



Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 21 July 2016¹

Case C-258/15

Gorka Salaberria Sorondo

v

Academia Vasca de Policía y Emergencias

(Request for a preliminary ruling from the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Autonomous Community of the Basque Country, Spain))

(Preliminary reference — Equal treatment in employment and occupation — Discrimination on grounds of age — Directive 2000/78/EC — Age limit of 35 years for participation in a selection process for recruitment to the autonomous police force of the Basque Country — Physical capacities — Genuine and determining occupational requirement — Objective of ensuring the operational capacity and proper functioning of the police service — Objective of ensuring a reasonable period of employment before retirement — Training requirement objective — Proportionality)

I – Introduction

1. By decision of 1 April 2014,² the Directora General de la Academia Vasca de Policía y Emergencias (Director-General of the Basque Police and Emergency Services Academy, Spain) initiated a selection process for recruitment to the post of officer at the lowest rank (Escala Básica) of the police force of the Autonomous Community of the Basque Country (Ertzaintza). Section 2(1)(c) of that decision states that only candidates who are 18 to 35 years of age at the time they apply are eligible to take part in that selection process.

2. Mr Gorka Salaberria Sorondo, who is over 35 years of age, applied to take part in the selection process. Having initially been excluded, he was subsequently given temporary authorisation to take part, pending a decision on his action for annulment of section 2(1)(c) of the second requirement laid down in the decision of 1 April 2014 announcing the selection process.³

3. The police force for which recruitment is being organised is the police force of the Autonomous Community of the Basque Country. Ley Orgánica de Fuerzas y Cuerpos de Seguridad del Estado (Organic Law No 2/1986 on State security forces and services), of 13 March 1986 ('Organic law No 2/1986'),⁴ sets out the duties of the State law enforcement authorities, the police forces of the Autonomous Communities and the local police forces. With regard to the Autonomous Communities, Article 38(1) of Organic Law No 2/1986 provides that the particular duties of their police forces are '[to ensure] compliance with individual regulations and orders issued by the bodies of the Autonomous

1 — Original language: French.

2 — *Boletín Oficial del País Vasco* No 63 of 1 April 2014.

3 — Mr Salaberria Sorondo was eliminated at the fifth stage of the selection process (the personal interview). He has also brought an action against that elimination, an action which was still pending at the time the present reference for a preliminary ruling was made.

4 — BOE of 14 March 1986.

Community, [to guard and protect] the persons, institutions, buildings, establishments and offices of the Autonomous Community and of its authorities, ensuring the normal functioning of facilities and the safety of users of their services, [to inspect] activities subject to the regulations of the Autonomous Community, reporting any unlawful activity [and using] force for the purposes of enforcing acts or rules adopted by the Autonomous Community'. The police forces of the Autonomous Communities also carry out duties in collaboration with the State law enforcement authorities and must, inter alia, in that connection, 'ensure compliance with laws and other regulations of the State and guarantee the functioning of essential public services, ... participate in the operations of the investigative police ..., monitor public spaces, protect demonstrations and maintain order at large gatherings ...'.⁵ In any simultaneous, combined intervention with the State law enforcement authorities, the police forces of the Autonomous Communities must 'assist in the amicable resolution of private disputes, ... provide assistance in the event of accidents, disasters or public emergencies, by participating, as provided for by law, in the implementation of civil protection plans ... ensure compliance with measures for the conservation of nature and the environment, water resources, game, fish and forestry stocks, and any other natural resources'.⁶

