

OPINION OF ADVOCATE GENERAL

ALBER

delivered on 25 September 2003 ¹

I — Introduction

1. This reference for a preliminary ruling from the Oberster Gerichtshof (Supreme Court), Austria, concerns the interpretation and application 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 security² (hereinafter ‘Equal Treatment Directive’ or ‘Directive 79/7’). The referring court has doubts regarding the compatibility with Community law of a national provision which provides for different pensionable ages³ for men and women in respect of a benefit described as an ‘early old-age pension in the event of unemployment’.

the Member States could, in accordance with Article 7(1)(a) of the Equal Treatment Directive, exclude the determination of the pensionable age for men and women from the scope of the Directive and therefore determine different qualifying ages for men and women.

II — Legal framework

A — *Community law*

Article 3 of Directive 79/7 provides the following:

‘This Directive shall apply to

- (a) statutory schemes which provide protection against the following risks:

1 — Original language: German.

2 — OJ 1979 L 6, p. 24.

3 — This note concerns only the German version of the Opinion.

— ...

— old age

— 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.’

— ...

Article 7 provides that

— unemployment

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

...’

Article 4(1) reads:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits.

‘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,

B — *The national provisions*

— the obligation to contribute and the calculation of contributions,

3. Paragraph 253a of the Allgemeines Sozialversicherungsgesetz (General Law on Social Security, hereinafter ‘ASVG’) reads:

‘(1) A male insured person is to be entitled to an early old-age pension in the event of unemployment after completion of his 738th month, and a female insured person after completion of her 678th month, if he or she:

year in the case of female insured persons, the pension calculated in accordance with Article 261 is at this point to be increased in accordance with Article 261b; from the following first of the month the entitlement will be that to an old-age pension pursuant to Article 253(1).’

1. has completed the qualifying period (Article 236),

4. Article 253 of the ASVG is entitled ‘old-age pension’ and its first paragraph reads:

2. has acquired at least 180 months of compulsory insurance contributions on the material date, ..., and

‘A male insured person is to be entitled to an old-age pension upon completion of his 65th year (regular pensionable age), a female insured person upon completion of her 60th year (regular pensionable age), provided the qualifying period (Paragraph 236) is met.’

3. has fulfilled the condition laid down in Article 253b(1) No 4 on the material date (Article 223(2)) and has received a cash benefit stemming from unemployment insurance for at least 52 weeks on account of unemployment within the last 15 months prior to the material date (Article 223(2)) for the further duration of the unemployment.

III — Facts and procedure

...

(4) Upon completion of the 65th year in the case of male insured persons and the 60th

5. The applicant in the main proceedings (hereinafter ‘the applicant’) had submitted an application for the grant of an early old-age pension in the event of unemployment. On the material date, the

applicant had not yet completed his 738th month and his application was therefore rejected.⁴ He subsequently brought legal proceedings to challenge this decision and an appeal on points of law is currently pending before the Oberster Gerichtshof.

6. The *referring court* has reservations as to the contested provision's compatibility with Directive 79/7. It considers it questionable whether the Austrian provision falls under the derogation contained in Article 7(1)(a) of the Directive. According to the narrow interpretation required by the case-law of the Court of Justice, it is at any rate doubtful whether the benefit to be categorised here is an old-age or a retirement pension. With regard to the contested benefit, the unemployment of the person concerned is the criterion which characterises the benefit, the attainment of a certain age and the fulfilment of qualifying periods being merely supplemental.

7. If the early old-age pension in the event of unemployment is not to be categorised as an old-age pension, the question arises whether this benefit can be subsumed under

the term 'other benefits' within the meaning of Article 7(1)(a) of the Directive 'for which the determination of different pensionable ages may have consequences'.

8. According to the established case-law of the Court, the scope of the permitted derogation is limited to forms of discrimination which are necessarily and objectively linked to the difference in pensionable age.⁵ Therefore, determination of ages which differ in accordance with sex in rules on benefits other than old-age and retirement pensions can be justified only where such unequal treatment is 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.

