

## **K.B. v NHS Pensions Agency (Advocate General, ECJ)**

Opinion of the Advocate General of the European Court of Justice, recommending that the UK's failure to allow K.B. to marry her trans man partner (and thereby allow him inherit a widower's pension) should be treated as a breach of EU law.

10<sup>th</sup> June 2003

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OPINION OF ADVOCATE GENERAL



RUIZ-JARABO COLOMER

delivered on 10 June 2003 [\(1\)](#)

**Case C-117/01**

**K.B.**

**v**

**The National Health Service Pensions Agency and the Secretary of State for Health**

(Reference for a preliminary ruling from the Court of Appeal (England and Wales))

(Equal treatment for men and women - Transsexual not entitled to a survivor's pension payable solely to a surviving spouse - Fundamental right to marry)

### **I - Introduction**

1. K.B., a British worker, is concerned that her partner, R., who was born a woman but who, following medical gender reassignment, has become a man, should in due course receive the survivor's pension to which he would be entitled as a surviving spouse. United Kingdom legislation, however, prevents transsexuals from marrying on the basis of their acquired gender.
2. The appellant in the main proceedings regards herself as the victim of pay-related sex discrimination. Such a cause of action may be covered by Directive 75/117/EC, [\(2\)](#) although the unequal treatment complained of does not arise directly from her sex or that of her partner but as a result of national civil rules regulating how a person's sex is determined: in the United Kingdom it is not permissible to amend the Register of Births following a gender reassignment operation, which would allow a necessarily heterosexual marriage to be contracted. It is true that the Community does not have any powers in this sphere but, if the United Kingdom rules are found to infringe a fundamental right, such a circumstance cannot easily be ignored.
3. This issue in this case may soon be resolved in any event, since it is likely that in the coming months the United Kingdom will enact legislation apt to solve the basic problem, namely the incapacity of transsexuals to marry.

## Facts and national procedure

4. K.B., the appellant in the main proceedings, worked for the National Health Service ('the NHS'), the United Kingdom body responsible for public health services, from 1976 to 1996. She paid contributions to the NHS pension scheme throughout those 20 years and acquired, *inter alia*, a right to annual income of GBP 5 375.86.

The NHS scheme provides for a survivor's pension to be payable to a member's surviving spouse. 'Spouse' means solely a person to whom the member has been married.

5. R., who was born a woman and is registered as such in the Register of Births, suffered from gender dysphoria. Following medical gender reassignment, he became a man in his relationship with K.B. and with the world. They have sustained an emotional and domestic relationship together for many years. Had it been possible, they would have married but, rightly, they took the view that the law barred them from doing so.

6. Since R. is not entitled to marry, he will have no entitlement to a widower's pension in the event of his partner predeceasing him.

7. For that reason, K.B. brought proceedings in the Employment Tribunal, arguing that the NHS's refusal, should the case arise, to award R. a widower's pension amounted to discrimination based on sex, contrary to the provisions of Article 141 EC, read in the light of the case-law of the Court of Justice and, in particular, the judgment of 30 April 1996 in *P. v S. and Cornwall County Council*, (3) and those of Directive 75/117. For K.B., those provisions require that in this context the term 'widowhood' or 'widowerhood' should be interpreted in such a way as to encompass the surviving member of the couple, who would have achieved the status of widower or widow had his or her sex not resulted from surgical gender reassignment.

8. The respondents in the main proceedings, namely the body managing the NHS Pension Scheme (the NHS Pensions Agency) and the Secretary of State for Health, contend that the appellant's claim failed to take account of the judgment of 17 February 1998 in *Grant*, (4) which stated that an employee's homosexual partner could not benefit from the travel concessions available to heterosexual partners, and also disregarded the fact that, although the Court of Justice confirmed in the judgment in *P. v S.* that the adverse treatment of a transsexual on the basis of the sex acquired as a result of his or her operation infringed the principle of equality, such a person did not thereby acquire all the rights attaching to his or her new gender.