4. Ley 4/1992 de Policías del País Vasco (Law No 4/1992 on the police force in the Basque Country) of 17 July 1992 ('Law No 4/1992')⁷ states, with regard to the duties of the Ertzaintza, that, 'within the powers exercised by the Autonomous Community of the Basque Country, the essential mission of the Ertzaintza is to protect people and property, to ensure that individuals can freely exercise their rights and freedoms and to ensure the safety of citizens throughout the territory of the Autonomous Community. To that end, the Ertzaintza will perform the duties conferred by law on the State security forces'.⁸ That law also states that the Ertzaintza is composed of different ranks. The lowest rank (Escala Básica) of the Basque Country police force — the rank for which the selection process is being organised in which Mr Salaberria Sorondo wished to take part — covers 'enforcement tasks that are required for law enforcement duties and tasks of commanding one or more officials in the rank on operational service'.⁹ Law No 4/1992 confers on the Basque Government the task of determining 'by means of regulation, the range of medical exclusions applying to recruitment to the ranks and categories of officers comprising the Basque Country police force, and also the age and height requirements'.¹⁰

5. Decreto 120/2010 de tercera modificación del decreto 315/1994 (Decree No 120/2010 amending for the third time Decree No 315/1994)¹¹ amended Article 4(b) of Decreto 315/1994 por el que se aprueba el Reglamento de Selección y Formación de la Policía del País Vasco (Decree No 315/1994 approving the rules on the selection and training processes of the Basque Country police force) of 19 July 1994, increasing to 35 years the maximum age of candidates eligible to take part in the selection process.¹²

6. Mr Salaberria Sorondo expressed doubts before the referring court as to whether Article 4(b) of Decree No 315/1994 thus amended was compatible with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.¹³

5 — Article 38(2) of Organic Law No 2/1986.

6 — Article 38(3) of Organic Law No 2/1986.

7 — BOE No 39 of 15 February 2012.

8 — Article 26(1) of Law No 4/1992.

9 — Article 106(1) of Law No 4/1992.

10 — The eighth additional provision of Law No 4/1992.

11 — *Boletín Oficial del País Vasco* No 82.

12 — In its original version, Decree No 315/1994 set that limit at 30 years, before the limit was amended, for the first time, in 2002 and increased to 32 years.

13 — OJ 2000 L 303, p. 16.

7. According to Article 1 of Directive 2000/78, its purpose 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’.¹⁴

8. It provides, furthermore, that ‘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’.¹⁵

9. Article 4(1) of Directive 2000/78, however, states that ‘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’. In addition, the first subparagraph of Article 6(1) of Directive 2000/78 provides that ‘Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’. Such differences of treatment ‘may include, among others ... the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement’.¹⁶

10. Taking the view that the notice of the selection process conflicted with the provisions of Directive 2000/78, Mr Salaberria Sorondo brought an administrative action against the decision of 1 April 2014 announcing a selection process for the recruitment of officers at the lowest rank of the police force of the Autonomous Community of the Basque Country.

11. The referring court notes that national courts have on several occasions ruled on age limits for recruitment to various police forces. It has itself already ruled that an age limit of 32 years was compatible with Directive 2000/78. However, the Court of Justice held, in its judgment in *Vital Pérez*,¹⁷ that that directive precluded the fixing of an age limit of 30 years for the recruitment of local police officers for the municipality of Oviedo (Spain). The referring court states however that the duties carried out by the police force of the Autonomous Community of the Basque Country differ from those considered by the Court in its judgment in *Vital Pérez*,¹⁸ inter alia, because the police force of the Autonomous Community of the Basque Country may be required to carry out duties that are in principle assigned to the State enforcement authorities.¹⁹ Furthermore, in Spanish law, maximum age limits vary depending on the police force and the duties concerned, but they are laid down at the discretion of the legislature. At international level, as the referring court also points out,

14 — Article 1 of Directive 2000/78.

15 — Article 2(2)(a) of Directive 2000/78.

16 — Article 6(1), second subparagraph, (c) of Directive 2000/78.

17 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371).

18 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371).