9. In this context, the referring court points out that early old-age pensions in the event of unemployment paid out in December 2001 amounted to just under 1.2% as a proportion of the total old-age and early old-age pensions paid out. In its opinion it is not evident that the removal of the discrimination at issue in the present case, namely the consistent regulation of the minimum age for the receipt of the benefits for both men and women, could have any serious effects on the financial equilibrium of the social security system as a whole. The

4 — It is not entirely clear why the applicant's application was rejected by way of notice of 5 December 2000 on the basis that the applicant had not yet completed his 738th month. According to the submissions of the referring court, the qualifying age for receipt of an early old-age pension in the event of unemployment was progressively increased by the Sozialrechtsänderungsgesetz (Law amending the Social Security Law) 2000, so that it amounted to 738 months for men only as of October 2002. This lack of clarity, however, is to be disregarded for the purposes of the present case as the referring court generally has doubts regarding the compatibility of the rule with Community law in so far as the rule provides for a different qualifying age for men and women.

5 — See Case C-104/98 *Buchner and Others* [2000] ECR I-3625, paragraph 25.

referring court also raised doubts regarding the coherence of the early old-age pension in the event of unemployment and the old-age pension provided for in Article 253 of the ASVG.

10. The Oberster Gerichtshof therefore refers the following question to the Court of Justice:

Is the derogation contained in 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 to be interpreted such that it is applicable to benefits such as early old-age pension in the event of unemployment for which the pensionable age under national law is different for men and women?

11. The applicants, the Austrian Government and the Commission took part in the proceedings. I shall return to their submissions within the framework of my legal analysis.

12. Before making submissions on the question referred, the applicant queries whether the derogating provision is still applicable to the pension law of the

Republic of Austria overall. According to the case-law of the Court, the derogation provided for by Community law may only be maintained for a transitory period, that is, for a limited period of time. In Austria, the procedure for aligning the pensionable ages of men and women will be definitely completed only in the year 2033. This is clearly not a transitory period. Furthermore, Austria has not met its obligation to undertake periodical examinations within the meaning of Article 7(2) of the Directive. By, on the one hand, taking inadmissible steps causing an increase in unequal treatment and by failing to act on the other, Austria has forfeited its right to apply the derogating provision.

13. This argument ought not to be addressed within the framework of this preliminary reference. According to the settled case-law of the Court, in a preliminary reference procedure only the questions posed by the referring court are to be addressed. In this regard, the Court stated in the *Kaba*⁶ case: ‘The Court has, moreover, consistently ruled that, as the power to formulate the questions to be referred is vested in the national court or tribunal alone, the parties cannot alter the wording of those questions It follows that the Court must in principle confine its examination to the matters which the court or tribunal making the reference has decided to submit to it for consideration. The Court must therefore, as regards application of the relevant

6 — Case C-466/00 *Kaba* [2003] ECR I-2219, paragraph 40 et seq.

national rules, proceed on the basis of the situation which that court or tribunal considers to be established; it cannot be bound by suppositions raised by one of the parties to the main proceedings'

the ASVG, the early old-age pension in the event of unemployment pursuant to Paragraph 253a of the ASVG and the rules of the Arbeitslosenversicherungsgesetz (Law on the Insurance of the Unemployed, 'AIVG').

14. The Court furthermore stated in *Hepple*⁷ 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 indissociable from that derogation and also amendments to such measures.'

IV — Observations submitted by the parties

A — Applicant

15. The *applicant* submits that an early old-age pension in the event of unemployment does not constitute an old-age pension within the meaning ascribed to this term under EU law. This can be deduced from the judgment of the Court in *Buchner*.⁸ According to the applicant, the central question is therefore to what extent there is coherence between the old-age pension pursuant to Paragraph 253(1) of

16. As follows from the title of Article 253a of the ASVG, unemployment is the central element of this type of pension. Pursuant to this provision, beneficiaries are entitled to this type of pension only 'for the further duration of the unemployment' and the entitlement will cease once employment is resumed. Pursuant to Article 253a(4) of the ASVG this type of pension is paid as a regular old-age pension to men with effect from completion of their 65th year and to women with effect from completion of their 60th year, at which point it will be calculated anew. It is therefore not a continuous maintenance payment, as is the case for the old-age pension pursuant to Article 253 of the ASVG, but rather a transitional allowance for older unemployed persons.