9. The Employment Tribunal and, on appeal, the Employment Appeal Tribunal concluded that the respondents' arguments were founded. The case was then referred to the Court of Appeal, which has made a reference to the Court of Justice for a preliminary ruling.

## Procedure before the Court of Justice

10. The request for a preliminary ruling was registered at the Court Registry on 15 March 2001.

11. Following receipt of the written observations of K.B., the United Kingdom Government and the Commission, a public hearing was held on 23 April 2002.

12. On 11 July 2002, the European Court of Human Rights delivered judgments in *Goodwin v United Kingdom* and *I. v United Kingdom*, in which, departing from its earlier case-law, it stated that the fact that it was impossible for British transsexuals to marry in their assigned gender was contrary to the European Convention on Human Rights. In the light of that factor, the Registry of the Court of Justice asked the national court whether it still deemed it necessary to obtain a preliminary ruling from the Court of Justice.

13. By letter of 4 October 2002, the Court of Appeal informed the Court of Justice that under national law it was obliged to summon the parties before deciding whether to proceed with the reference for a preliminary ruling.

14. On 5 March 2003, the Court of Appeal stated that it continued to take the view that an answer to the question referred was necessary, since the point of the judgment in *Goodwin* was different from that in the main proceedings. It added that imminent changes in legislation or judicial precedent might provide a solution to the case in the main action without the need for a ruling from the Court of Justice.

## **Relevant national law**

15. The Sex Discrimination Act 1975 makes it unlawful for an employer to discriminate directly against a person of one sex by treating her or him less favourably than he treats or would treat a member of the opposite sex. It also prohibits indirect sex discrimination, which it defines essentially as the application of a uniform condition or requirement which has a disproportionate and unjustified adverse impact on one sex.

16. Following the judgment in *P. v S.*, [\(5\)](#) the United Kingdom introduced the Sex Discrimination (Gender Reassignment) Regulations 1999. These regulations amended the Sex Discrimination Act 1975 and brought direct discrimination on the ground of an employee's gender reassignment within the scope of the Act. However, the legislation dealing with equal treatment as regards pay (the Equal Pay Act 1970) and pensions (the Pensions Act 1995) was not amended.

The new provisions define gender reassignment as 'a process which is undertaken under medical supervision for the purpose of reassigning a person's sex by changing physiological or other characteristics of sex'.

According to the Guide to the new legislation, 'transsexualism affects an estimated 5 000 people in the United Kingdom. Medical treatment to enable transsexual people to alter their bodies to match their gender identity is highly successful. The process is known medically as gender reassignment'.

17. The NHS pension scheme provides for a pension to be paid to the widow or widower of NHS employees. The fact of being a widow or widower implies that there is a surviving spouse.

18. Under English law, marriage is defined as the voluntary union between a man and a woman. For that purpose, on the basis of the rule laid down by the High Court in 1971 in *Corbett*, (6) sex must be determined by reference to chromosomal, gonadal and genital factors whilst the fact that a person has undergone surgery cannot be taken into account.

19. Furthermore, section 11(c) of the Matrimonial Causes Act 1973 provides that a marriage is void if the parties are not respectively male and female.

20. In its judgment of 10 April 2003 in *Bellinger v Bellinger*, (7) the House of Lords dismissed an application for recognition of a marriage celebrated by a transsexual in her acquired gender. The House of Lords understood English law not to give legal recognition to a change of gender. It none the less made a declaration that section 11(c) of the Matrimonial Causes Act was incompatible with the European Convention on Human Rights for the purposes of section 4(2) of the Human Rights Act 1998. The purpose of that declaration is to urge the Government to enact, as a matter of urgency, the necessary measures to put an end to the incompatibility. (8)

## Relevant Community law

21. Article 141 EC establishes that the principle of equal pay for male and female workers for equal work or work of equal value is to apply (paragraph (1)). 'Pay' means not only the ordinary wage or salary but also any other consideration paid, directly or indirectly, in cash or in kind, by the employer to the worker in respect of his or her employment (paragraph (2)).

