

JUDGMENT OF THE COURT

23 May 2000 *

In Case C-104/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Johann Buchner and Others

and

Sozialversicherungsanstalt der Bauern,

on the interpretation of Article 7 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24),

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, D.A.O. Edward and L. Sevón, (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissechot, G. Hirsch, P. Jann and H. Ragnemalm (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Buchner and Others, by J. Winkler, Rechtsanwalt, Linz,
- the Austrian Government, by C. Pesendorfer, Oberrätin in the Ministry of Justice, acting as Agent,
- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and C. Vajda QC,
- the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, and M. Wolfcarius, of its Legal Service, acting as Agents, assisted by T. Eilmansberger, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Buchner and Others, represented by J. Winkler, of the Austrian Government, represented by G. Hesse, of the Ministry of Justice, acting as Agent, of the United Kingdom Government, represented by J.E. Collins and C. Vajda, and of the Commission, represented by M. Wolfcarius, assisted by T. Eilmansberger, at the hearing on 8 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

Judgment

- 1 By order of 31 March 1998, received at the Court on 14 April 1998, the Oberster Gerichtshof (Supreme Court), Austria, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 7 of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6 p. 24, hereinafter ‘the Directive’).
- 2 Those questions were raised in proceedings between Mr Buchner and 12 other claimants and the Sozialversicherungsanstalt der Bauern (Farmers’ Social Insurance Institution) concerning the latter’s refusal to grant them early old-age pensions on account of incapacity for work.

The Community legislation

3 Article 4(1) of the Directive prohibits all discrimination on grounds of sex, in particular as concerns the calculation of benefits.

4 Such discrimination may be justified only under Article 7(1)(a) of the Directive which provides that the Directive is to be without prejudice to the right of 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.

5 Article 7(2) of the Directive provides:

‘Member States shall periodically examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned.’

6 Article 8 of the Directive provides:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within six years of its notification. They shall immediately inform the Commission thereof.

2. Member States shall communicate to the Commission the text of laws, regulations and administrative provisions which they adopt in the field covered by this Directive, including measures adopted pursuant to Article 7(2).

They shall inform the Commission of their reasons for maintaining any existing provisions on the matters referred to in Article 7(1) and of the possibilities for reviewing them at a later date.'

7 Article 9 of the Directive provides:

'Within seven years of notification of this Directive, Member States shall forward all information necessary to the Commission to enable it to draw up a report on the application of this Directive for submission to the Council and to propose such further measures as may be required for the implementation of the principle of equal treatment.'

The national legislation

8 Article 122c(1) of the Bauern-Sozialversicherungsgesetz (Farmers' Social Insurance Law — 'the BSVG'), as amended by the Strukturanpassungsgesetz (Structural Adjustment Law) 1996 (BGBl. 1996/201), which entered into force on 1 September 1996, provides:

'A male insured person is to be entitled to an early old-age pension on account of incapacity for work after completion of his 57th year, and a female insured person after completion of her 55th year, if he or she:

A. has completed the qualifying period (Paragraph 111),

B. establishes 24 months of compulsory insurance contributions within the last 36 calendar months before the material date or 36 months of compulsory insurance contributions within the last 180 calendar months before the material date under the pension insurance scheme, and as a result of illness or other infirmities or weakness of his or her physical or mental powers is incapable of pursuing a self-employed occupation which requires similar training and similar knowledge and capabilities to the occupation which the insured person has last exercised for at least 60 calendar months, if his or her personal work was necessary for maintaining the business.’

9 According to the provisions in force before the enactment of the Strukturanpassungsgesetz, most recently Article 122c of the BSVG as amended by the 18th Law amending the BSVG (BGBl. 1993, p. 337), which entered into force on 1 July 1993, farmers were entitled to an early old-age pension on account of permanent incapacity for work. However, in the period before 1 September 1996, both men and women could claim such a pension when they had completed their 55th year.

10 Before 1 July 1993, farmers were entitled, under the same conditions, to a pension known as the ‘pension on account of incapacity for work’.

11 The statutory retirement age in Austria is 60 years for women and 65 for men.

The main proceedings and the questions referred to the Court

- 12 The claims brought by the applicants — who were all born between September 1941 and July 1942 — for early payment of an old-age pension on account of incapacity for work were rejected by decisions of the Sozialversicherungsanstalt der Bauern on the ground that entitlement to that benefit is subject to the condition that male insured persons must have completed their 57th year. However, at the material time the applicants did not fulfil that age condition.
- 13 The courts of first instance dismissed the claims brought against those decisions and the Oberlandsgericht (Higher Regional Court) Linz upheld the judgments of those courts on appeal.
- 14 The appeals on points of law brought by all the claimants before the national court from which the order for reference emanates criticise the judgments disposing of their earlier appeals and claim that the contested decisions should be varied so as to uphold their initial applications. The claimants maintain that it was contrary to the Community principle of equal treatment for the legislature to lay down different qualifying ages for men and women as from 1 September 1996 and that the fact of completing their 55th year is sufficient to entitle them to a pension.
- 15 The Sozialversicherungsanstalt der Bauern confines itself to objecting that none of the claimants has completed his 57th year as required by the applicable rules for entitlement to the benefit at issue. The other conditions for entitlement to that benefit are not contested. It is undisputed that all the claimants had reached the age of 55 at the material time.