19 — The duties assigned to State law enforcement authorities are set out in Article 11 of Organic Law No 2/1986. They consist in ensuring compliance with general laws and regulations, by following the orders received from the authorities; assisting and protecting people and ensuring the protection and guarding of goods in jeopardy; guarding and protecting public premises and buildings as required; ensuring the protection and safety of high-profile people; maintaining and re-establishing public order and security; investigating crimes in order to determine and apprehend the presumed perpetrators; seizing the instruments, goods and evidence associated with the crime and making same available to the judge or court having jurisdiction, and drawing up or having drawn up the relevant technical and expert reports; preventing criminal acts; gathering, receiving and analysing all information relevant to public order and security, and studying, planning and implementing technical methods for preventing crime; and cooperating with the civil protection services in the event of serious risk, disaster or public calamity.

practices differ considerably and it is not unusual for States not to lay down any age limit.²⁰ Nonetheless, the referring court seems to take the view that law enforcement is an activity which, due to its special nature, justifies the imposition of a maximum age for the initial recruitment of officers due to the fact that the latter must be able to carry out all the law enforcement duties characteristic of ‘an integrated police force’ such as that of the Basque Country.

II – The question referred and the procedure before the Court

12. Thus confronted with a difficulty in the interpretation of EU law, the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Autonomous Community of the Basque Country, Spain) decided to stay the proceedings and, by order received at the Registry of the Court on 1 June 2015, to refer the following question for a preliminary ruling:

‘Is the setting of a maximum age of 35 years as a condition for participation in the selection process for recruitment to the post of officer of the police force of the Autonomous Community of the Basque Country compatible with the interpretation of Article 2(2), Article 4(1) and Article 6(1)(c) of Directive 2000/78?’

13. Written observations were submitted by the applicant in the main proceedings, the defendant in the main proceedings, the Spanish Government, Ireland, the French and Italian Governments, and the European Commission. All those parties also presented oral argument at the hearing held at the Court on 30 May 2016.

III – Legal assessment

14. In essence, the question raised by the referring court is the same as that referred in *Vital Pérez*,²¹ but the context in which it arises is different in as much as the police force in the present case is not that of a municipality but of an Autonomous Community. The duties concerned differ significantly. Furthermore, the relevant age limit in *Vital Pérez*²² was 30 years. In Mr Salaberria Sorondo’s case a higher limit of 35 years had been set.

15. Despite those differences, which I shall come back to later, the judgment in *Vital Pérez*²³ has already resolved a number of preliminary issues of relevance in the present case.

16. In the first place, national legislation such as Decree No 315/1994, as amended, which the decision of 1 April 2014 announcing the selection process merely implemented, affects police officers’ recruitment conditions, by providing that persons over 35 years of age cannot be recruited into the police force of the Autonomous Community of the Basque Country. Hence, Directive 2000/78 does apply to that situation.²⁴

20 — The referring court cites in that regard the examples of the United States of America, Israel, the Kingdom of Norway and New Zealand and, so far as the Member States of the European Union are concerned, the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden.

21 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371).

22 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371).

23 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371).

24 — By analogy, see judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraphs 30 and 31). Article 3(1)(a) of Directive 2000/78 provides that that directive applies to all persons, as regards both the public and private sectors, including public bodies, in relation inter alia to conditions for access to employment, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy. I also note that, although it is enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, in proceedings involving an individual and a public administrative body concerning the general principle of non-discrimination on grounds of age, the Court examines the question solely in the light of Directive 2000/78 (see judgments of 7 June 2012, *Tyrolean Airways Tiroler Luftfahrt Gesellschaft* (C-132/11, EU:C:2012:329, paragraphs 21 to 23), and of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 25)).

17. Secondly, as regards the existence of a difference of treatment on grounds of age, Article 2(2)(a) of Directive 2000/78 provides that direct discrimination occurs where one person is treated less favourably than another in a comparable situation, on grounds, inter alia, of age. Article 4(b) of Decree No 315/199, as amended, has the consequence that certain persons are treated less favourably than other persons in comparable situations on the sole ground that they have exceeded the age of 35 years. It is obvious that this is a difference of treatment based directly on age.²⁵

18. There now remains the more delicate question of whether that difference of treatment is justified under Article 4(1) or Article 6(1) of Directive 2000/78.

A – Interpretation of Article 4(1) of Directive 2000/78

19. Article 4(1) of Directive 2000/78 reads ‘Member States may provide that a difference of treatment which is based on [age] 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’.

