JUDGMENT OF THE COURT

11 January 2000 (1)

(Equal treatment for men and women Limitation of access by women tomilitary posts in the Bundeswehr)

In Case C-285/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234EC) by the Verwaltungsgericht Hannover, Germany, for a preliminary ruling in theproceedings pending before that court between

Tanja Kreil

and

Bundesrepublik Deutschland

on the interpretation of Council Directive 76/207/EEC of 9 February 1976 on theimplementation of the principle of equal treatment for men and women as regardsaccess to employment, vocational training and promotion, and working conditions(OJ 1976 L 39, p. 40), in particular Article 2 thereof,

THE COURT,

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

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

Tanja Kreil, by J. Rothardt, Rechtsanwalt, Soltau,

the German Government, by W.-D. Plessing, Ministerialrat at the FederalMinistry of the Economy, and C.-D. Quassowski, Regierungsdirektor at thesame ministry, acting as Agents,

the Commission of the European Communities, by J. Grunwald, LegalAdviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Tanja Kreil, represented by J. Rothardt; ofthe German Government, represented by C.-D. Quassowski; of the ItalianGovernment, represented by D. Del Gaizo, Avvocato dello Stato; of the UnitedKingdom Government, represented by J.E. Collins, Assistant Treasury Solicitor,acting as Agent, and by N. Pleming QC; and of the Commission, represented byJ. Grunwald, at the hearing on 29 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 26 October1999,

gives the following

Judgment

1. By order of 13 July 1998, received at the Court on 24 July 1998, theVerwaltungsgericht (Administrative Court), Hanover, referred to the Court for apreliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) aquestion on the interpretation of Council Directive 76/207/EEC of 9 February 1976on the implementation of the principle of equal treatment for men and women asregards access to employment, vocational training and promotion, and workingconditions (OJ 1976 L 39, p. 40, hereinafter 'the Directive), in particular Article2 thereof.

2. The question has been raised in proceedings between Tanja Kreil and theBundesrepublik Deutschland concerning the refusal to engage her in themaintenance (weapon electronics) branch of the Bundeswehr.

The law applicable

3. Article 2(1), (2) and (3) of the Directive provides:

'1. For the purposes of the following provisions, the principle of equaltreatment shall mean that there shall be no discrimination whatsoever on groundsof sex either directly or indirectly by reference in particular to marital or familystatus.

2. This Directive shall be without prejudice to the right of Member States toexclude from its field of application those occupational activities and, whereappropriate, the training leading thereto, for which, by reason of their nature or thecontext in which they are carried out, the sex of the worker constitutes adetermining factor.

3. This Directive shall be without prejudice to provisions concerning theprotection of women, particularly as regards pregnancy and maternity.

4. Article 9(2) of the Directive provides: 'Member States shall periodically assess theoccupational activities referred to in Article 2(2) in order to decide, in the light ofsocial developments, whether there is justification for maintaining the exclusionsconcerned. They shall notify the Commission of the results of this assessment.

5. Article 12a of the Grundgesetz für die Bundesrepublik Deutschland (Basic law forthe Federal Republic of Germany) provides:

'(1) Men who have attained the age of eighteen years may be required to servein the Armed Forces, in the Federal Border Guard, or in a Civil Defenceorganisation.

...

(4) If, while a state of defence exists, civilian service requirements in the civilianpublic health and medical system or in the stationary military hospitalorganisation cannot be met on a voluntary basis, women between eighteenand fifty-five years of age may be assigned to

such services by or pursuantto a law. They may on no account render service involving the use ofarms.

6. Access for women to military posts in the Bundeswehr are governed in particularby Article 1(2) of the Soldatengesetz (Law on Soldiers, hereinafter 'the SG) and

by Article 3a of the Soldatenlaufbahnverordnung (Regulation on Soldiers' Careers,hereinafter 'the SLV), according to which women may enlist only as volunteersand only in the medical and military-music services.

The main proceedings

7. In 1996, Tanja Kreil, who has been trained in electronics, applied for voluntaryservice in the Bundeswehr, requesting duties in weapon electronics maintenance. Her application was rejected by the Bundeswehr's recruitment centre and then byits head staff office on the ground that women are barred by law from serving inmilitary positions involving the use of arms.

8. Tanja Kreil then brought an action in the Verwaltungsgericht (AdministrativeCourt) Hannover claiming in particular that the rejection of her application ongrounds based solely on her sex was contrary to Community law.