16 In those circumstances, the Oberster Gerichtshof stayed proceedings pending a preliminary ruling from the Court of Justice on the following two questions:

- '1. Is Article 7(1)(a) of Directive 79/7/EEC to be interpreted as allowing Member States to determine different pensionable ages only for pension rights which are granted exclusively on the basis of the risk of old age, or is that derogation applicable also to pension rights which are granted only from a specified age but in addition are granted only because of invalidity (incapacity for work)?
2. Are the provisions of Article 7(1)(a) and (2) of Directive 79/7/EEC to be interpreted as allowing a Member State to alter a previously existing identical provision on pensionable age (in this case completion of the 55th year for men and women) after the end of the transposition period, in such a way that a different pensionable age for men and women (in this case completion of the 57th year for men and the 55th year for women) is now determined?'

17 By those two questions, which it is appropriate to consider together, the national court seeks essentially to ascertain whether the derogation for which Article 7(1)(a) of the Directive provides must be interpreted as applying to a benefit such as the old-age pension on account of incapacity for which a qualifying age which differs according to sex was introduced into national legislation after expiry of the period prescribed for transposition of the Directive.

18 It should be observed at the outset, first, that the benefit at issue in the main proceedings falls within the scope of the Directive and, second, that it is discriminatory in character in that the minimum age at which entitlement to the benefit commences is different for men and for women.

- 19 As regards the actual nature of the benefit, the Austrian Government submits that it is an old-age pension within the meaning of Article 7(1)(a) of the Directive and not an invalidity benefit for which the determination of retirement age might have repercussions.
- 20 In that connection, it must be observed that, although the grant of the benefit at issue is subject to an age condition, the fact remains that it is granted only to persons who are incapable, following an illness or other infirmity or weakness of their physical or mental powers, of continuing to work.
- 21 Such a benefit cannot constitute an old-age pension within the meaning of Article 7(1)(a) of the Directive, which is a derogating provision, since, according to settled case-law, in view of the fundamental importance of the principle of equal treatment, any such provision must be interpreted strictly (see, in particular, Case C-328/91 *Secretary of State for Social Security v Thomas and Others* [1993] ECR I-1247, paragraph 8).
- 22 In those circumstances, it is necessary to determine whether the determination of a qualifying age, which differs according to sex, for entitlement to the benefit at issue in the main proceedings may be regarded as a consequence of the pensionable age laid down for the purpose of granting an old-age pension.
- 23 In that connection, it should be made clear that the temporary maintenance of different retirement ages according to sex may necessitate the subsequent adoption, after expiry of the period prescribed for transposition of the Directive, of measures which are indissociable from that derogation and also amendments to such measures (see the judgment delivered today in Case C-196/98 *Hepple and Others v Chief Adjudication Officer* [2000] ECR I-3691, paragraph 23).

- 24 To prohibit a Member State which has set different retirement ages for men and women from adopting or subsequently amending, after expiry of the period prescribed for transposition of the Directive, measures linked to that age difference would be tantamount to depriving the derogation for which Article 7(1)(a) of the Directive provides of its practical effect (see *Hepple*, paragraph 24).
- 25 According to settled case-law, where, pursuant to Article 7(1)(a) of the Directive, a Member State prescribes different pensionable ages for men and women for the purposes of granting old-age and retirement pensions, the scope of the permitted derogation, defined by the words ‘possible consequences thereof for other benefits’, contained in Article 7(1)(a), is limited to the forms of discrimination existing under other benefit schemes which are necessarily and objectively linked to the difference in pensionable age (see, in particular, *Thomas and Others*, cited above, paragraph 20, Case C-92/94 *Secretary of State for Social Security and Chief Adjudication Officer v Graham and Others* [1995] ECR I-2521, paragraph 11, and Case C-139/95 *Balestra v INPS* [1997] ECR I-549, paragraph 33).
- 26 That will be the position where such forms of discrimination are objectively necessary in order to avoid disturbing the financial equilibrium of the social-security system or to ensure coherence between the retirement-pension scheme and other benefit schemes (see *Thomas and Others*, paragraph 12, *Graham and Others*, paragraph 12, and *Balestra*, paragraph 35).
- 27 As regards, first, the requirement of preserving the financial equilibrium of the social-security system, it is clear from the order for reference and from the written observations of the Austrian Government that the grant of the early old-age pension on account of incapacity for work was made subject to an age condition which differs according to sex for reasons of an essentially budgetary nature.