22. The first paragraph of Article 1 of Directive 75/117 (9) provides that the principle of equal pay for male and female workers means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. Under Article 3 of that Directive, Member States must abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay. Pursuant to Article 4, Member States are to take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay will be, or may be declared, null and void or may be amended.

23. The Court of Justice has consistently held that the concept of pay, as defined in Article 141 EC, does not encompass social security schemes or benefits, in particular retirement pensions, directly governed by legislation. (10) On the other hand, benefits granted under a contractual pension scheme, which essentially relate to the employment of the person concerned, form part of the pay received by that person. (11) For the purposes of determining whether a retirement pension falls within the scope of Article 141 EC, the decisive criterion is the existence of a link between the employment relationship and the retirement benefit, whereas the structural elements of the system do not play a decisive role. (12)

24. The Court of Justice has also stated that a survivor's pension provided for on the same conditions falls within Article 141 EC. It has stated in that connection that that interpretation is not negated by the fact that the widow's or widower's pension, by definition, is not paid to the worker but to his or her survivor, since such a benefit is an advantage deriving from the survivor's spouse's membership of the scheme, so that the pension is vested in the survivor

by reason of the employment relationship between the employer and the survivor's spouse and is paid to the survivor by reason of the spouse's employment. (13) The surviving spouse may rely on Article 141 EC in order to have the principle and scope of the entitlement to payment of a survivor's pension recognised. (14)

## **Transsexuals' right to marry**

25. A transsexual, for the purposes of medical science, is a person who, although presenting the phenotypical and genotypical features of one sex, feels strongly that he or she belongs to the other sex, whose outer appearance and demeanour he or she has adopted and as a member of which he or she wishes to be accepted for all purposes and at any price. Transsexualism can thus be defined as a syndrome where the anatomical (gonadal) or biological (chromosomal) sex of a patient is not congruent with his or her psychological sex. (15)

The unshakeable belief of transsexuals that they must obtain recognition, including at law, that they belong to the other sex can be seen in their willingness to undergo hormone treatment to change their secondary sexual characteristics and to have surgery to bring about the anatomical alteration of the genital organs by removal and reconstruction. Chromosomal patterns remain unaltered, so what is known as biological sex remains the same. (16)

Transsexualism is clearly different from the various conditions associated with sexual orientation (heterosexuality, homosexuality or bisexuality), where the individual unequivocally accepts his or her sex and any problems arise fundamentally in emotional expression, and from transvestism, which entails wearing the clothes of the opposite sex for sexual gratification.

26. I wish to make clear that although, in principle, the obstacle preventing transsexuals from marrying is the impossibility of amending data in the Register of Births in order to reflect the change of gender, the fact is that their right to marry is thereby restricted in the absence of general acceptance of associations between persons of the same gender. For that reason, in the interests of brevity and concision, I shall analyse the question solely from the perspective of transsexuals' right to marry, without dealing with the specific technical obstacles on which that right is contingent.

27. From a legal point of view, the desire of transsexuals to marry on the basis of their acquired gender (17) has been addressed both in the legislation and administrative practice of the Member States and in case-law, in particular the case-law of the European Court of Human Rights. Those factors are of the utmost importance for the purpose of the analysis which the Court of Justice must carry out, since a general principle of Community law may be derived from a constitutional tradition common to the countries of the European Union or from guidance given by international treaties concerning the protection of human rights ratified by all the Member States.

28. A comparative study of the prevailing legal situation shows that the marriage of transsexuals in their acquired gender is generally accepted. Whether it is as a result of express action by the legislature (Germany, (18) Greece, (19) Italy, (20) the Netherlands, (21) Sweden (22)), administrative practice (Austria, (23) Denmark (24)) or judicial interpretation (Belgium, (25) Spain, (26) Finland, (27) France, (28) Luxembourg, (29) Portugal (30)),

registers can be amended following gender reassignment operations, so that transsexuals are able to marry.

