OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 25 November 2020

Case C-795/19

XX
v
Tartu Vangla,
interveners
justiitsminister,
tervise- ja tööminister,
õiguskantsler

(Request for a preliminary ruling
from the Riigikohus (Supreme Court, Estonia))

I. Introduction

1. The present case concerns the interpretation of the prohibition of discrimination on grounds of disability laid down by Directive 2000/78/EC.  

2. It involves a person employed as a prison officer who was dismissed on the ground that his hearing, when tested, was found to be below the minimum standard required by the national legislation.

3. The request for a preliminary ruling was made by the Riigikohus (Supreme Court, Estonia).

4. In this case, the Court is called upon to examine, in particular, the proportionality of national legislation which, in the prison sector, prohibits the continued employment of an employee with a hearing disability.
5. At the end of my assessment, I shall propose that the Court should rule that Article 2(2)(a) of Directive 2000/78, read in conjunction with Article 4(1) and Article 5 of that directive, is to be interpreted as meaning that the absolute prohibition on carrying out, as a prison officer, the task of supervising prisoners, on the sole ground that the auditory acuity of the person concerned falls below the standard laid down by that legislation and constitutes a disability, must be regarded as disproportionate and, consequently, contrary to that directive.

II. Legal framework

A. EU law

6. Recitals 16, 17, 18, 20, 21 and 23 of Directive 2000/78 state:

'(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

...

(20) Appropriate measures should be provided, that is to say effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.

...

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.'

7. According to Article 1 of that directive, entitled 'Purpose':

'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'
8. Article 2 of that directive, entitled ‘Concept of discrimination’, provides:

‘1. For the purposes of this Directive, the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

…

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.’

9. Article 3(1) of that directive, entitled ‘Scope’, is worded as follows:

‘Within the limits of the areas of competence conferred on the [European Union], this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…

(c) employment and working conditions, including dismissals and pay;

…’

10. Article 4 of Directive 2000/78, entitled ‘Occupational requirements’, provides, in paragraph 1 thereof:

‘Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’

11. Article 5 of that directive, entitled ‘Reasonable accommodation for disabled persons’, provides:

‘In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.’
B. Estonian law

12. Paragraph 146 of the Vangistusseadus (Law on detention) provides:

‘(1) The purpose of the medical examination for prison officers is to detect health problems caused by their service, to reduce and prevent health risks and to establish that prison officers have no health problems which prevent them from performing their professional duties.

…

(4) The rules concerning the health requirements and medical examination for prison officers, as well as the requirements relating to the content and format of medical certificates, shall be laid down by regulation of the Government of the Republic of Estonia.’

13. The Vabariigi Valitsuse määrus nr 12 ‘Vanglateenistuse ametniku tervisenõuded ja tervisekontrolli kord ning tervisetõendi sisu ja vormi nõuded’ (Regulation No 12 of the Government of the Republic of Estonia ‘concerning the health requirements and medical examination for prison officers, as well as the requirements relating to the content and format of medical certificates’), of 22 January 2013 (‘Regulation No 12’), adopted on the basis of Paragraph 146(4) of the Law on detention, entered into force on 26 January 2013.

14. Paragraph 3 of Regulation No 12 provides:

‘(1) A prison officer’s visual acuity must meet the following requirements:

1. visual acuity with correction must be no less than 0.6 in one eye and no less than 0.4 in the other eye;

2. normal field of vision, normal colour perception and normal night vision.

(2) A prison officer is permitted to wear contact lenses or glasses.’

15. According to Paragraph 4 of that regulation:

‘(1) A prison officer’s level of auditory acuity must be sufficient to communicate by telephone and to hear the sound of an alarm and radio messages.

(2) At the time of the medical examination, a prison officer’s hearing impairment must not exceed, in the ear with better hearing, 30 decibels (dB) at frequencies from 500 to 2,000 Hertz (Hz), and 40 dB at frequencies from 3,000 to 4,000 Hz or, in the ear with the greatest hearing loss, 40 dB at frequencies from 500 to 2,000 Hz, and 60 dB at frequencies from 3,000 to 4,000 Hz.’

16. Paragraph 5 of that regulation provides:

‘(1) The list of health problems which prevent prison officers from performing their professional duties, a list which must be respected when assessing the state of health of a prison officer, is set out in Annex 1.

(2) The existence of an absolute medical impediment shall prevent a person from entering service as a prison officer or undertaking training in preparation for carrying on the activity of a prison officer. …’

17. Annex 1 to that regulation contains a list of health problems which prevent prison officers from performing their professional duties. The ‘medical impediments’ include ‘impaired hearing below the prescribed standard’, which is classified as an ‘absolute impediment’.
III. The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

18. For almost fifteen years from December 2002, the applicant in the main proceedings was employed as a prison officer by Tartu Prison (Estonia), first on the closed prison wing and then, from June 2008, on the open wing. His employment obligations in the latter position included, inter alia, supervising persons under electronic surveillance by means of a surveillance system, passing on information on those persons, monitoring surveillance and signalling equipment, responding to and passing on information, particularly in the event of alarms, and identifying breaches of the internal regulations. The referring court states that the applicant in the main proceedings was, over his entire period of service, never criticised for the performance of his professional duties.

19. A medical certificate dated 4 April 2017 showed that the applicant’s hearing was impaired in one ear, with the result that he failed to reach the level prescribed by Regulation No 12 and therefore did not fulfil the health requirements for prison officers laid down by that regulation. According to the applicant in the main proceedings, that impairment was congenital.