17. The applicant is of the opinion that there is no coherence between these two types of pension. The fact that both men and women can obtain an early old-age pension in the event of unemployment three and a half years before attainment of the regular pensionable age is only a seeming link between these two types of pension. The difference in qualifying age for the receipt of an early old-age pension in

⁷ — Case C-196/98 *Hepple and Others* [2000] ECR I-3701, paragraph 23.

⁸ — Cited in footnote 5.

the event of unemployment is not a necessary and objective consequence of the different qualifying ages on the ground of sex contained in Article 253 of the ASVG. The applicant therefore submits that the question referred be answered in the negative.

B — Austrian Government

18. The Austrian Government is of the opinion that the criteria developed by the Court in *Buchner*⁹ cannot be applied to the early old-age pension in the event of unemployment. In contrast to the early old-age pension on account of incapacity for work, the pensionable age for the early old-age pension in the event of unemployment was initially, for both sexes, five years before the respective regular pensionable age and, following the parallel increase provided for in the Sozialrechtsänderungsgesetz (Law amending the Social Security Law) 2000, 3.5 years before that age. There can therefore be no doubt as to the coherence with the old-age pension.

19. Early old-age pension in the case of unemployment is therefore an early pension for the long-term unemployed. The qualifying age for the early old-age pension in the event of unemployment is necessarily and

objectively linked to the qualifying age applicable to the regular old-age pension. This is because the statistical chance of obtaining new employment is primarily dependent upon the period of time, namely how many months or years, after which the insured person can claim regular old-age pension benefits.

20. The Austrian Government refers to the judgment of the Court in *Graham*.¹⁰ The Court here considered a difference in qualifying ages for men and women for invalidity benefits to be justified as there was coherence between the retirement pension scheme and the invalidity pension scheme. These considerations are applicable to the present case and their content is equally true as regards the Austrian early old-age pension in the event of unemployment.

21. If the Court were to declare the Austrian rule to be incompatible with Community law, this would have far-reaching consequences. In this case the disadvantaged sex would have the right to equality of treatment with the favoured sex. Men would therefore be entitled to this benefit when 56.5 years old, namely 8.5 years before attainment of the regular pensionable age. The Republic of Austria is of the opinion that this constitutes an unjustified favourable treatment of men. Therefore, the qualifying age for women would have to be raised to that of men, namely to 61.5 years. However, in reality this would lead to the abolition of this type of pension for

⁹ — Cited in footnote 5.

¹⁰ — Case C-92/94 *Graham and Others* [1995] ECR I-2521.

women as they reach their regular pensionable age at age 60 and can then claim regular pension benefits. Early old-age pension in the event of unemployment could therefore in practice be claimed by men only. From the point of view of the Republic of Austria, this result cannot be justified by equal treatment considerations. Therefore, taking this approach would force the Republic of Austria to abandon the 'early old-age pension in the event of unemployment' type of benefit altogether. EC law must not, however, have such far-reaching consequences.

22. The Austrian Government is of the opinion that the solution adopted is the only, and consequently also a permitted, solution which ensures the coherence of the Austrian system. The derogation contained in Article 7(1)(a) of Directive 79/7 is to be interpreted as being applicable to a benefit such as an early old-age pension in the case of unemployment for which national law determines different pensionable ages for men and women.

C — Commission

23. The Commission takes the view that the early old-age pension in the event of unemployment pursuant to Article 253a(1)

of the ASVG does not constitute an old-age or retirement pension within the meaning of the Directive. It substantiates its opinion by referring to the judgment in *Buchner*.¹¹ The benefit which is the subject of these proceedings is thus not to be categorised as an old-age or retirement pension.