Only the Irish and United Kingdom legal systems appear to go against this general trend, which is not a bar to identifying a sufficiently uniform legal tradition capable of being a source of a general principle of Community law.

29. In any event, there is less room for doubt as regards the guidance afforded by the European Convention on Human Rights ('the Convention').

30. Article 8(1) of the Convention provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. In order to be valid, any interference with that right must be prescribed by law, must pursue a legitimate objective and must be necessary in a democratic society (paragraph 2).

Article 12 of the Convention provides that 'men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

31. Faced with a series of claims brought by transsexuals, particularly of British nationality, who invoked Articles 8 and 12 to claim recognition of their right to marry in their reassigned gender, the European Court of Human Rights stated in its judgment of 17 October 1986 *Rees v United Kingdom* (31) that 'it must *for the time being* be left to the respondent State to determine to what extent it can meet the remaining demands of transsexuals. ... The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments'. (32)

The judgment of 27 September 1990 in *Cossey v United Kingdom*, (33) confirmed that the Court of Human Rights recognised that States had a broad discretion in this area, as did the judgment of 30 July 1998 in *Sheffield and Horsham v United Kingdom*. (34) In the latter case, the Court recalled that 'it continues to be the case that transsexualism raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States'. (35)

32. That was the situation when the main proceedings were commenced. It had not changed at the time when this question was referred for a preliminary ruling and remained unchanged until after the public hearing on 23 April 2002.

33. On 11 July 2002, the European Court of Human Rights, sitting as a Grand Chamber, delivered judgment in *Goodwin v United Kingdom*, (36) which brought about a fundamental change in the case-law.

34. Unanimously and in particularly forceful terms, the Members of the Court of Human Rights concluded, following an analysis of the earlier case-law and of legal and social developments, that 'the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender reassignment, [the Court] reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant.

There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention'. (37)

35. In the sphere of Article 12, the European Court found that it was artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. It recognised that the applicant, who was living as a woman in a relationship with a man whom she wished to marry, had no possibility of doing so. (38) It added that, '[w]hile it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender reassignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances'. (39) The Court therefore unanimously concluded that there had been a breach of Article 12 of the Convention.

## **The question referred for a preliminary ruling**

36. By order of 14 December 2000 the Court of Appeal asked the Court of Justice for a ruling on 'whether the exclusion of the female-to-male transsexual partner of a female member of the National Health Service Pension Scheme, which limits the material dependant's benefit to her widower, constitutes sex discrimination in contravention of Article 141 EC and Directive 75/117'.

37. It appears from the order that the Court of Appeal entertains the following doubts:

- The conclusions reached by the Court of Justice in *P. v S.* and *Grant* respectively are clear, but the principle which distinguishes them is not. If the principle is that an inhibition on benefits for homosexual partners is not discriminatory so long as it applies equally to men and women, then the same outcome must apply in the present case in relation to the inhibition on benefits for unmarried partners. If on the other hand the principle is that sex, as a ground of discrimination, includes sexual identity but not sexual orientation, then the exclusion in the present case is based directly on sex and therefore is discriminatory.
- If there is a breach of Article 14, and possibly also Article 8, of the European Convention on Human Rights, the bearing of such a breach on the interpretation of the word 'widower' is uncertain. Given that family life includes the making of provision for surviving dependants by those at work, and if private life includes the avoidance of unnecessary scrutiny of a person's biological character, it is arguable that respect for both family and private life is unjustifiably denied or is enjoyed in diminished form by K.B. because of the exclusion of surviving transsexual partners from pension benefits. If this argument is held to be sound, its impact on Article 141 and the Equal Pay Directive may require consideration.

38. The national court takes the view that there is no indirect discrimination, since there is no reason to believe that men and women in relationships with transsexuals are differently affected by the requirement of marriage; and to rely on the unequal impact on transsexuals would be to treat them, wrongly, as a third sex.

