



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

7 December 2023*

(Reference for a preliminary ruling – Social policy – Equal treatment in employment and occupation – Directive 2000/78/EC – Article 2(5) – Prohibition of discrimination on grounds of age – United Nations Convention on the Rights of Persons with Disabilities – Article 19 – Living independently and being included in the community – Charter of Fundamental Rights of the European Union – Article 26 – Social and occupational integration of persons with disabilities – Personal assistance service for persons with disabilities – Job offer stating a minimum age and maximum age of the person to be hired – Account taken of the wishes and interests of the disabled person – Justification)

In Case C-518/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Federal Labour Court, Germany), made by decision of 24 February 2022, received at the Court on 3 August 2022, in the proceedings

J.M.P.

v

AP Assistenzprofis GmbH,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, F. Biltgen, N. Wahl, J. Passer and M.L. Arastey Sahún (Rapporteur), Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- J.M.P., by T. Nick, Rechtsanwalt,
- AP Assistenzprofis GmbH, by O. Viehweg, Rechtsanwalt,

* Language of the case: German.

- the Greek Government, by V. Baroutas and M. Tassopoulou, acting as Agents,
 - the Polish Government, by B. Majczyna, acting as Agent,
 - the Portuguese Government, by P. Barros da Costa and A. Pimenta, acting as Agents,
 - the European Commission, by D. Martin and E. Schmidt, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 13 July 2023,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(5), Article 4(1), Article 6(1) and Article 7 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), read in the light of the Charter of Fundamental Rights of the European Union ('the Charter') and the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Union by Council Decision 2010/48/EC of 26 November 2009 (OJ 2010 L 23, p. 35; 'the UN Convention').
- 2 The request has been made in proceedings between J.M.P. and AP Assistenzprofis GmbH, a provider of assistance and advisory services to persons with disabilities, concerning the payment of compensation sought by J.M.P. for alleged discrimination on grounds of age occurring in the context of a recruitment procedure.

Legal context

International law

- 3 The preamble to the UN Convention reads as follows:

'The States Parties to the present Convention,

...

- (c) *Reaffirming* the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination,

...

- (h) *Recognising* also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person,

...

(j) *Recognising* the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support,

...

(n) *Recognising* the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices,

...'

4 Article 1 of that convention, entitled 'Purpose', provides:

'The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

...'

5 Article 3 of that convention, entitled 'General principles', states:

'The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) Non-discrimination;

(c) Full and effective participation and inclusion in society;

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

...'

6 Article 5 of that convention, entitled 'Equality and non-discrimination', is worded as follows:

'1. States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

...

4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.'

7 Article 12 of the UN Convention, entitled 'Equal recognition before the law', provides, in paragraph 2 thereof:

'States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.'

- 8 Under Article 19 of that convention, entitled ‘Living independently and being included in the community’:

‘States Parties to the present Convention recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.’

European Union law

- 9 Recitals 23 and 25 of Directive 2000/78 state:

‘(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 [European] Commission.

...

(25) The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited.’

- 10 Article 1 of that directive, entitled ‘Purpose’, provides:

‘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.’

- 11 Article 2 of that directive is worded as follows:

‘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.'

12 Article 3 of that directive, entitled 'Scope', provides, in paragraph 1(a) thereof:

'Within the limits of the areas of competence conferred on the Community, 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'.

13 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.'

14 Article 6 of that directive, entitled 'Justification of differences of treatment on grounds of age', provides:

'1. Notwithstanding Article 2(2), 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:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

- (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
- (c) 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.

...'

15 Article 7 of that directive, entitled 'Positive action', provides:

'1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.

2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.'

German law

The GG

16 Article 1 of the Grundgesetz für die Bundesrepublik Deutschland (Basic Law of the Federal Republic of Germany) of 23 May 1949 (BGBl. 1949 I, p. 1), in the version applicable to the dispute in the main proceedings ('the GG'), is worded as follows:

'1. Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

...'

17 Article 2(1) of the GG provides:

'Every person shall have the right to free development of his or her personality in so far as he or she does not infringe the rights of others or offend against the constitutional order or the moral law.'

The AGG

18 The Allgemeines Gleichbehandlungsgesetz (General Law on Equal Treatment) of 14 August 2006 (BGBl. 2006 I, p. 1897; 'the AGG') is intended to transpose Directive 2000/78 into German law.