24. There is no link between the early old-age pension in the event of unemployment and the old-age pension. This is supported by the fact that upon attainment of the regular pensionable age the early old-age pension in the event of unemployment is replaced by the old-age pension. If one benefit is replaced by another, then the first type of benefit, here the early old-age pension in the event of unemployment, terminates and another type of benefit, namely old-age pension pursuant to Article 253 of the ASVG, commences.

25. In the opinion of the Commission, the fact that the same period of time, namely 3.5 years before attainment of the regular retirement age, applies to both men and women for the grant of an early old-age pension in the event of unemployment does not lead to the conclusion that there is a link between these two types of benefit. Nor does it follow that the discrimination was objectively necessary in order to maintain the coherence of both types of pension.

¹¹ — Cited in footnote 5.

26. The Commission is therefore of the opinion that the derogation provided for in Article 7(1)(a) of the Directive is not applicable to the benefit which is the subject of these proceedings.

28. The legal categorisation of the benefit in question is ultimately an assessment of national law that is to be carried out by the referring court. Nevertheless, such an assessment must take place within parameters laid down by Community law, and it is the Court of Justice's task to specify those parameters.

V — Assessment

27. In my Opinion in *Buchner*¹² I stated that the derogation in Article 7(1)(a) of the Directive applies, on the one hand, to old-age and retirement pensions and, on the other, to the possible consequences of the determination of pensionable age for other benefits. The derogation must therefore be analysed in two stages. Firstly, the benefit in question must be categorised and, if appropriate, the relevant criteria in Community law must be defined. Only once it is accepted that one is not dealing with an old-age or retirement pension will it become necessary to examine whether the determination of the different pensionable ages, as under the national legislation at issue, is to be interpreted as a consequence for the benefit in question of having lawfully determined different pensionable ages.

29. In order to be able to categorise a benefit under a particular risk, one must ascertain its characteristics. Those objective criteria should also make it possible to draw a clear dividing line between the different risks. In the case of an 'old-age benefit' the essential prerequisite of entitlement is the fact of having reached the statutory retirement age. In the case of an 'unemployment benefit', on the other hand, it is usually required that the beneficiary not be in an active employment relationship, but that he be nevertheless, in principle, ready to take up work again, which is manifested by the fact that he puts himself at the disposal of the employment authorities as someone looking for work.¹³ Categorising a benefit can present problems where — as is the case here — it contains elements of one risk in addition to those of the other.

1 — 30. The Court addressed the interpretation of the derogation provided for in

12 — Opinion in Case C-104/98 *Buchner* [2000] ECR I-3628, point 10.

13 — Case C-88/95 *Martínez Losada and Others* [1997] ECR I-869 and Case C-320/95 *Alvite* [1999] ECR I-951.

Article 7(1) of the Equal Treatment Directive in *De Vriendt*. The Court stated that 'it follows from the nature of the exceptions contained in Article 7(1) of the Directive that the Community legislature intended to allow Member States to maintain temporarily the advantages accorded to women with respect to retirement in order to enable them progressively to adapt their pension systems in this respect without disrupting the complex financial equilibrium of those systems, the importance of which could not be ignored'.¹⁴

31. In order to categorise the benefits at issue one has to revert to the criteria developed by the Court in *Buchner*. This case concerned the question of the compatibility with Community law of an Austrian national rule regarding an early old-age pension on account of incapacity for work. In this context, the Court stated¹⁵ that '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'.¹⁶ Furthermore, although the grant of the benefit at issue was subject to an age condition, the fact remains that it

was granted only to persons who were incapable, following an illness or other infirmity or weakness of their physical or mental powers, of continuing to work.¹⁷

32. The substance of these criteria is applicable to the present case. Although the grant of an early old-age pension in the event of unemployment is subject to an age condition, this is not the only condition. It is supplemented by further conditions. The applicant must, inter alia, have completed the qualifying period pursuant to Article 236 of the ASVG, acquired at least 180 months of compulsory insurance contributions on the material date and, within the 15 months immediately preceding that date, have received a cash benefit stemming from unemployment insurance for at least 52 weeks.