39. However, the Court of Appeal harbours some doubt about the meaning of Article 2(1) of the Directive, which prohibits all discrimination 'on grounds of sex either directly or indirectly by reference in particular to marital or family status'. This principle appears to limit the use of marital status to testing solely for indirect discrimination. But if it is applied to men and women alike, it is difficult to see in what circumstances it could ever have a differential impact on one sex or the other. This leads to the question whether marital or family status is intended in the Directive to be treated as equivalent to sex for the purposes of direct discrimination or to be a test not of a gender-neutral requirement but of unequal impact for the purposes of identifying unlawful indirect discrimination.

## Analysis of the question

40. All the parties who have expressed a view on the matter concur that the widower's pension at issue forms part of 'pay' for the purpose of Article 141 EC. There is no reason to depart from that conclusion.

It is settled case-law that benefits granted under a pension scheme which relate to the employment of the person concerned form part of the pay received by that person. (40) The same is true of widow(er)s' pensions provided for on the same conditions. (41)

It appears from the documents before the Court that the pension granted by the NHS scheme is calculated on the basis of the employee's occupational circumstances, in particular, her salary, from which it can be presumed that it relates to her pay.

41. I also agree that there is no justification for assessing differently discrimination consisting of unequal treatment, which is prohibited by Directive 76/207, (42) and discrimination based on unequal pay, in respect of which Directive 75/117 applies. It is sensible to adopt a uniform interpretation, given that, for one thing, Article 141 EC does not set up different systems of protection and, for another, the directives are strikingly similar in the way in which they are drafted and in the objectives that they pursue.

42. The appellant in the main proceedings and the national court are not at all at one on what exactly the question is about.

43. In K.B.'s submission, the case is not about the right of transsexuals to marry, which is not within the Community's sphere of competence, or about discrimination against same-sex couples on grounds of sexual orientation, since this case is concerned with a relationship which is for all intents and purposes between a man and a woman. For that reason, the Court of Justice should, in the submission of the appellant in the main action, apply the rule in *P. v S.*, the operative part of which stated that Community law (43) 'precludes dismissal of a transsexual for a reason related to a gender reassignment', (44) and it would therefore be sufficient to replace the words 'dismissal of a transsexual' by 'refusal to grant a transsexual a pension'.

As she emphasised at the hearing, the appellant in the main action is not claiming that transsexuals should be entitled to marry but merely that a transsexual who forms part of a couple should be entitled to have that couple treated as a married couple for the purpose of obtaining economic benefits.



44. In its order, the Court of Appeal expressed uncertainty as to the principle which distinguishes the decisions in *P. v S.* and *Grant*: is the principle that treatment applied equally to men and women is not discriminatory? Or is it that discrimination on the ground of sexual identity is unacceptable but discrimination on the ground of sexual orientation is not? It also asks whether the refusal to pay a survivor's pension might be detrimental to the rights of transsexuals deriving from Articles 14 and 8 of the Convention. Finally, the Court entertains some doubts as to whether the term 'marital or family status' in Article 2(1) of the Equal Treatment Directive is to be understood as equivalent to 'sex' or solely as a factor for the purposes of identifying unlawful indirect discrimination.

Furthermore, the Court of Appeal dismisses all arguments relating to indirect discrimination, which would entail accepting the incorrect proposition that transsexuals are a third sex.

45. I am merely concerned to point out that it can, at the least, be inferred from the reasoning of the referring court that it does not exclude the possibility that the correct approach in the present case may be to treat the fact that it is impossible for transsexuals to marry as direct discrimination based on sex.

46. In practical terms, for the purposes of the question as worded, whether the present case entails discrimination contrary to Article 141 EC and Directive 75/117 depends on whether the rule in *P. v S.* applies to it. Beyond that aspect, it does not seem easy to disregard, as the appellant in the main action would have the Court do, the influence on any solution of the problem concerning the conditions for marriage imposed by national law and, specifically, the obstacle to marriage resulting from the impossibility of amending the relevant entry in the Register of Births pursuant to gender reassignment surgery.