19 Under Paragraph 1 of the AGG:

'The purpose of this Law is to prevent or eliminate any disadvantage on the grounds of race or ethnic origin, sex, religion or belief, disability, age or sexual identity.'

20 Paragraph 3(1) of the AGG provides:

‘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 Paragraph 1. ...’

21 Paragraph 5 of the AGG provides:

‘Notwithstanding the grounds referred to in Paragraphs 8 to 10 ..., a difference of treatment shall also be permitted where there are adequate and appropriate measures intended to prevent or compensate for disadvantages existing on one of the grounds stated in Paragraph 1.’

22 Paragraph 7(1) of the AGG is worded as follows:

‘Employees may not be discriminated against in any way on any of the grounds referred to in Paragraph 1; ...’

23 Paragraph 8(1) of the AGG provides:

‘A difference of treatment on one of the grounds referred to in Paragraph 1 shall be permitted where, by reason of the nature of the activity to be carried out or of the context in which it is carried out, that ground constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’

24 Under Paragraph 10 of the AGG:

‘Notwithstanding Paragraph 8, a difference of treatment on grounds of age shall also be permitted where it is objectively and reasonably justified by a legitimate aim. The means deployed to achieve that aim must be appropriate and necessary. Such differences of treatment may include, among others:

1. the setting of special conditions on access to employment and vocational training, employment and occupation, including remuneration conditions and conditions related to the termination of the employment relationship, for young people, older employees and persons with caring responsibilities, in order to promote their vocational integration or ensure their protection;
2. the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
3. the fixing of a maximum age for recruitment which is based on the specific training requirements of the post in question or the need for a reasonable period of employment before retirement;

...’

25 Paragraph 15 of the AGG provides:

‘1. In the event of an infringement of the prohibition of discrimination, the employer shall be required to provide compensation for the resulting damage. ...’

2. In the case of damage other than material damage, the employee may claim appropriate monetary compensation. ...'

The SGB

26 Paragraph 33 of the Sozialgesetzbuch, Erstes Buch (I) (Book I of the Social Security Code), of 11 December 1975 (BGBl. 1975 I, p. 3015; 'the SGB I'), provides:

'If the content of rights or obligations is not defined in detail in terms of their nature or scope, account shall be taken, when they are given effect, of the personal circumstances of the person entitled or the person subject to obligations, his or her needs and capacity to contribute, and local conditions, provided that legal provisions do not preclude such account from being taken. In that regard, the wishes of the person entitled or the person subject to obligations must be respected in so far as they are reasonable.'

27 Paragraph 8(1) of the Sozialgesetzbuch, Neuntes Buch (IX) (Book IX of the Social Security Code), of 23 December 2016 (BGBl. 2016 I, p. 3234; 'the SGB IX'), is worded as follows:

'When deciding on services and in the performance of services intended to promote participation [in the community], the legitimate wishes of persons entitled to receive services shall be respected. In that regard, account shall also be taken of the personal circumstances, age, sex, family and religious and philosophical needs of persons entitled to receive services; Paragraph 33 of [the SGB I] shall otherwise apply. ...'

28 Paragraph 78(1) of the SGB IX provides:

'Assistance services shall be provided to enable the self-determined and independent management of everyday life, including the structuring of a daily routine. They shall include, in particular, services in connection with general everyday tasks such as managing a household, forming social relationships, planning day-to-day life, participating in social and cultural life, organising leisure activities, including sports, and ensuring the effectiveness of medical and medically prescribed services. They shall entail interaction with the persons involved in those areas.'

The dispute in the main proceedings and the question referred for a preliminary ruling

29 AP Assistenzprofis, the defendant and respondent in the appeal on a point of law in the main proceedings ('the defendant'), is a company which offers disabled persons assistance and advisory services in relation to the self-determined and independent management of their everyday life, in accordance with Paragraph 78(1) of the SGB IX.

30 In July 2018, that company published a job offer stating that A., a 28-year-old female student, was looking for female personal assistants, who should be 'preferably between 18 and 30 years old', to help her in all areas of everyday life.

31 J.M.P., the applicant and appellant in the appeal on a point of law in the main proceedings ('the applicant'), who was born in 1968, applied for that job and received a rejection from AP Assistenzprofis.