20. The Spanish Government, Ireland, and the French and Italian Governments maintain that the national legislation setting the age limit for participating in the selection process for the police force of the Autonomous Community of the Basque Country at 35 years is justified under that provision, since the duties carried out by its officers call for a particularly high level of physical fitness, which constitutes a genuine and determining occupational requirement, and that that legislation pursues the legitimate objective of ensuring the operational capacity and proper functioning of the police service, whilst being proportionate. On the other hand, the applicant in the main proceedings and the Commission question whether the age limit in question complies with Article 4(1) of Directive 2000/78.

21. So far as the interpretation of Article 4(1) of Directive 2000/78 is concerned, in view of the similarities between the present case and the *Vital Pérez* case,²⁶ guidance can in several respects be obtained from the latter. As a preliminary, it should be noted that recital 23 of Directive 2000/78 states that it is only in very limited circumstances that a difference of treatment may be justified where a characteristic related to age constitutes a genuine and determining occupational requirement and that, in so far as it allows a derogation from the principle of non-discrimination, Article 4(1) of that directive must be interpreted strictly.²⁷

22. Bearing that in mind, I shall, first, substantiate the presence of a genuine and determining occupational requirement and a legitimate objective and, secondly, determine whether the national legislation at issue in the main proceedings complies with the principle of proportionality.

1. The existence of a genuine and determining occupational requirement and pursuit of a legitimate objective

23. It is not disputed by the parties involved in the present preliminary ruling procedure that the possession of particular physical capacities may be regarded as a ‘genuine and determining occupational requirement’ within the meaning of Article 4(1) of Directive 2000/78 to perform the duties of an officer in the police force of the Autonomous Community of the Basque Country. The Court has already held that ‘tasks relating to the protection of persons and property, the arrest and

25 — See, by analogy, the judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 33).

26 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371).

27 — See judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraphs 46 and 47).

custody of offenders and the conduct of crime prevention patrols may require the use of physical force'.²⁸ The nature of those duties does require a particular physical capability since physical defects may have significant consequences for police officers, for the public and also for the maintenance of public order.²⁹ Furthermore, the possession of particular physical capacities is one characteristic relating to age.³⁰

24. In those circumstances, it must be conceded, in the light of recent developments in the case-law of the Court, that the possession of particularly significant physical capacities, in order to be able to protect persons and property, to ensure the free exercise of rights and freedoms of everyone and to ensure the safety of citizens, which are the three essential functions of the police force of the Autonomous Community of the Basque Country described — albeit somewhat vaguely — in Article 26(1) of Law No 4/1992,³¹ constitutes a genuine and determining requirement for engaging in that occupation.

25. It is also common ground that the objective of the legislation at issue may be described as legitimate. The possession of particular physical capacities, which is what is sought through setting an age limit for participating in the selection process for the police force of the Autonomous Community of the Basque Country, is required in order to ensure the operational capacity and proper functioning of police services, by ensuring that newly-recruited officers are able to perform the more physically demanding tasks for a relatively long period of their career. Moreover, noting *inter alia* the content of recital 18 of Directive 2000/78,³² the Court has held that that concern constitutes a legitimate objective within the meaning of Article 4(1) of that directive.³³

26. The only question that remains unanswered is whether, in setting the age limit at 35 years, the national legislation at issue in the main proceedings is proportionate, meaning whether that limit is appropriate for attaining the objective pursued and does not go beyond what is necessary in order to attain it.

2. The proportionality of the national legislation

27. At this stage of the analysis it is necessary to establish whether the setting of an age limit of 35 years for joining the police force of the Autonomous Community of the Basque Country constitutes a necessary and proportionate measure in the light of the legitimate objective of ensuring the operational capacity and proper functioning of the police service of that Community.