47. First, however, I wish to examine whether it is possible to conclude from the case-law of the Court of Justice that the refusal to grant a transsexual a widower's pension is contrary to Article 141 EC. I am thus adopting the approach advocated by the appellant in the main proceedings and endorsed, in the main, by the referring court.

48. In *P. v S.* the question for the Court was whether the dismissal of an employee because he had undergone gender reassignment surgery was discrimination of the kind prohibited in the Directive on equal treatment for men and women.

49. The Court of Justice observed that the principle of equal treatment means that there should be no discrimination whatsoever *on grounds of sex* and therefore gives expression to the fundamental right to equality, whose observance the Court ensures. [\(45\)](#)

The Court concluded from the foregoing that the scope of the directive cannot be confined simply to discrimination based on the fact that a person is of one or other sex but that it includes discrimination which arises as a result of the gender reassignment of the person concerned. *Such discrimination is based, essentially if not exclusively, on the sex of the person concerned.* Therefore, 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 unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment. Such discrimination fails to *respect the dignity and freedom* to which he or she is entitled, and which the Court has a duty to safeguard. [\(46\)](#)

50. The proposition of K.B.'s representatives is based on the assertion that the right which she is claiming for her transsexual partner is to be inferred merely by replacing the words 'when a person is dismissed' with 'when a person is denied entitlement to a widow's or widower's pension', since in each case the right concerned is one which is to be enjoyed by all persons equally and which is guaranteed by Directive 76/207 or 75/117, as the case may be.

51. I agree with that assertion inasmuch as, for the purposes of the Court of Justice's assessment, it is quite immaterial whether the inequality complained of consists in a dismissal or in a refusal to pay a widower's pension.

52. However, as I see it, an objection could legitimately be made to the interpretation put forward by the appellant in the main proceedings in that refusal of the pension at issue does not arise as a result of the gender reassignment of the person concerned but as a result of his incapacity to fulfil one of the conditions necessary under national law to contract a valid marriage with the person entitled to the primary pension, namely the requirement that the future spouses cannot be of the same sex. If that line of argument is followed, it can be seen that refusal of the form of pay concerned can be explained not by the change of gender but by, precisely, the fact that, in the eyes of the law, the transsexual person has not changed gender, which prevents celebration of a valid marriage.

53. Before pursuing that argument, which digresses from the original approach to the question, it is appropriate to mention other judicial precedents in order to distil the essence of the Court of Justice's case-law in this area. I shall refer first to the judgments of 17 February 1998 in *Grant*, cited above, and of 31 May 2001 in *D v Council*. [\(47\)](#)

54. In *Grant*, a female employee of a railway company claimed that the grant of travel concessions to an employee and his or her spouse or common law opposite-sex partner with whom the employee had sustained a 'meaningful' and stable relationship, and the corresponding refusal of concessions to same-sex couples in similar circumstances infringed the prohibition on discrimination set out in what was then Article 119 of the EC Treaty.

The Court of Justice did not look favourably on that claim and adopted a particular line of argument. First, it answered the question whether a condition such as that in issue in the main proceedings constituted discrimination based directly on the sex of the worker. Then it considered whether Community law required that stable relationships between two persons of the same sex should be regarded by all employers as equivalent to marriages or stable relationships outside marriage between two persons of opposite sex. Finally, it considered whether discrimination based on sexual orientation entailed discrimination based on the sex of the worker. [\(48\)](#)

As regards the first of the questions, the Court of Justice confined itself to stating that the condition applied in the same way to female and male workers, so could not constitute discrimination directly based on sex. [\(49\)](#)

As to the second question, the Court analysed the state of the law in the Community and the Member States and the legal position resulting from the case-law concerning the European Convention on Human Rights. It was persuaded that in the state of the law then prevailing within the Community, stable relationships between two persons of the same sex were not regarded as equivalent to stable relationships outside marriage between persons of opposite

sex or to stable relationships between spouses. Consequently, an employer was not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex. (50) That way of proceeding can greatly assist in answering the question referred, as I shall explain below.