20. By decision of 28 June 2017, the applicant in the main proceedings was dismissed by the Governor of Tartu Prison on the basis of, inter alia, Article 5 of Regulation No 12, on the ground that his level of auditory acuity did not meet the requirements of that regulation. The applicant in the main proceedings then brought before the Tartu Halduskohus (Administrative Court, Tartu, Estonia) an action seeking a declaration that the decision to dismiss him was unlawful and seeking compensation, arguing that Regulation No 12 constituted discrimination on grounds of disability contrary to the Constitution and the law on equal treatment.

21. By judgment of 14 December 2017, that court dismissed the action and held, in particular, that the hearing requirement provided for by Regulation No 12 constituted a necessary and justified measure to ensure that serving prison officers are able to carry out all their duties.

22. By judgment of 11 April 2019, the Tartu Ringkonnakahus (Court of Appeal, Tartu, Estonia) upheld the appeal brought by the applicant in the main proceedings, set aside the earlier judgment, declared that the decision to dismiss him was unlawful and ordered Tartu Prison to pay him compensation corresponding to 60 months’ salary. That court held that Regulation No 12, more specifically Annex 1 thereto, which provides that impaired hearing below the prescribed standard constitutes an absolute impediment to continued employment as a prison officer, was contrary to the general principle of equality and to the principle of protection of legitimate expectations enshrined in the Constitution. Accordingly, that court did not apply Regulation No 12 to the case in the main proceedings and initiated the procedure for reviewing the constitutionality of that annex before the referring court.

23. With regard to the general principle of equality, the Tartu Ringkonnakahus (Court of Appeal, Tartu) has, inter alia, compared the category of prison officers with impaired hearing to that of prison officers with impaired vision and found that there was a difference of treatment which was not based on reasonable and relevant grounds. According to that court, the rules provided for by Regulation No 12 in cases of visual impairment or hearing impairment are comparable, in particular in so far as impaired vision below the prescribed standard also constitutes an absolute impediment. However, a prison officer with impaired vision is entitled to wear contact lenses or glasses under Paragraph 3(1) of that regulation, whereas Paragraph 4 of that regulation makes no provision for the use of a hearing aid, and wearing such a device is not permitted during the hearing test.

The order for reference states that the level of auditory acuity of the worst ear of the applicant in the main proceedings was from 55 to 75 dB at frequencies between 500 and 2,000 Hz, whereas, under Paragraph 4(2) of Regulation No 12, auditory acuity of the ear with the greatest hearing loss must not exceed 40 dB at those frequencies.
24. The Tartu Ringkonnakohus (Court of Appeal, Tartu) added that it did not understand why it was necessary for a hearing-impaired officer also to have the ability to hear in the event of the loss or malfunctioning of a corrective device, while no comparable requirement exists for a visually impaired person, even though broken glasses could constitute a greater danger than a damaged hearing aid. In particular, a hearing aid can be miniaturised, sit inside the ear and be placed under headgear. Moreover, it would be possible to draw up a list of devices permitted in prisons. According to that court, it is therefore unreasonable indiscriminately to exclude all hearing aids and to prevent hearing impaired persons from working in prisons.

25. In its order for reference, the Riigikohus,põhiseaduslikkuse järelvalve kolleegium (Supreme Court, Constitutional Review Chamber) states that the public authorities which are parties to the proceedings expressed diverging views. Thus, according to the justiitsminister (Minister for Justice, Estonia) and Tartu Prison, the auditory acuity requirements laid down by Regulation No 12 are justified by the need to guarantee security and public order. A prison officer should be capable of performing all the tasks for which he or she was trained and should, where necessary, provide assistance to police officers. The Minister for Justice explains that prison officers are not actually prohibited from wearing a hearing aid when carrying out their duties, but that their hearing must be tested without the use of such a device, that is to say without correction. A prison officer’s natural level of auditory acuity should therefore be sufficient, without the aid of a medical device, to ensure his safety and that of his colleagues, and full communication in all circumstances.

26. By contrast, according to the tervise- ja tööminister (Minister for Health and Labour, Estonia) and the õiguskantsler (Chancellor of Justice, Estonia), those requirements are not proportionate to the objective pursued, that is to say the protection of public order and security and the rights and freedoms of individuals.

27. For its part, the referring court takes the view that there is doubt as to whether the national legislation is in conformity with EU law, in the light of the principle of equality provided for in Article 2 of the EU Treaty and the prohibition of discrimination on grounds of disability laid down in the Charter of Fundamental Rights of the European Union (‘the Charter’) and in Directive 2000/78. The referring court states, with reference to the judgment in Vital Pérez,4 that the concern to ensure the operational capacity and proper functioning of the police, prison or rescue services constitutes a legitimate objective, but that it must be ascertained whether restrictions on the activity of a prison officer with a hearing disability, such as those laid down by Regulation No 12, are proportionate to that objective. Neither the wording of Directive 2000/78 nor the case-law of the Court of Justice permits any clear conclusions to be drawn in relation to the question raised in the present case, with the result that an interpretation by the Court is required.

28. The referring court states also that, according to the national rules of procedure, in the context of a review of constitutionality, such as that brought before it in the main proceedings, it does not have the power to examine directly whether the national legislation is compatible with EU law. By contrast, the Tartu Ringkonnakohus (Court of Appeal, Tartu), which had jurisdiction in that regard, should probably have carried out such an examination. Nevertheless, the referring court adds that it may itself refer a question to the Court for a preliminary ruling on that matter and that, if, as a result, EU law precludes legislation such as that at issue in the main proceedings, that national legislation should be disapplied without the referring court having to examine the application for a review of constitutionality, which would be declared inadmissible. Conversely, if it results that EU law does not preclude such legislation, the referring court may review the constitutionality of the legislation at issue.