28. In addition to the existence of statistics that provide objective evidence that the average age of the police force of the Autonomous Community of the Basque Country will inevitably increase, the assignment of duties characteristic of 'a comprehensive police force', and the reports annexed to the observations of the Basque Police and Emergency Services Academy containing data provided by the occupational health service,³⁴ the fact that the age limit at issue in the main proceedings is five years

28 — See judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 39).

29 — See judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 40 and the case-law cited).

30 — See judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 37 and the case-law cited).

31 — See point 4 of this Opinion.

32 — Which states that 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' (emphasis added).

33 — See judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraphs 42 to 44 and the case-law cited).

34 — It must be recognised however that the scientific information contained in those reports is relatively brief in comparison with that supplied to the Court in connection with the *Wolf* case (judgment of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3).

higher constitutes further reason to think that the Court should adopt in this case a different approach from that adopted in the *Vital Pérez* case.³⁵ The focus must therefore be on those factors which single out and characterise the situation of officers of the police force of the Autonomous Community of the Basque Country.

29. As regards the nature of the duties and the career path of an officer in that police force, it is apparent from the documents submitted and the discussion before the Court that the selection process in which the applicant in the main proceedings wished to take part is the only selection process for recruitment as an officer in the police force of the Autonomous Community of the Basque Country. Such an officer's duties are essentially operational. An officer in the lowest rank will not be assigned to administrative tasks, since members of the purely administrative staff are recruited through a different selection process, which is organised wholly separately from the process at issue in the main proceedings. At the time of his recruitment, an officer is expected to be able to carry out any task characteristic of his occupation.

30. Once the selection process has been successfully completed, a 27-month period of initial training³⁶ begins. The selection process is a general one: specialisation, if any, takes place only in the course of an official's career, through in-service training. It is not possible therefore to distinguish in advance between officers whose main activity will involve duties of a mainly physical nature from those whose duties will tend to be less physically demanding, such as forensic scientists. In any event, it is expected that lowest rank police officers, until they reach a level of specialisation, will be capable of undertaking the physical tasks characteristic of their duties.

31. Next, due to his constant exposure to risk and stress, provision is made for an officer of the police force of the Autonomous Community of the Basque Country, at his request, to be placed on modified active service from the age of 56. Modified active service means exemption from night work, exemption from patrols away from police stations and reduction in weekly working time. In exchange, the officer undertakes to retire at the age of 59 or 60 instead of the normal age of 65. In practice, according to the Basque Police and Emergency Services Academy, nearly all the officers of the police force of the Autonomous Community of the Basque Country who are of an age to be eligible for modified active service ask to be transferred to it.

32. Lastly, the police force of the Autonomous Community of the Basque Country is a force which is objectively faced with the fact that the average age of its workforce is significantly increasing. The data supplied to the Court by the Basque Police and Emergency Services Academy show that the force is currently made up of 8 000 officers. In 2009, 59 officers were aged between 60 and 65 and 1 399 were aged between 50 and 59. By 2018, 1 135 officers will be aged between 60 and 65, and 4 660 officers, that is to say over half the workforce, will be aged between 50 and 59. The projection for 2025 is that by then over 50% of the workforce will be between 55 and 65 years of age.³⁷

33. It is also clear from the reports which the Basque Police and Emergency Services Academy annexed to its written observations that, from the age of 40, a marked decline is noticeable in recovery capacity. An appreciable effect on operational abilities occurs from the ages of 40 to 45 onwards due to age-related impairment and, in any event, an officer aged over 55 cannot be regarded as being in full possession of the physical and mental capacities required in order to carry out his job properly without incurring any risks either to himself or to others.

35 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371).

36 — Consisting of 9 months of actual training and 18 months of on-the-job training.

37 — That is due inter alia to the fact that the police force of the Autonomous Community of the Basque Country was formed in the 1980s, after the Basque Country attained the status of an Autonomous Community in 1979.

34. As a result, a person who is 35 years of age at the time of the selection process, if he is successful, takes up his duties after the initial 27 months of training, thus at the age of 37. It is to be expected that he will provide 13 years of service at the maximum level of his mental and physical capacities, which will decline significantly until he transfers to modified active service.