Finally, with regard to the third issue, the Court of Justice stated that discrimination based on sex did not cover discrimination based on sexual orientation. It also found that the rule in *P. v S.* was limited to the case of a worker's gender reassignment.

55. The judgment in *Grant* lends support to the United Kingdom Government's argument that this case does not involve unlawful discrimination. To that end it applies the tripartite reasoning outlined above.

The first point, in its submission, is wholly applicable to the present case: all unmarried persons are excluded from the widow(er)'s pension, whether they are male or female, and there are therefore no grounds for invoking direct discrimination based on sex. For these purposes, it makes no difference whether the obstacle is that the employee has a same-sex partner or a transsexual partner or is some other reason.

The second also lends support to the United Kingdom Government's position, since it refers to the fact that Article 12 of the European Convention on Human Rights protects only traditional marriage between two persons of opposite biological sex (see Eur. Court H.R., *Rees v United Kingdom*, judgment of 17 October 1986, and *Cossey v United Kingdom*, judgment of 27 September 1990). (51) Those judgments encapsulate European law on the matter.

The United Kingdom Government submits that the third part of the reasoning in *Grant* is not relevant for K.B.

56. The judgment in *Grant* does not support the arguments of the appellant in the main proceedings, since the Court did not find that there was a violation of the right to equal treatment for men and women. However, it is worthy of note that the United Kingdom Government seems to appreciate that the answer to the question referred is inextricably linked to the Court's assessment of the lawfulness of preventing the marriage of a transsexual in his or her acquired gender.

For that reason, the United Kingdom Government, whilst continuing to assert that the United Kingdom rules are compatible with Articles 8 and 14 of the Convention on Human Rights, submits that any such incompatibility would not make the rule at issue infringe Article 141 EC.

It refers to paragraphs 45 to 47 of the judgment in *Grant*, in which it was stated that although respect for the fundamental rights which form an integral part of the general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competence inherent in it. The scope of any provision of Community law is to be determined only by having regard to its wording and purpose, its place in the scheme of the Treaty and its legal context.

57. In *D v Council* a male official of the European Communities, of Swedish nationality, who had a registered partnership under Swedish law with another man, had claimed that he was entitled to the household allowance which the staff regulations confined to married persons. D claimed that terms such as 'spouse' or 'married official' must be interpreted by reference to the law of the Member States and not be given an independent definition, and that the refusal to pay the allowance therefore amounted to discrimination based on sex.

58. On appeal, the Court of Justice found that the word 'marriage', according to the definition generally accepted by the Member States, meant a union between two persons of the opposite sex and, although it was true that in an increasing number of cases, statutory arrangements had been introduced, alongside marriage, which granted recognition to various forms of union between partners of the same sex or of the opposite sex and conferred on such unions certain effects which, both between the partners and as regards third parties, were the same as or comparable to those of marriage, such arrangements were, in the Member States which had introduced them, distinct from marriage *per se*. Consequently, the Community Courts could not interpret the Staff Regulations of Officials of the European Community in such a way that legal situations distinct from marriage were treated in the same way as marriage. (52)

The Court of Justice pointed out, first, that the alleged discrimination based on sex did not exist, since it was irrelevant whether the applicant was a man or a woman: nor was there any unequal treatment on ground of sexual orientation given that it was not the sex of the partner which determined whether the household allowance was granted, but the legal nature of the ties between the official and the partner. (53) That statement appears to mean that the Community judicature is not competent to determine whether the conditions on which persons may marry under national law are compatible with fundamental rights. However, the Court of Justice went on to consider the views prevailing within the Community as a whole, from which it concluded that there was a diversity of laws and an absence of any general assimilation of marriage and other forms of statutory union. (54)

59. The judgment in *D v Council* does not lend support to K.B.'s claims either. As in *Grant*, the Court of Justice found that there had been no discrimination based on sex.

60. In my opinion, the judgment in *Safet Ey*