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29. In those circumstances, the Riigikohus, põhiseaduslikkuse järelevalve kolleegium (Supreme Court, Constitutional Review Chamber) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Should Article 2(2), read in combination with Article 4(1), of ... Directive [2000/78], be interpreted as precluding provisions of national law which provide that impaired hearing below the prescribed standard constitutes an absolute impediment to work as a prison officer and that the use of corrective aids to assess compliance with the requirements is not permitted?’

30. The request for a preliminary ruling, dated 24 October 2019, was received at the Court on 29 October 2019. Written observations were submitted by the appellant in the main proceedings, the Chancellor of Justice, the Greek Government and the European Commission. No hearing was held.

IV. Analysis

31. By its question, the referring court is asking the Court, in essence, whether national legislation, such as that in the main proceedings, which prohibits the maintenance in employment of a prison officer with a level of auditory acuity below the standard laid down for employment in that post, is proportionate under Directive 2000/78.

32. In order to answer that question, it is necessary to ascertain at the outset whether, and if so to what extent, Directive 2000/78 applies to such legislation, in particular whether the prohibition provided for in that national legislation establishes a difference of treatment on grounds of disability and whether that difference of treatment is capable of being justified by a legitimate objective.

A. The application of Directive 2000/78

1. The scope of Directive 2000/78

33. It is apparent from the title of Directive 2000/78 and the preamble thereto that the directive seeks to lay down a general framework in order to guarantee equal treatment in employment and occupation to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1, which include disability.\(^5\)

34. The concept of ‘disability’ in Article 1 of Directive 2000/78 refers to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.\(^6\) Impairment of a sensory capability, in this case hearing, constitutes impairment of a physical capacity under that article.

35. Article 3(1) of Directive 2000/78 further provides that the directive is to apply to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for access to employment, including recruitment conditions, according to point (a), and, employment and working conditions, including dismissals, according to point (c).

\(^5\) See, to that effect, as regards discrimination on grounds of age, judgment of 13 September 2011, Prigge and Others (C-447/09, EU:C:2011:573, paragraph 39).

36. Consequently, by providing that a prison officer’s level of auditory acuity must meet certain requirements and that a level of auditory acuity below the prescribed standard constitutes an absolute impediment to the recruitment of such a prison officer, Regulation No 12 relates to conditions for access to employment within the meaning of Article 3(1)(a) of Directive 2000/78 and, in so far as it results in the dismissal of a person who has already been recruited, relates also to employment conditions for the purposes of Article 3(1)(c) of that directive. Such a regulation therefore falls within the scope of Directive 2000/78.

2. The existence of a difference of treatment on grounds of disability

37. It is apparent from the order for reference that Regulation No 12 provides for a minimum standard of auditory acuity by reason of which persons who meet that standard are treated differently from those who do not meet it. Only the former may be recruited as prison officers. Moreover, persons who do not meet that standard but who were recruited before the regulation entered into force, cannot, as with the applicant in the main proceedings, be maintained in employment.

38. It follows that such a regulation hinders the access to and continued employment of persons who do not meet the prescribed standard of auditory acuity and thus gives rise to a difference of treatment based directly on disability for the purposes of Article 2(2)(a) of Directive 2000/78.⁷

39. I note, moreover, that the referring court uses the term disability to describe the level of auditory acuity of the applicant in the main proceedings and that use of that term in relation to him seems not to be contested by the parties to the main proceedings.

40. A difference of treatment having been identified, it is important to ascertain whether it constitutes prohibited discrimination or whether it can be justified because it fulfils a genuine and determining requirement and does not go beyond what is necessary for that purpose.

3. The existence of a justification

41. As requested by the referring court, it is necessary, in my view, to examine whether a standard laying down a level of auditory acuity, such as Regulation No 12, constitutes a ‘genuine and determining occupational requirement’, within the meaning of Article 4(1) of Directive 2000/78, which pursues legitimate objectives, for the purposes of Article 2(5) of that directive, and which does not go beyond what is necessary for that purpose. If the answer is in the affirmative, it follows from the wording of Article 4(1) of that directive that the difference of treatment on grounds of disability established by such a regulation does not constitute discrimination within the meaning of Article 2 of that directive.

42. I would recall that, in the case of a derogation from the prohibition of discrimination, Article 4 of Directive 2000/78 must be interpreted strictly and that recital 23 of that directive states that such a derogation may be applied only in very limited circumstances.⁸

43. I would also point out that what must constitute a genuine requirement is not one of the grounds which are referred to in Article 1 of Directive 2000/78 and on which the difference of treatment is based but a characteristic related to that ground.⁹

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⁷ I would point out that I do not share the view of the Tartu Ringkonnakohus (Court of Appeal, Tartu) that the comparison should be between persons with a visual disability and persons with a hearing disability.

⁸ See judgment of 14 March 2017, Bougnoussi and ADDH (C-188/15, EU:C:2017:204, paragraph 38).

⁹ See, to that effect, inter alia, judgment of 14 March 2017, Bougnoussi and ADDH (C-188/15, EU:C:2017:204, paragraph 37, and the case-law cited).
44. In that regard, it is clear from the statements made in points 37 and 38 of this Opinion that the requirement for a minimum level of auditory acuity constitutes a characteristic related to one of those grounds, namely disability.