33. As the referring court, the Commission and the applicant correctly state, the criterion that is characteristic of the benefit at issue is not the attainment of a certain age but the state of unemployment. Early old-age pension in the event of unemployment is meant to bring forward the accrual of the old-age pension in all those cases in which the reintegration of the insured person into working life is hardly possible

14 — See Joined Cases C-377/96 to C-384/96 *De Vriendt and Others* [1998] ECR I-2105, paragraph 26.

15 — *Buchner and Others*, cited in footnote 5, paragraph 21.

16 — Compare judgments in Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 8, Case C-154/96 *Wolfs* [1998] ECR I-6173, paragraph 24, and *De Vriendt and Others*, cited in footnote 14, paragraph 25.

17 — *Buchner and Others*, cited in footnote 5, paragraph 20.

or inordinately difficult to achieve as a result of old age, illness and the like. The difficulty of the reintegration is reflected in the fact that the insured has already been receiving a cash benefit from unemployment insurance for 52 weeks. The early old-age pension in the event of unemployment therefore represents transitional assistance for older unemployed persons until receipt of the old-age pension. It particularly takes account of the fact that the chance of finding new employment strongly depends upon the date when the person concerned will reach the statutory pensionable age. Furthermore, the early old-age pension in the event of unemployment is intended to prevent the persons affected from being forced to claim social security shortly prior to receipt of the statutory old-age pension.

not the criterion that is *characteristic* of the benefit, the Court decided that such a benefit was not to be categorised as an old-age or retirement pension within the meaning of Directive 79/7. Accordingly, the benefit at issue in these proceedings is not an old-age or retirement pension within the meaning of article 7(1)(a) of that directive.

35. As a consequence, it is necessary to consider whether this benefit may fall under the concept of ‘possible consequences thereof for other benefits’ within the meaning of the article cited above.

34. The Court stated in its judgment in *Molenaar*¹⁸ that the decisive factor in categorising a benefit is not its classification under the relevant national law, but rather the aim pursued by the benefit. The necessary conditions for granting an early old-age pension in the event of unemployment and the reasons for its introduction show that unemployment is the criterion which characterises this benefit. In comparable cases¹⁹ which concerned benefits for the receipt of which the attainment of a certain age was one of the criteria *to be fulfilled* but

36. This phrase limits the scope of the permitted derogation to forms of discrimination existing in other benefit systems which are *necessarily* and *objectively* linked to this difference in pensionable age. This has been consistently held by the Court. Such a link exists where discrimination is objectively necessary either to avoid disturbing the financial equilibrium of the social security system or to ensure coherence between the retirement pension scheme and other benefit schemes.²⁰ The answer to the question whether this discrimination is objectively and necessarily linked to the setting of pensionable ages which differ according to sex is also a matter falling within the competence of the national

18 — Case C-160/96 *Molenaar* [1998] ECR I-843, paragraph 19, also Case C-215/99 *Jauch* [2001] ECR I-1901, paragraph 25.

19 — Compare *Buchner and Others* (cited in footnote 5), *Martínez Losada* (cited in footnote 13) and *Alvite* (cited in footnote 13).

20 — Compare e.g. *Buchner and Others* (cited in footnote 5, paragraphs 25 and 26), *Thomas* (cited in footnote 16, paragraphs 20 and 12) or *Graham* (cited in footnote 10, paragraphs 11 and 12).

court. However, the Court has jurisdiction to give the national court guidance enabling it to give judgment.²¹

37. In the present case a disturbance of the financial equilibrium of the social security system cannot be an argument justifying the difference in qualifying age for men and women for receipt of an early old-age pension in the event of unemployment. As illustrated by the referring court in its decision, the early old-age pensions in the event of unemployment paid out in December 2001 amounted to just under 1.2% as a proportion of the total old-age and early old-age pensions paid out. Therefore, the assumption of the referring court and the Commission that the removal of the discrimination at issue would not have any serious effects on the financial equilibrium of the social security system as a whole is to be endorsed.