9. Considering that the case required an interpretation of the Directive, theVerwaltungsgericht Hannover decided to stay the proceedings and to refer thefollowing question to the Court for a preliminary ruling:

'Is Council Directive 76/207/EEC of 9 February 1976, in particular Article 2(2) ofthat directive, infringed by the third sentence of Article 1(2) of the Soldatengesetz(Law on Soldiers) in the version of 15 December 1995 (*Bundesgesetzblatt* I,p. 1737), as last amended by the Law of 4 December 1997 (*Bundesgesetzblatt* I,p. 2846), and Article 3a of the Soldatenlaufbahnverordnung (Regulations onSoldiers' Careers), in the version published on 28 January 1998 (*Bundesgesetzblatt*I, p. 326), under which women who enlist as volunteers may be engaged only in themedical and military-music services and are excluded in any event from armedservice?

The question referred for a preliminary ruling

10. By its question the national court is asking essentially whether the Directiveprecludes the application of national provisions, such as those of German law,which bar women from military posts involving the use of arms and which allowthem access only to the medical and military-music services.

11. The applicant argues that this bar constitutes direct discrimination contrary to theDirective. She considers that, under Community law, a law or a regulation may notprohibit a woman from access to the occupation which she wishes to pursue.

12. The German Government, on the other hand, considers that Community law doesnot preclude the provisions of the SG and SLV in question, which are inaccordance with the German constitutional rule prohibiting women fromperforming armed service. According to it, Community law does not in principle

govern matters of defence, which form part of the field of common foreign andsecurity policy and which remain within the Member States' sphere of sovereignity. Secondly, even if the Directive could apply to the armed forces, the nationalprovisions in question, which limit access for women to certain posts in theBundeswehr, are justifiable under Article 2(2) and (3) of the Directive.

13. The Italian and United Kingdom Governments, which presented oral argument,argue basically that decisions concerning the organisation and combat capacity ofthe armed forces do not fall within the scope of the Treaty. Alternatively, theysubmit that in certain circumstances Article 2(2) of the Directive allows women tobe excluded from service in combat units.

14. The Commission considers that the Directive, which is applicable to employmentin the public service, applies to employment in the armed forces. It considers thatArticle 2(3) of the Directive cannot justify greater protection for women againstrisks to which men and women are equally exposed. As regards the questionwhether the employment sought by Tanja Kreil forms part of activities whosenature or the context in which they are carried out require, as a determining factorwithin the meaning of Article 2(2) of the Directive, that they be carried out by menand not by women, it is for the referring court to answer that question having dueregard for the principle of proportionality and taking account both of the discretionwhich each Member State retains according to its own particular circumstances andof the progressive nature of the implementation of the principle of equal treatmentfor men and women.

15. The Court observes first of all that, as it held in paragraph 15 of its judgment of26 October 1999 in Case C-273/97 *Sirdar* [1999] ECR I-0000, it is for the MemberStates, which have to adopt appropriate measures to ensure their internal andexternal security, to take decisions on the organisation of their armed forces. Itdoes not follow, however, that such decisions are bound to fall entirely outside thescope of Community law.

16. As the Court has already held, the only articles in which the Treaty provides forderogations applicable in situations which may affect public security are Articles 36,48, 56, 223 (now, after amendment, Articles 30 EC, 39 EC, 46 EC and 296 EC) and224 (now Article 297 EC), which deal with exceptional and clearly defined cases. It is not possible to infer from those articles that there is inherent in the Treaty ageneral exception excluding from the scope of Community law all measures takenfor reasons of public security. To recognise the existence of such an exception,regardless of the specific requirements laid down by the Treaty, might impair thebinding nature of Community law and its uniform application (see, to that effect,Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986]ECR 1651, paragraph 26, and Case C-273/97 *Sirdar*, cited above, paragraph 16).

17.

The concept of public security, within the meaning of the Treaty articles cited inthe preceding paragraph, covers both a Member State's internal security, as in the*Johnston* case, and its external security, as in the *Sirdar* case (see, to this effect,Case C-367/89 *Richardt and 'Les Accessoires Scientifiques* [1991] ECR I-4621,paragraph 22, Case C-83/94 *Leifer and Others* [1995] ECR I-3231, paragraph 26,and *Sirdar*, cited above, paragraph 17).

18.

Furthermore, some of the derogations provided for by the Treaty concern only therules relating to the free movement of goods, persons and services, and not thesocial provisions of the Treaty, of which the principle of equal treatment for menand women relied on by Tanja Kreil forms part. In accordance with settled case-law, this principle is of general application and the Directive applies to employmentin the public service (Case 248/83 *Commission* v *Germany* [1985] ECR 1459,paragraph 16, Case C-1/95 *Gerster* v *Freistaat Bayern* [1997] ECR I-5253, paragraph18, and *Sirdar*, cited above, paragraph 18).

19.

It follows that the Directive is applicable in a situation such as that in question inthe main proceedings.

20.

Under Article 2(2) of the Directive, Member States may exclude from the scopeof the Directive occupational activities for which, by reason of their nature or thecontext in which they are carried out, sex constitutes a determining factor; it mustbe noted, however, that, as a derogation from an individual right laid down in theDirective, that provision must be interpreted strictly (*Johnston*, paragraph 36, and*Sirdar*, paragraph 23).