45. As regards the need for such a characteristic, there is little doubt that the requirement to hear properly and thus to reach a certain level of auditory acuity follows from the duties of a prison officer, as described by the referring court. Indeed, the referring court stated that the supervision of prisoners involves, inter alia, being able to detect disturbances which may become perceptible as sound and to hear an alarm being set off. In order to communicate with his colleagues, a prison officer must also be able to hear what is said by them, whether face-to-face, sometimes during a commotion, or through communications devices.

46. As with the requirement to possess certain physical capacities, in particular the ability physically to control detained persons, auditory acuity may be regarded as a genuine and determining occupational requirement.

47. As regards the objectives pursued, all the public authorities involved in the case in the main proceedings as well as the referring court mentioned the maintenance of public security and the maintenance of order. It is clear that prison services seek to safeguard those objectives. In so far as the latter objectives are among those expressly referred to in Article 2(5) of Directive 2000/78 as allowing a derogation from the prohibition of discrimination, they must be regarded as legitimate.

48. It would thus appear, at first sight, that a regulation, such as that in the main proceedings, which prescribes a minimum level of auditory acuity applicable to the functions of a prison officer responsible for supervising prisoners constitutes a genuine and determining occupational requirement for achieving legitimate objectives. That legislation therefore appears suitable for achieving the objectives pursued.

49. The question which arises is whether such legislation, which strictly prohibits the exercise of those functions where the auditory acuity requirement laid down is not met, is proportionate to those objectives, in that it does not go beyond what is necessary to ensure the proper functioning and operational capacity of the prison services concerned and, consequently, to ensure public security and the maintenance of order.

B. The proportionality of a measure such as that at issue in the main proceedings

50. In determining whether legislation such as that in the main proceedings is proportionate, it is important to point out that the right not to be discriminated against on grounds of disability is a fundamental right enshrined in Article 21 of the Charter and given concrete expression in Directive 2000/78. That right is also enshrined in the United Nations Convention on the Rights of Persons with Disabilities, to which the European Union has acceded.

10 See Paragraph 4(1) of Regulation No 12, cited in point 15 of this Opinion.
11 See, by analogy, with regard to the requirement to have sufficient physical capacity to perform the activities of a police officer, judgment of 13 November 2014, Vital Pérez (C-416/13, EU:C:2014:2371, paragraph 41), and those of an airline pilot, judgments of 13 September 2011, Prigge and Others (C-447/09, EU:C:2011:573, paragraph 67), and of 7 November 2019, Cafaro (C-396/18, EU:C:2019:929, paragraph 62).
51. The European Union has not only undertaken to combat discrimination on grounds of disability by seeking to eliminate inequalities based on disability, but has also affirmed the importance of promoting the integration of disabled people into the labour force by taking appropriate action\(^\text{13}\) to contribute to their full participation in economic, cultural and social life and to the realisation of their potential.\(^\text{14}\)

52. That integration is ensured through the adoption by employers of reasonable accommodation measures for persons with disabilities, such as individual patterns of working time or specific infrastructure.\(^\text{15}\) in accordance with Article 5 of Directive 2000/78, as well as by positive action,\(^\text{16}\) in accordance with Article 7(2) of that directive.

53. It is in that context that it is necessary to assess whether a total exclusion from activities of a prison officer involving the supervision of prisoners, such as the exclusion at issue in the main proceedings, can be regarded as being compatible with Directive 2000/78.

54. I would point out that, while seeking to promote the integration of persons with disabilities into the labour force, Directive 2000/78 recognises the importance of not affecting the proper functioning of the sectors concerned. The preamble thereto illustrates, in that regard, the seeking of a balance between those two imperatives.

55. On the one hand, recital 17 of Directive 2000/78 emphasises the capacity to perform the essential functions of the post concerned as well as competence and availability. Those qualities are further reinforced in recital 18 of that directive, according to which the directive ‘does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services’.\(^\text{17}\) I would note that recital 18 of Directive 2000/78 makes specific reference to the prison services. Moreover, by emphasising the capacity to carry out the ‘the range of functions’ which may be assigned to staff in order to preserve that operational capacity, that recital reflects the need, made apparent in the case-law of the Court, not only to have in certain cases a high level of physical capacity, but also possibly to satisfy a requirement of ‘interoperability’, that is to say to demonstrate the ability to perform tasks which go beyond those ordinarily required.\(^\text{18}\)

56. On the other hand, recitals 16, 17 and 20 of Directive 2000/78 highlight the importance of measures to accommodate the needs of disabled people at their workplace in combating discrimination on grounds of disability. Recital 17, in particular, while recognising the importance of having the capacities required for the post concerned, sets out an obligation to provide reasonable accommodation for people with disabilities. Recital 20 adds that appropriate measures should be provided, that is to say effective and practical measures to adapt the workplace to the disability, for example adapting equipment or the distribution of tasks.

57. The present case raises questions concerning the balance to be struck between the proper functioning of the services concerned and the consideration to be given to the disability. In order to ensure that a measure such as that at issue in the main proceedings does not go beyond what is necessary to ensure the proper functioning of the services concerned, I shall examine below the Court’s

\(^{13}\) See, to that effect, recital 6 of Directive 2000/78, which refers to the Community Charter of the Fundamental Social Rights of Workers, and recital 8 of that directive.

\(^{14}\) See recital 9 of Directive 2000/78. Moreover, I would point out that under Article 26 of the Charter, entitled ‘Integration of persons with disabilities’, ‘the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community’. See also judgment of 22 May 2014, Glatzel (C-356/12, EU:C:2014:350, paragraph 77).

\(^{15}\) See recital 20 of Directive 2000/78.