35. As I mentioned above, the mission assigned to the police force of the Autonomous Community of the Basque Country is to protect persons and property, to ensure the free exercise of rights and freedoms and to ensure the safety of citizens throughout the Autonomous Community. The duties performed by the police force of the Autonomous Community of the Basque Country are those of ‘a comprehensive police force’. In contrast to the duties in question in the *Vital Pérez* case,³⁸ the duties performed by the police force of the Autonomous Community of the Basque Country, viewed overall, genuinely appear to require a high level of physical fitness in order to cope with all the physical challenges that a police officer faces in carrying out all his duties. Tasks associated with the maintenance of public order require officers to act and react at any moment — including at night-time or in extreme conditions — in an appropriate manner and in accordance with the aim being pursued, which is to restore social order. Besides performing the duties traditionally assigned to ‘a comprehensive police force’, officers of the police force of the Autonomous Community of the Basque Country must also be capable of carrying, for example, the special personal safety equipment supplied to them.

36. In those circumstances, and in the light of what the Court held in the *Wolf* case,³⁹ I am inclined to the view that, in order to ensure the effective operation of the police force of the Autonomous Community of the Basque Country, it may be considered necessary for the majority of police officers to be capable of carrying out the more physically demanding tasks — which an officer over the age of 50 can perform less effectively and which an officer over the age of 55 is no longer capable of undertaking at all. The transfer by 2025 — that is to say within nine years — of nearly half the workforce to modified active service requires measures to be taken now to restore a degree of balance between the more active officers and those who are less so. Maintenance of a relatively balanced age profile within the forces of law and order of the Autonomous Community of the Basque Country is clearly necessary in order to safeguard the operational capacity of the police force of the Autonomous Community of the Basque Country.⁴⁰ With its present profile, if recruitment were to take place without an age limit or with a higher limit, the result might be that too great a number of officials could not be assigned to perform the more physically demanding tasks.⁴¹

37. That fact demonstrates that a reasonable organisation of the police force of the Autonomous Community of the Basque Country requires, in order to ensure the operational capacity and proper functioning of the police services — at least in the medium term — the restoration of a correlation between physically demanding posts that are not suitable for the older officials and less physically demanding posts that are suitable for such officials,⁴² especially since the Court has acknowledged that physical weaknesses in the exercise of tasks relating inter alia to the protection of persons and property, the arrest and custody of offenders and the conduct of crime prevention patrols may have significant consequences not only for the police officers themselves and for other people but also for

38 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371).

39 — Judgment of 12 January 2010 (C-229/08, EU:C:2010:3).

40 — In its judgment of 12 January 2010, *Wolf* (C-229/08, EU:C:2010:3), the Court accepted that the assignment of older officials to duties which are less physically demanding requires them to be replaced by younger officials (see paragraph 43 of that judgment).

41 — By analogy, see judgment of 12 January 2010, *Wolf* (C-229/08, EU:C:2010:3, paragraph 43).

42 — *Idem*.

the maintenance of public order.⁴³ This applies *a fortiori* in respect of the additional duties incumbent on the police forces of the Autonomous Communities involving the use of force for the purposes of enforcement, the protection of demonstrations and the maintenance of order at large gatherings, and also to combat terrorism.⁴⁴

38. Furthermore, the feared deficiencies in the operation of the law enforcement services of the Autonomous Community of the Basque Country preclude holding rigorous, eliminatory physical tests as part of the entry selection process as a less restrictive alternative. The objective of preserving the operational capacity and proper functioning of the police force of the Autonomous Community of the Basque Country requires the restoration of a certain age structure, so that the possession of particular physical capacities must not be envisaged statically, solely at the particular point in time of the selection process, but rather in a dynamically, taking into consideration also the years of service which will follow the successful outcome of that process.