38. The next question to be assessed is that of coherence. In this context, one can refer to the judgment of the Court in the case of *Balestra*.²² The Court here held that the discrimination which was the subject of the main proceedings was 'objectively linked to the setting of pensionable ages which differ for women and men in so far as it ensues directly from the fact that those pensionable ages are set at 55 for women and at 60 for men. The rule applicable to both men and women is that they may rely on their right to early retirement no more than five years

before the date on which they reach the age at which they become entitled to a retirement pension' Applied to the present case, this reasoning means that the difference in qualifying age for the early old-age pension in the event of unemployment is objectively linked to the pensionable age in so far as men and women can apply for the grant of an early old-age pension in the event of unemployment three and a half years prior to the attainment of the regular pensionable age. In Austria, this is 65 for men and 60 for women.

39. The benefits are also necessarily linked. The function of the early old-age pension in the event of unemployment is to guarantee an income to a person who has been unemployed for a certain amount of time and whose reintegration into the job market is difficult or impossible, but who has not yet reached the regular pensionable age.²³ This also follows from the explanations of the referring court, the Austrian Government and the Commission that the early old-age pension in the event of unemployment is transitional assistance for older unemployed persons until the attainment of the regular pensionable age. The Austrian Government states that the qualifying age for the early old-age pension in the event of unemployment is objectively and necessarily linked to the qualifying age for the regular pension as the statistical chance of obtaining new employment primarily depends upon when the

21 — Case C-139/95 *Balestra* [1997] ECR I-549, paragraph 39.

22 — Cited in footnote 21, paragraph 40.

23 — Compare also the reasoning of the Court in *Balestra* (cited in footnote 21, paragraph 41).

insured person can claim regular old-age pension benefits. Employers are generally less willing to enter into an employment relationship with persons who are about to reach their pensionable age than with persons who will be available to work for a longer period of time. The risk of not finding an employment prior to attaining the regular pensionable age therefore primarily depends upon the regular pensionable age applicable at the time. This argument is convincing.

40. A link between these two benefits also exists in so far as the regular old-age pension replaces the early old-age pension in the event of unemployment when the insured person reaches the regular pensionable age. In *Graham* the situation was similar to that in the present proceedings. In this context, the Court stated²⁴ 'that since invalidity benefit is designed to replace income from occupational activity, there is nothing to prevent a Member State from providing for its cessation and replacement by a retirement pension at the time when the recipients would in any case stop working because they have reached pensionable age.' This means that also in the present case the fact that upon attainment of a certain age one benefit is replaced by another leads to the conclusion that both benefits are necessarily linked to each other.

41. In *Buchner*,²⁵ to which the parties in the main proceedings repeatedly refer, the Court stated that there was no coherence between the early old-age pension on account of incapacity for work and the old-age pension. The Austrian Government takes the view that the criteria regarding coherence that were developed by the Court in *Buchner* are not applicable in the present case. This view is correct. In *Buchner*, the right to early old-age pension on account of incapacity for work arose at 55 for women, that is to say five years before the regular retirement age, and at 57 for men, that is to say eight years before the regular retirement age. As stated by the referring court, the same period of time prior to attainment of the regular pensionable age has applied to both men and women for the grant of an early old-age pension in the event of unemployment. As the Austrian Government rightly emphasises, the qualifying age for the early old-age pension in the event of unemployment for men and women has always been, for both sexes, five years and, following the parallel increase provided for in the Sozialrechtsänderungsgesetz (Law amending Social Security Law) 2000, 3.5 years before their respective regular pensionable age.

42. It can be concluded from these arguments that in the present case there is coherence between the rules on the old-age pension and the rules on the early old-age pension in the event of unemployment.

24 — *Graham* (cited in footnote 10, paragraph 14).

25 — Cited in footnote 5.

VI — Conclusion

43. I therefore suggest that the question referred by the Oberster Gerichtshof be answered as follows:

Article 7(1)(a) of Directive 79/7/EEC is to be interpreted as applying to a benefit such as the early old-age pension in the event of unemployment for which national law determined different pensionable ages for men and women.