\(^{16}\) See recitals 26 and 27 of Directive 2000/78.

\(^{17}\) Emphasis added.

\(^{18}\) I examine that concept in detail below. See points 58 to 68 of this Opinion.
case-law on the requirements for interoperability (Section 1) and for a high level of physical capacity (Section 2). Although that case-law relates to discrimination between men and women and discrimination on grounds of age, I consider that it contains principles which are relevant to discrimination on grounds of disability. I shall then analyse the provisions of Article 5 of Directive 2000/78 as interpreted by the Court, noting that they impose specific obligations in relation to disability and further reinforce those principles (Section 3). I shall conclude my analysis by drawing from all the case-law examined the appropriate conclusions for a case such as that in the main proceedings (Section 4).

1. **The requirement for interoperability**

58. As is apparent from the request for a preliminary ruling, the requirement for interoperability is at the heart of the arguments put forward by the Minister for Justice in support of the requirement for a minimum level of auditory acuity for performance of the duties of a prison officer. The referring court states that, according to that Minister, all prison officers must be able to perform tasks other than their usual ones and, in particular, be able to provide assistance to police officers. It should be possible, within the prison, to assign prison officers to any post for which they have received adequate training and, to that end, they should meet the health requirements for all such posts. The Minister for Justice takes the view that, without the auditory acuity requirement laid down in Regulation No 12, it would not always be possible to achieve the objectives of guaranteeing, to the fullest practicable extent, the safety of persons staying in a prison establishment and of ensuring that public order is not jeopardised.

59. The question arises as to whether, in order to justify a difference of treatment for the purposes of Article 2(1) of Directive 2000/78, it is sufficient that the persons responsible for the services referred to in recital 18 of Directive 2000/78, in the present case the prison service, consider the interoperability of officers to be necessary to ensure the operational capacity of those services.

60. The Court was called upon to examine a similar issue in the judgment in Sirdar,¹⁹ relating to the recruitment of a female cook by the British armed forces, in the context of a difference of treatment between men and women. The referring court asked whether the context in which activities are carried out within a particular unit of the armed forces, in that case the Royal Marines, an elite corps, made it possible to exclude women from their ranks.

61. The Court noted that the army corps in question differed fundamentally from others in that it was the first line of attack in commando operations²⁰ and applied the rule of ‘interoperability’.²¹ Under that rule, all personnel without exception, including cooks, had to be capable of fighting in a commando unit.

62. The Court accepted that, in that particular context, the specific conditions for deployment, and in particular the rule of interoperability to which the assault units forming the Royal Marines were subject, justified their composition remaining exclusively male in order to ensure combat effectiveness.²²

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²⁰ See judgment of 26 October 1999, Sirdar (C-273/97, EU:C:1999:523, paragraph 30).
²¹ See judgment of 26 October 1999, Sirdar (C-273/97, EU:C:1999:523, paragraph 7).
²² Judgment of 26 October 1999, Sirdar (C-273/97, EU:C:1999:523, paragraphs 25 and 31). I note that the Court had been careful to recall the need to assess periodically whether, in the light of social developments, the derogation from the general scheme of the directive could be maintained. See also, to that effect, judgment of 15 May 1986, Johnston (222/84, EU:C:1986:206, paragraph 37).
63. The very particular nature of the duties and the context in which the related activities are carried out could justify a difference of treatment between men and women and suggest that that difference was proportionate to the objective pursued. I would point out that the Court's reasoning in that judgment concerning the proportionality of a measure resulting in discrimination between men and women applied not to the armed forces as a whole, but only to a particular unit within those forces.

64. That approach was confirmed in the judgment in Commission v France. That judgment concerned recruitment to the civil service, in particular to the police service, of that Member State, which established different recruitment quotas for men and women, to the detriment of the latter.

65. In order to justify rules providing for the recruitment of fewer women than men to the active services of the police force, France had argued, in its dispute with the Commission, that members of the national police force must at any time be able to use force in order to deter potential troublemakers. The Court pointed out that the exceptions to the prohibition of discrimination between men and women may relate only to specific activities and ruled that the Member State had not complied with that requirement.

66. It follows from that judgment that the alleged need to be able to use force at any time and the requirement for general interoperability within the national police force were not regarded as having been established.

67. As is apparent from the judgments in Sirdar and Commission v France, it is not possible simply to provide that there is a need for an interoperability rule which is applicable generally throughout a profession or sector of activity and, in so doing, to justify an infringement of the right to equal treatment.

68. Apart from cases in which interoperability is justified by the work carried out, as in the case which gave rise to the judgment in Sirdar, the nature of an activity may nonetheless lead to the imposition of particularly high requirements in terms of physical capacities and therefore health. I shall consider below how the Court has assessed the proportionality or otherwise of such requirements in the light of the prohibition of discrimination on one of the grounds referred to in Article 1 of Directive 2000/78, in this case discrimination on grounds of age.

2. The requirement for high physical capacity

69. The Court has examined the proportionality of a requirement for high physical capacity in the fire and police services, which are referred to in recital 18 of Directive 2000/78, as well as in the aviation sector. The Court noted that that requirement is age related, pointing out that physical capacity diminishes with age.

