of 3 September 2014, *X* (C-318/13, EU:C:2014:2133, paragraphs 34 and 35), as well as Opinion of Advocate General Kokott in *X* (C-318/13, EU:C:2014:333, points 32 to 34). This is consistent with the approach with regard to direct discrimination covered by other instruments (see the case-law cited in footnote 7 of this Opinion). Moreover, the Court has repeatedly declared that, due to the fundamental importance of the principle of equal treatment, the exceptions to the prohibition of discrimination on grounds of sex must be interpreted strictly (judgment of 18 November 2010, *Kleist* (C-356/09, EU:C:2010:703, paragraph 39 and the case-law cited)).

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33 Article 4(2) concerns the provisions on the protection of women on the grounds of maternity. Article 7(1) enables the Member States to exclude from its scope a certain number of rules, advantages and benefits as regards social security.

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34 Judgment of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraphs 34 to 37).

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35 It might be added, for the sake of completeness, that the Applicant has argued in the alternative, relying on official statistics, that the requirement to be unmarried also constitutes indirect discrimination between male-to-female and female-to-male transgender persons. That is because it more broadly impacts on the first group than on the second. In the light of the conclusion that the requirement to be unmarried results in direct discrimination in the present case, there is no need examine this argument.

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36 ECtHR judgments of 11 July 2002, *Goodwin v. United Kingdom* (CE:ECHR:2002:0711JUD002895795, § 93), and *I. v. United Kingdom* (CE:ECHR:2002:0711JUD002568094, § 73), and of 23 May 2006, *Grant v. United Kingdom* (CE:ECHR:2006:0523JUD003257003, §§ 39 to 40).

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37 Judgments of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7, paragraphs 33 to 35) with regard to Article 157 TFEU (ex-Article 141 EC), and of 27 April 2006, *Richards* (C-423/04, EU:C:2006:256, paragraphs 28 to 30).

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38 Judgment of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7, paragraph 35). The Court made an important reservation: 'Since it is for the Member States to determine the conditions under which legal recognition is given to the change of gender of a person in R.'s situation — as the European Court of Human Rights has accepted (*Goodwin v. United Kingdom*, § 103) — it is for the national court to determine whether in a case such as that in the main proceedings a person in K.B.'s situation can rely on Article 141 EC in order to gain recognition of her right to nominate her partner as the beneficiary of a survivor's pension.'

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39 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).

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40 Judgment of 7 January 2004, *K. B.* (C-117/01, EU:C:2004:7).

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41 Judgment of 7 January 2004, K. B. (C-117/01, EU:C:2004:7, paragraph 30).

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42 Judgment of 27 April 2006, *Richards*, C-423/04 (EU:C:2006:256, paragraph 31). That ruling refers to the judgment of 7 January 2004, K. B. (C-117/01, EU:C:2004:7, paragraphs 30 to 34).

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43 This is also the case concerning conditions related to *marital* status which is expressly identified by Article 4(1) of Directive 79/7 as an illustrative element with regard to which Member States must be particularly vigilant in order not to indirectly discriminate.

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44 Judgment of 7 January 2004, K. B. (C-117/01, EU:C:2004:7, paragraph 35).

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45 With regard to civil status, see in particular judgments of 1 April 2008, *Maruko* (C-267/06, EU:C:2008:179, paragraph 59); of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraph 38); of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 26); and of 24 November 2016, *Parris* (C-443/15, EU:C:2016:897, paragraph 58).

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46 According to the Opinion of Advocate General Jacobs in *Richards* (C-423/04, EU:C:2005:787, point 57), this issue was already debated at the hearing in *Richards*. However, the Advocate General did not take a position on this issue, as he considered that with post-operative transsexuals the entitlement was clear.

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47 Points 44 and 52 of this Opinion.

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48 Judgment of 24 November 2016, *Parris* (C-443/15, EU:C:2016:897, paragraph 59). See also judgments of 1 April 2008, *Maruko* (C-267/06, EU:C:2008:179, paragraph 59); of 10 May 2011, *Römer* (C-147/08, EU:C:2011:286, paragraph 38); and of 12 December 2013, *Hay* (C-267/12, EU:C:2013:823, paragraph 26).

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49 Judgment of 24 November 2016, *Parris* (C-443/15, EU:C:2016:897, paragraph 59).

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50 See point 73 and footnote 45 above.

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51 A similar lack of coherence has explicitly been underlined by the ECtHR judgment of 11 July 2002, *Goodwin v. United Kingdom* (CE:ECHR:2002:0711JUD002895795, § 78). 'In this case, as in many others, the applicant's gender reassignment was carried out by the national health service, which recognises the condition of gender dysphoria and provides, *inter alia*, reassignment by surgery, with a view to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs. The Court is struck by the fact that nonetheless the gender reassignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention.'

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52 See, for example, sections 10 to 21, and Schedules 1 to 6. In particular, Schedule 5 regulates the specificities of benefits and pensions.

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53 See ECtHR decisions on the admissibility of 28 November 2006, *Parry v. United Kingdom* (CE:ECHR:2006:1128DEC004297105), and *R. and F. v. United Kingdom* (CE:ECHR:2006:1128DEC003574805).

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54 Judgment of 16 July 2014, *Hämäläinen v. Finland* (CE:ECHR:2014:0716JUD003735909).

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55 Judgment of 16 July 2014, *Hämäläinen v. Finland* (CE:ECHR:2014:0716JUD003735909, §§ 74 and 75).

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56 As the Court also stated in the pre-Charter era, see, for example, judgments of 15 June 1978, *Defrenne* (149/77, EU:C:1978:130, paragraphs 26 and 27) and of 30 April 1996, *P. v S.P. v S.P. v S.* (C-13/94, EU:C:1996:170, paragraph 19).