39. It is also due to the very special situation of the police force of the Autonomous Community of the Basque Country that the comparison with age limits for other police forces operating within the national territory, which were taken into consideration by the Court in the context of the *Vital Pérez* case,⁴⁵ ceases to be the decisive factor.⁴⁶

40. For all the above reasons, I take the view that the Court should not remain indifferent to the organisational difficulties encountered by the police force of the Autonomous Community of the Basque Country — whether current or future — and should therefore find that the national legislation at issue in the main proceedings is compatible with Article 4(1) of Directive 2000/78.

41. However, I am also convinced that that compatibility should be found to exist only for so long as is strictly necessary in order to restore a particular age structure which is no longer such that it jeopardises the operational capacity and proper functioning of the police force of the Autonomous Community of the Basque Country.

42. It follows from the foregoing that Article 4(1) of Directive 2000/78 must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which sets the maximum age for recruitment of officers of the police force of the Autonomous Community of the Basque Country at 35 years, in so far as it is strictly necessary in order to restore an age structure which no longer jeopardises the operational capacity and proper functioning of that police force.

43 — See judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 40 and the case-law cited).

44 — In that regard, the Spanish Government states that the terrorist organisation ETA is made up of young members and that an effective campaign against that organisation requires the existence of personnel equipped with equivalent material and human resources, who are in particular in peak physical condition (see paragraph 34 of the Spanish Government's written observations). In addition, the surveillance of that organisation calls for the conduct of many night-time missions, from which older officers are exempt. The Spanish Government does not, however, quantify the number of basic-rank officers in the police force of the Autonomous Community of the Basque Country involved in combating terrorism.

45 — Judgment of 13 November 2014 (C-416/13, EU:C:2014:2371, paragraphs 50 and 51).

46 — There are 65 000 officers in the Spanish national police force. On 5 May 2016, 34% of the workforce were aged between 18 and 35 and 32% were aged between 36 and 44. 66% of officers in the national police force were therefore between 18 and 44 years of age. The Spanish Government also stated that the duties of the national police force include more bureaucratic or administrative tasks than those of the police forces of the Autonomous Communities. That information was provided by the Spanish Government in response to a question put to it by the Court at the hearing seeking clarification as to why the age limit had been abolished for entry to the national police force.

B – *Interpretation of Article 6(1) of Directive 2000/78*

43. Given that the difference of treatment introduced by the national legislation setting at 35 the age limit for participating in the selection process for the police force of the Autonomous Community of the Basque Country appears to me to be justified in the light of Article 4(1) of Directive 2000/78, there is no need to examine whether it would be justified under Article 6(1) of that directive.⁴⁷ It is therefore only very much in the alternative that I shall make just a few comments on that point.

44. The first subparagraph of Article 6(1) of Directive 2000/78 provides that ‘Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary’. Such differences of treatment ‘may include, among others ... the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement’.⁴⁸

45. The explanatory notes to Decree No 120/2010 provide little clarification to identify the objective pursued by setting an age limit of 35 for participating in the selection process for the police force of the Autonomous Community of the Basque Country.⁴⁹ Since the parties’ observations in the course of the present preliminary ruling procedure have focused mainly on analysis of Article 4(1) of Directive 2000/78, the documents in the case do not contain as much potentially useful information in respect of the application of Article 6(1) of that directive.

46. However, the (Basque Police and Emergency Services Academy puts forward the objective of ensuring the organisational and financial equilibrium of the Basque police force or the need to create a balanced age structure. The Spanish Government, for its part, refers to the training requirement, the need for a reasonable period of employment before retirement and considerations relating to employment policy, without going further into those points.

47. The objective of ensuring a reasonable period of employment before retirement and the justification for setting a maximum age limit based on the training required are objectives whose legitimacy stems directly from the wording of Article 6(1) of Directive 2000/78.⁵⁰

48. I have reservations, however, as to whether the pursuit and maintenance of the organisational and financial equilibrium of the police force of the Autonomous Community of the Basque Country or the need to create a balanced age structure constitute legitimate objectives under Article 6(1) of Directive 2000/78, since those objectives are, in the view of the Court, ‘social policy objectives, such as those related to employment policy, the labour market or vocational training’.⁵¹

47 — See judgment of 12 January 2010, *Wolf* (C-229/08, EU:C:2010:3, paragraph 45).