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30 See, to that effect, judgments of 12 January 2010, Wolf (C-229/08, EU:C:2010:3, paragraph 41); of 13 September 2011, Prigge and Others (C-447/09, EU:C:2011:573, paragraph 67); of 5 July 2017, Fries (C-190/16, EU:C:2017:513, paragraph 46), and of 7 November 2019, Cafaro (C-396/18, EU:C:2019:929, paragraph 60).
70. As regards the activities of the fire service, which is an emergency service for the purposes of that recital, the Court noted in the judgment in Wolf\textsuperscript{31} that fire-fighting, including rescuing persons, requires extremely high physical capacities and that the tasks involved can be carried out only by young persons. Few people over 45 years of age have sufficient physical capacities.\textsuperscript{32} In order that an adequate number of officials in the fire service with those capacities can be assigned to fighting fires for a sufficiently long period before being assigned to other tasks within the fire service, the Court held that setting 30 years as the maximum age for recruitment was proportionate to the objective of ensuring the operational capacity and proper functioning of that service.\textsuperscript{33}

71. That judgment served as a benchmark for subsequent judgments, particularly in the field of policing. Accordingly, the question was raised whether, as in the case of officials in the fire service, a maximum age of 30 or 35 years for the recruitment of police officers was proportionate to the aim pursued, namely to ensure the operational capacity and proper functioning of the police service concerned.

72. The Court drew a distinction between the activities of local police officers assigned to a municipality in Spain\textsuperscript{34} and the activities of the police officers of an autonomous community in that Member State,\textsuperscript{35} while recognising that all police officers must have a certain physical capacity, due to the use of physical force in their activities relating to the protection of property and persons and to the custody and arrest of offenders. The Court accepted that the level of physical capacity required for police officers of an autonomous community could be higher than that required for local police officers and could therefore necessitate such an age limit for recruitment, whereas that limit was disproportionate in the case of the recruitment of local police officers.

73. The Court pointed out that the activities of police officers of an autonomous community, whose essential task is to ensure the safety of citizens throughout the territory of that community, may involve conditions where taking action is difficult, if not extremely difficult,\textsuperscript{36} whereas local police officers’ activities, which also include road traffic control and administrative tasks, do not require exceptionally high physical capacities comparable to those regularly required of officials in the fire service assigned to fighting fires.\textsuperscript{37}

74. As regards employment as an airline pilot, the examination of proportionality followed a similar approach involving a different assessment depending on the context in which the activities are carried out.

75. With regard to the commercial transportation of passengers or freight, the Court ruled in the judgment in Prigge and Others\textsuperscript{38} that a requirement under a collective agreement for airline pilots to cease all activities at the age of 60 was not proportionate to the aim of protecting public security, having regard to the tasks involved.

\textsuperscript{31} Judgment of 12 January 2010 (C-229/08, EU:C:2010:3; ‘the judgment in Wolf’).
\textsuperscript{32} See the judgment in Wolf, paragraphs 41 and 43.
\textsuperscript{33} See the judgment in Wolf, paragraphs 43 and 44.
\textsuperscript{34} Judgment of 13 November 2014, Vital Pérez (C-416/13, EU:C:2014:2371).
\textsuperscript{35} Judgment of 15 November 2016, Salaberria Sorondo (C-258/15, EU:C:2016:873).
\textsuperscript{36} See judgment of 15 November 2016, Salaberria Sorondo (C-258/15, EU:C:2016:873, paragraph 41). I would also note that, as with fire service officials in the judgment in Wolf (paragraph 43), the alleged need to re-establish a satisfactory age pyramid made it necessary to recruit officers under 35 years of age.
\textsuperscript{37} See judgments of 13 November 2014, Vital Pérez (C-416/13, EU:C:2014:2371, paragraphs 53 and 54), and of 18 October 2017, Kalliri (C-409/16, EU:C:2017:767, paragraph 38).
\textsuperscript{38} Judgment of 13 September 2011 (C-447/09, EU:C:2011:573).
76. By contrast, where a pilot’s activities consist not in providing commercial flights but in ensuring the security of the State, the obligation to cease all activities as a pilot at the age of 60 was held, in the judgment in Cafaro, to be proportionate to the objective pursued, having regard to the nature of the activity and to the context in which it has to be carried out.

77. It follows from the case-law examined in this section that the requirement for a particularly high physical capacity, such as that required of fire service officials assigned to fighting fires in the judgment in Wolf, must be confined to the most demanding duties within a given occupation. With respect to fire service officials, police officers and airline pilots, it is necessary to ascertain whether or not there are any posts for which a lower level of physical capacity would be sufficient, so that persons wishing to work in those posts are not automatically and disproportionately excluded on the basis of their age.

78. I consider that that case-law can be applied to other forms of discrimination, in particular discrimination on grounds of disability. However, with regard to such discrimination, Article 5 of Directive 2000/78 also provides for the adoption of ‘reasonable accommodation’ measures for disabled persons. I shall examine such measures in the next section.

3. The consideration to be given to the disability

79. As regards persons with disabilities, it is therefore necessary to ascertain, on the basis of the case-law examined in the preceding section, whether those persons can be assigned to specific posts within the professions or occupations considered.

80. Article 5 of Directive 2000/78 further reinforces that requirement by imposing on employers an obligation to provide ‘reasonable accommodation’ for persons with disabilities, provided that this does not constitute a disproportionate burden. Reasonable accommodation is defined in that provision as appropriate measures, where needed in a particular case, to enable a person with a disability, inter alia, to have access to, participate in, or advance in employment.

81. Article 5 of Directive 2000/78 makes clear that it is necessary for both public and private employers to take into account the needs of persons with disabilities and to facilitate their integration at work. Article 5 imposes on employers an obligation to provide reasonable accommodation for their employees with a disability provided that this does not constitute a disproportionate burden.

82. It follows from that provision that the situation of persons with disabilities must be the subject of a specific, or indeed individual, examination that takes into account their needs 'in a particular case'.