21.

The Court has thus recognised, for example, that sex may be a determining factorfor posts such as those of prison warders and head prison warders (Case 318/86*Commission* v *France* [1988] ECR 3559, paragraphs 11 to 18), for certain activitiessuch as policing activities performed in situations where there are serious internaldisturbances (*Johnston*, paragraphs 36 and 37) or for service in certain specialcombat units (*Sirdar,* paragraphs 29 to 31).

22.

A Member State may restrict such activities and the relevant professional trainingto men or to women, as appropriate. In such a case, as is clear from Article 9(2)of the Directive, Member States have a duty to assess periodically the activitiesconcerned in order to decide whether, in the light of social developments, thederogation from the general scheme of the Directive may still be maintained(*Johnston*, paragraph 37, and *Sirdar*, paragraph 25).

23.

In determining the scope of any derogation from an individual right such as theequal treatment of men and women, the principle of proportionality, one of thegeneral principles of Community law, must also be observed, as the Court pointedout in paragraph 38 of *Johnston* and paragraph 26 of *Sirdar*. That principlerequires that derogations remain within the limits of what is appropriate andnecessary in order to achieve the aim in view and requires the principle of equal

treatment to be reconciled as far as possible with the requirements of publicsecurity which determine the context in which the activities in question are to beperformed.

24.

However, depending on the circumstances, national authorities have a certaindegree of discretion when adopting measures which they consider to be necessaryin order to guarantee public security in a Member State (*Leifer*, paragraph 35, and*Sirdar*, paragraph 27).

25.

As the Court emphasised in paragraph 28 of its judgment in *Sirdar*, the questionis therefore whether, in the circumstances of the present case, the measures takenby the national authorities, in the exercise of the discretion which they arerecognised to enjoy, do in fact have the purpose of guaranteeing public security andwhether they are appropriate and necessary to achieve that aim.

26.

As was explained in paragraphs 5, 6 and 7 above, the refusal to engage theapplicant in the main proceedings in the service of the Bundeswehr in which shewished to be employed was based on provisions of German law which bar womenoutright from military posts involving the use of arms and which allow womenaccess only to the medical and military-music services.

27.

In view of its scope, such an exclusion, which applies to almost all military posts inthe Bundeswehr, cannot be regarded as a derogating measure justified by thespecific nature of the posts in question or by the particular context in which theactivities in question are carried out. However, the derogations provided for inArticle 2(2) of the Directive can apply only to specific activities (see, to this effect,*Commission* v *France*, cited above, paragraph 25).

28.

Moreover, having regard to the very nature of armed forces, the fact that personsserving in those forces may be called on to use arms cannot in itself justify theexclusion of women from access to military posts. As the German Governmentexplained, in the services of the Bundeswehr that are accessible to women, basictraining in the use of arms, to enable personnel in those services to defendthemselves and to assist others, is provided.

29.

In those circumstances, even taking account of the discretion which they have asregards the possibility of maintaining the exclusion in question, the nationalauthorities could not, without contravening the principle of proportionality, adoptthe general position that the composition of all armed units in the Bundeswehr hadto remain exclusively male.

30.

Finally, as regards the possible application of Article 2(3) of the Directive, uponwhich the German Government also relies, this provision, as the Court held inparagraph 44 of its judgment in *Johnston*, is intended to protect a woman'sbiological condition and the special relationship which exists between a woman and

her child. It does not therefore allow women to be excluded from a certain typeof employment on the ground that they should be given greater protection thanmen against risks which are distinct from women's specific needs of protection, suchas those expressly mentioned.

31.

It follows that the total exclusion of women from all military posts involving the useof arms is not one of the differences of treatment allowed by Article 2(3) of theDirective out of concern to protect women.

32. The answer to be given to the question must therefore be that the Directiveprecludes the application of national provisions, such as those of German law,which impose a general exclusion of women from military posts involving the useof arms and which allow them access only to the medical and military-musicservices.

Costs

33. The costs incurred by the German, Italian and United Kingdom Governments andby the Commission, which have submitted observations to the Court, are notrecoverable. 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 amatter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Verwaltungsgericht Hannover byorder of 13 July 1998, hereby rules:

Council Directive 76/207/EEC of 9 February 1976 on the implementation of theprinciple of equal treatment for men and women as regards access to employment,vocational training and promotion, and working conditions precludes theapplication of national provisions, such as those of German law, which impose ageneral exclusion of women from military posts involving the use of arms andwhich allow them access only to the medical and military-music services.

Rodríguez Iglesias
Moitinho de Almeida
Sevón

Kapteyn

Gulmann
Puissochet

Hirsch

Ragnemalm
Wathelet

Delivered in open court in Luxembourg on 11 January 2000.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President

1: Language of the case: German.