48 — Article 6(1), second subparagraph, heading (c), of Directive 2000/78.

49 — It speaks of ‘extend[ing] opportunities for recruitment to the police force of the Basque Country to a larger number of citizens (both men and women) and ensur[ing] that persons who belong to that force have developed the maximum potential their work requires’.

50 — See also paragraph 65 of the judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371).

51 — See judgments of 5 March 2009, *Age Concern England* (C-388/07, EU:C:2009:128, paragraph 46); of 18 June 2009, *Hütter* (C-88/08, EU:C:2009:381, paragraph 41); and of 13 September 2011, *Prigge and Others* (C-447/09, EU:C:2011:573, paragraph 81). With regard to the distinction between public interest objectives and the objectives covered by Article 6(1) of Directive 2000/78, see my Opinion in the *Vital Pérez* case (EU:C:2014:2109, point 42 et seq.). As regards the need to establish a balanced age structure, the Court has recognised that aim to be legitimate for the purposes of applying that provision only in so far as that objective is directed at furthering employment objectives such as, in particular, encouraging recruitment, especially of young people, in the interests of sharing work among the generations (see my Opinion in *Vital Pérez* (EU:C:2014:2109, points 50 and 51). See also judgments of 16 October 2007, *Palacios de la Villa* (C-411/05, EU:C:2007:604, paragraph 53); of 21 July 2011, *Fuchs and Köhler* (C-159/10 and C-160/10, EU:C:2011:508, paragraph 68); of 6 November 2012, *Commission v Hungary* (C-286/12, EU:C:2012:687, paragraph 62); and of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 63). Subject to possible further investigation by the referring court, the Spanish Government does not appear to have linked the objective of creating a balanced age structure to employment policy objectives as such.

49. In any event, once a legitimate objective, according to Article 6(1) of Directive 2000/78, has been identified, it will remain to be determined whether setting 35 as a maximum age limit exceeds what is appropriate and necessary for attaining that objective.

50. Member States unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy. That discretion is however limited in that it cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age.⁵² As regards the objective concerning the training required for the post of officer in the police force of the Autonomous Community of the Basque Country, the documents in the case contain nothing that would justify such an age limit. Furthermore, as regards the objective of ensuring a reasonable period of employment before retirement, the 'normal' retirement age for officers in that police force is 65, so, in theory, even an officer who is recruited at the age of 40 could remain in his job for 25 years.⁵³

51. Consequently, I find it difficult to consider that the age limit of 35 for joining the police force of the Autonomous Community of the Basque Country might appear to be justified on the basis of Article 6(1) of Directive 2000/78.

IV – Conclusion

52. In the light of the above considerations, I propose that the Court should give the following answer to the question referred for a preliminary ruling by the Tribunal Superior de Justicia de la Comunidad Autónoma del País Vasco (High Court of Justice of the Autonomous Community of the Basque Country, Spain):

Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which sets the maximum age for recruitment of officers of the police force of the Autonomous Community of the Basque Country at 35 years, in so far as that limit is strictly necessary in order to restore an age structure which no longer jeopardises the operational capacity and proper functioning of that police service.

52 — See judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371, paragraph 67 and the case-law cited).

53 — Even if the officer does not actually spend all of those 25 years in normal service due to age-related mental or physical impairment. Furthermore, no argument can be accepted in connection with the pension entitlement of officers who are late recruits to the police force of the Autonomous Community of the Basque Country. Even if such a ground for justification were admissible on the basis of Article 6(1) of Directive 2000/78, I note that, first, the Spanish Government clearly dismissed such justification during the hearing and, secondly, since current socio-economic conditions make a career path increasingly less linear, it is legitimate to assume that an officer who is recruited at the age of 40 will have contributed towards his pension during his working life prior to joining the police force.