40 See, to that effect, judgment of 7 November 2019, Cafaro, (C:396/18, EU:C:2019:929, paragraphs 53 to 57). Similar reasoning was applied by the Court in the judgment of 22 May 2014, Glattel (C:356/12, EU:C:2014:350), with regard to driving and to the difference in visual acuity requirements imposed on drivers of heavy goods vehicles as against drivers of light vehicles. The Court held that, having regard to the requirements of road safety and in view of the differences in terms of the size of the vehicles, the number of passengers carried and the responsibilities resulting therefrom, stricter visual acuity requirements could be imposed on drivers of heavy goods vehicles than on drivers of light vehicles (see, to that effect, paragraphs 83 to 85 of that judgment).
41 Article 7 of Directive 2000/78 further provides that Member States may maintain or adopt positive actions and specific measures for persons with disabilities.
42 Article 3(1) of Directive 2000/78 provides that the directive is to apply to all persons, both public and private.
43 See judgments in HK Danmark, paragraph 49, and of 4 July 2013, Commission v Italy (C:312/11, not published, EU:C:2013:446, paragraph 62).
44 See Article 5 of Directive 2000/78 (emphasis added).
83. All employers are subject to an obligation to provide reasonable accommodation.\textsuperscript{45} The Court has held in the judgment in \textit{HK Danmark} that the concept of ‘reasonable accommodation’ should be understood broadly\textsuperscript{46} as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers.\textsuperscript{47} Recital 20 of Directive 2000/78 contains a list of reasonable accommodation measures of a physical, organisational or educational nature,\textsuperscript{48} which the Court has already stated is not an exhaustive list.\textsuperscript{49}

84. The Court has thus held that that directive precludes dismissal which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.\textsuperscript{50}

85. The judgment in \textit{HK Danmark} confirms and illustrates that interpretation. That judgment concerns a national law allowing a worker to be dismissed with reduced notice in the event of long-term absence because of illness.\textsuperscript{51} Under that law, disabled workers had been dismissed on account of their absences. It is clear from the facts in that judgment that those persons were able to work a limited number of hours per week. Moreover, following the dismissal of one of the workers, the employer had advertised a position for a part-time post.\textsuperscript{52} The Court held that it was necessary to examine whether or not a reasonable accommodation, in that case in the form of a reduction in working hours, would have allowed those workers to carry out their work without being an unreasonable burden on their employers\textsuperscript{53} and whether or not the absences which led to their dismissal were the result of the failure to adopt such accommodation measures.\textsuperscript{54}

86. The Court concluded that Directive 2000/78 precludes national legislation which permits the dismissal of disabled workers on account of their absences because of illness, where those absences are the consequence of the employer’s failure to provide reasonable accommodation in accordance with Article 5 of that directive.\textsuperscript{55}

87. In other words, in a situation where the adoption of reasonable accommodation measures would have enabled a disabled worker to meet the requirements of his employment, but the employer failed to take such measures, the dismissal of that worker on the ground that he does not meet those requirements is contrary to Directive 2000/78,\textsuperscript{56} and a national law which permits such dismissal is also contrary to that directive.

\textsuperscript{45} See judgment of 4 July 2013, \textit{Commission v Italy} (C-312/11, not published, EU:C:2013:446, paragraph 62). Judgment was given against Italy because its measures transposing Directive 2000/78 did not cover all employers (paragraph 67 of that judgment). In the judgment in \textit{HK Danmark} (paragraph 49), the Court confirmed that the employer is required to take appropriate action.

\textsuperscript{46} See the judgment in \textit{HK Danmark}, paragraph 53.

\textsuperscript{47} See the judgment in \textit{HK Danmark}, paragraph 54.

\textsuperscript{48} See, to that effect, judgment in \textit{HK Danmark}, paragraph 49.

\textsuperscript{49} See the judgment in \textit{HK Danmark}, paragraphs 49 and 56. Thus, although a reduction in working hours is not referred to in the list of appropriate measures to adapt the workplace to the disability in recital 20 of Directive 2000/78, it could be regarded as one of the reasonable accommodation measures referred to in Article 5 of that directive (see paragraph 64 of that judgment).

\textsuperscript{50} See judgment of 11 July 2006, \textit{Chacón Navas} (C-13/05, EU:C:2006:456, paragraph 51).

\textsuperscript{51} See the judgment in \textit{HK Danmark}, paragraph 13.

\textsuperscript{52} See the judgment in \textit{HK Danmark}, paragraph 62.

\textsuperscript{53} See the judgment in \textit{HK Danmark}, paragraphs 59 and 62.

\textsuperscript{54} See the judgment in \textit{HK Danmark}, paragraphs 67.

\textsuperscript{55} See, to that effect, the judgment in \textit{HK Danmark}, paragraph 68.

\textsuperscript{56} See, to the same effect, judgment of 11 September 2019, \textit{Nobel Plastiques Ibérica}, (C-397/18, EU:C:2019:703, paragraphs 71 and 75). It follows from that judgment that, if an employer has laid down criteria for dismissal based on standards of productivity, absenteeism and multi-skilling, the dismissal of a disabled worker on the ground that he does not fulfil those criteria, without reasonable accommodation within the meaning of Article 5 of Directive 2000/78 having been provided, constitutes discrimination on grounds of disability prohibited by that directive.
4. What conclusions can be drawn from that case-law for the present case?