- 28 In that connection, it must be borne in mind that, although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes (Case C-343/92 *De Weerd and Others* [1994] ECR I-571, paragraph 35).
- 29 Moreover, apart from general considerations of a budgetary nature, no argument has been put to the Court such as to demonstrate any interdependence between social-security systems which might be affected by removal of the discrimination at issue in the main proceedings.
- 30 Accordingly, it must be concluded that the removal of such discrimination could not have any serious effect on the financial equilibrium of the social-security system as a whole.
- 31 As regards, second, the preservation of coherence between the early old-age pension on account of incapacity for work and the old-age pension, it must be observed that the only link between those two benefits is the fact that the latter replaces the former when the insured person reaches statutory retirement age.
- 32 There is no precise relationship between the minimum qualifying age for the benefit at issue and the statutory retirement age since the minimum qualifying age for the early old-age pension on account of incapacity for work was set at 55 years for women, that is to say five years before the statutory retirement age, whilst it is 57 years for men, that is to say eight years before the statutory retirement age.

33 Furthermore, as is clear from paragraph 27 of this judgment, the grant of the early old-age pension on account of incapacity for work was made subject to an age condition which differs according to sex for reasons of an essentially budgetary nature.

34 Accordingly, it cannot be argued that it was objectively necessary to introduce the discrimination at issue in the main proceedings in order to guarantee coherence between the old-age pension and the early old-age pension on account of incapacity for work.

35 In view of the foregoing, it must be concluded that discrimination such as that at issue in this case is not necessarily linked to the difference between the retirement age for men and that for women and it is not therefore covered by the derogation for which Article 7(1)(a) of the Directive provides.

36 The answer to the questions submitted must therefore be that the derogation for which Article 7(1)(a) of the Directive provides must be interpreted as not applying to a benefit such as the early old-age pension on account of incapacity for work for which a qualifying age which differs according to sex was introduced into national legislation after expiry of the period prescribed for transposition of the Directive.

The effects in time of the present judgment

37 At the hearing, the Austrian and United Kingdom Governments submitted that the Court might, in the event of its holding the Austrian rules to be

incompatible with Community law, limit in time the effects of the present judgment.

- 38 In support of that request, the Austrian Government claimed that the removal of the discriminatory measures would have major financial repercussions, whilst the United Kingdom referred to the novelty of the questions raised in this case.
- 39 It should be pointed out that it is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying upon a provision which it has interpreted with a view to calling in question legal relationships established in good faith (Case 24/86 *Blaizot* [1988] ECR 379, paragraph 28, and Case C-163/90 *Administration des Douanes et Droits Indirects v Legros and Others* [1992] ECR I-4625, paragraph 30).
- 40 In the present case, it must be noted, first, that on the date when the national rules were adopted case-law of the Court already existed concerning the application of Article 7(1)(a) of the Directive, so that the Austrian Republic was in a position to assess the compatibility of the national rules with the Directive (see, in particular, Case C-9/91 *Equal Opportunities Commission* [1992] ECR I-4297, *Thomas and Others* and *Graham and Others*, both cited above).
- 41 Second, the financial consequences which might ensue for a Member State from a preliminary ruling have never in themselves justified limiting the temporal effect of such a ruling (see, in particular, Joined Cases C-367/93 to C-377/93 *Rodgers and Others* [1995] ECR I-2229, paragraph 48, Case C-137/94 *R v Secretary of State for Health*, ex parte *Richardson* [1995] ECR I-3407, paragraph 37, and Joined Cases C-197/94 and C-252/94 *Bautiaa and Société Française Maritime* [1996] ECR I-505, paragraph 55).

Consequently, there are no grounds for limiting in time the effects of the present judgment.

Costs

The costs incurred by the Austrian and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Oberster Gerichtshof by order of 31 March 1998, hereby rules:

The derogation for which Article 7(1)(a) 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 provides must be interpreted as not applying to a benefit such as the early old-age pension on account of incapacity for work for which a qualifying age which differs according to sex was introduced into national legislation after expiry of the period prescribed for transposition of that directive.

Rodríguez Iglesias

Edward

Sevón

Kapteyn

Gulmann

Puissochet

Hirsch

Jann

Ragnemalm

Delivered in open court in Luxembourg on 23 May 2000.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President