88. I would point out that in the case in the main proceedings, the Minister for Justice maintains that the level of auditory acuity required by Regulation No 12, which is the same as that required for police officers, is justified by the need for every prison officer to be able, where necessary, to provide assistance to police officers inside the prison and therefore satisfy a requirement for interoperability. As I have pointed out, however, such a need cannot simply be deemed to exist, but must be established.  

89. The interoperability of officers may be necessary in particular circumstances, for example, in prisons exclusively for dangerous prisoners or prison wings for those prisoners. In such circumstances, requiring prison officers, in the same way as police officers, to have a high level of auditory acuity appears justified by the nature of their assigned duties and the context in which the duties are carried out.  

90. However, no evidence to that effect has been adduced in the present case, and it is for the national court to assess any such evidence.

91. In any event, even if a requirement for a specific level of auditory acuity, such as that laid down by Regulation No 12, is justified not so much on the basis of occasional assistance given to police officers, but in a general way by the nature of the duties carried out by prison officers, I would point out that Article 5 of Directive 2000/78 requires employers, in principle, to adopt reasonable accommodation measures. An employer is required to take appropriate measures for a disabled worker where needed in a particular case, provided that those measures do not constitute a disproportionate burden on the employer.

92. Such accommodation measures might be organisational in nature and consist in assigning the prison officer concerned to a service which does not normally require the same level of auditory acuity as that required for police officers. In a case such as that in the main proceedings, it would be appropriate to ascertain whether assignment to a position such as that to which the applicant in the main proceedings was most recently assigned, that is to say the electronic surveillance of prisoners, might allow him fully to meet the requirements of his employment.

93. The fact that a prison officer, such as the applicant in the main proceedings, was able to carry out the surveillance tasks assigned to him, to the satisfaction of his managers, is such as to demonstrate that assignment to another post was possible.

94. I would point out that if a person with a disability is capable of performing his duties, where appropriate after the adoption of reasonable accommodation measures as referred to in Article 5 of Directive 2000/78, the dismissal of that person on the sole ground that he does not meet an auditory acuity standard goes beyond what is necessary to achieve the objective of ensuring the operational capacity of the service and is tantamount to dismissing him solely on the basis of his disability in a manner contrary to that directive.

95. In addition to accommodation measures of an organisational nature, accommodation measures of a physical nature might be envisaged in a case such as that in the main proceedings.

57 See point 67 of this Opinion.
58 Such a requirement for interoperability could also be imposed if there was a shortage of prison officers in all the prisons of the Member State concerned or if that problem existed in the prison in question.
59 See point 18 of this Opinion.
60 See, to that effect, judgments of 11 July 2006, Clacón Navas (C-13/05, EU:C:2006:456), HK Danmark, and of 11 September 2019, Nobel Plastiques Ibérica (C-397/18, EU:C:2019:703), considered in Section 3 of this Opinion.
96. In that regard, it was suggested in the course of the proceedings before the national courts that a prison officer with a hearing disability could wear a device which enabled him to reach the level required by Regulation No 12.

97. It seems to me possible to regard authorisation to use such a device as a reasonable accommodation within the meaning of Article 5 of Directive 2000/78.

98. The applicant in the main proceedings, the Minister for Health and Labour, and the Chancellor of Justice are of the view that wearing such a device should be authorised, in the same way as glasses or contact lenses are authorised for correcting a visual impairment.

99. For his part, the Minister for Justice takes the view that there is no evidence that hearing aids provide, with respect to auditory acuity, a level of assistance and comfort comparable to that offered by glasses or contact lenses, with respect to vision. I would point out that, on the contrary, there is no evidence to show that the devices in question do not correct hearing impairments as effectively and with the same degree of comfort as glasses and contact lenses correct visual impairments. Since one device has been expressly authorised to remedy a disability, such as a visual impairment, it could be queried why the use of a device cannot be authorised in the same way to remedy a different sensory disability, such as a hearing impairment.

100. As regards whether the use of a device constitutes a disproportionate burden on the employer, no evidence to that effect was presented. The comparison with use of a device to correct vision suggests that wearing a hearing aid would not create such a disproportionate burden.

101. I would note, in any event, that since the use of a hearing aid is permitted for the performance of the duties of prison officers inside a prison and enables those who perform those duties to reach the level of auditory acuity required by Regulation No 12, it does not appear to be consistent to prohibit prison officers already in service or at the recruitment stage from performing the duties of supervising prisoners on the sole ground that, during the hearing test carried out without the aid of such a device, they do not reach that level.

102. I therefore consider that the automatic exclusion of any prison officer assigned to supervising prisoners or of any applicant for such duties, without regard to his ability to perform the assigned duties, on the sole ground that he does not meet the standard of auditory acuity laid down by a regulation such as Regulation No 12 is not proportionate to the objective of public security and of maintenance of order. It follows that such a regulation constitutes direct discrimination on the ground of disability, contrary to Article 2(2)(a) of Directive 2000/78.

V. Conclusion

103. In the light of the foregoing considerations, I propose that the Court answer as follows the question referred by the Riigikohus, põhiseaduslikkuse järelevalve kolleegium (Supreme Court, Constitutional Review Chamber, Estonia):

Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in conjunction with Article 4(1) and Article 5 of that directive, must be interpreted as precluding national legislation which strictly prohibits the continued employment of a prison officer on the sole ground that his auditory acuity is below the prescribed standard, without the employer having examined whether that person is capable of

61 The Minister for Justice has himself noted that fact.
performing the duties arising from his employment, where appropriate after the adoption of reasonable accommodation measures, as referred to in Article 5 thereof, such as assigning him to a particular service or authorising him to wear a hearing aid.