- 32 After having exercised her rights out of court, J.M.P. brought an action against AP Assistenzprofis before the Arbeitsgericht Köln (Labour Court, Cologne, Germany) seeking compensation for damage resulting from discrimination on grounds of age, pursuant to Paragraph 15(2) of the AGG.
- 33 In that action, J.M.P. argued, first, that, since the job offer was expressly addressed to persons aged ‘between 18 and 30 years old’, that allowed the presumption that her application was rejected in the recruitment procedure solely on account of her age, and that AP Assistenzprofis has not rebutted that presumption. Second, the ensuing difference of treatment on grounds of age is not justified having regard to the nature of the personal assistance services, nor is it permitted under Paragraph 8(1) or Paragraph 10 of the AGG, in particular since a specific age is irrelevant in terms of the relationship of trust in the context of such personal assistance.
- 34 AP Assistenzprofis contended that that action should be dismissed, claiming any difference of treatment on grounds of age was justified under Paragraph 8(1) or Paragraph 10 of the AGG. According to the defendant, the personal assistance activity involves highly personal support with daily living, which implies continued dependence on the part of the person in receipt of assistance. Accordingly, the requirement for a specific age would ensure that A.’s highly personal needs in relation to her social life as a university student are met.
- 35 According to the defendant, it is important to take account, pursuant to Paragraph 8(1) of the SGB IX, of the legitimate wishes and subjective needs of each person in receipt of personal assistance. Against that background, the legitimate wish that the person providing that assistance be of a certain age should be regarded as being a ‘genuine and determining occupational requirement’, within the meaning of Paragraph 8(1) of the AGG, in order to enable the attainment of the objective of the assistance services pursued by Paragraph 78(1) of the SGB IX and protect the right of personality, for the purposes of Article 2(1) of the GG, read in conjunction with Article 1 thereof. According to AP Assistenzprofis, that requirement is also proportionate. In addition, it argues that a difference of treatment on grounds of age such as that at issue in the main proceedings is permissible under Paragraph 10 of the AGG, since it is objective and reasonable, is justified by a legitimate aim, and the means of attaining the objective of the personal assistance, referred to in Paragraph 78 of the SGB IX, are appropriate and necessary.
- 36 Since the Arbeitsgericht Köln (Labour Court, Cologne) upheld the action brought by J.M.P. and the appeal brought by AP Assistenzprofis was upheld by judgment of the Landesarbeitsgericht Köln (Higher Labour Court, Cologne, Germany), J.M.P. brought an appeal on a point of law (*Revision*) against the judgment of the latter court before the referring court, namely the Bundesarbeitsgericht (Federal Labour Court, Germany).
- 37 As a preliminary point, that court states, first, that a situation such as that at issue in the main proceedings comes within the scope of Directive 2000/78, since it concerns selection criteria for access to employment for the purposes of Article 3(1)(a) of that directive. Second, the applicant has been directly discriminated against on grounds of age, for the purposes of Article 2(2)(a) of Directive 2000/78, following the rejection of her application by the defendant.
- 38 That court states that, in a situation such as that at issue in the main proceedings, which concerns a specific personal assistance case in which both the applicant and the disabled person may claim protection against discrimination, the present reference for a preliminary ruling seeks to clarify to what extent a balance should be struck between the applicant’s right to effective protection against discrimination on grounds of age and the disabled person’s right to effective protection against

discrimination on the basis of her disability, having regard to Directive 2000/78, which gives specific expression, as regards employment and occupation, to the general principle of non-discrimination enshrined in Article 21 of the Charter.

- 39 In that regard, according to the referring court, first, the personal assistance is based, pursuant to the applicable national legislation, namely Paragraph 8 of the SGB IX, read in conjunction with Paragraph 33 of the SGB I, on the principle of self-determination, and is thus intended to enable persons with disabilities to organise their daily life in as self-determined and independent a manner as possible, by taking account, inter alia, of the legitimate wishes of recipients of assistance services. In accordance with Paragraph 78(1) of the SGB IX, those services include, inter alia, services in connection with general everyday tasks such as managing a household, forming social relationships, planning day-to-day life, and participating in social and cultural life.
- 40 Second, that court states that, according to the case-law of the Court of Justice, Directive 2000/78 is one of the EU acts which refers to matters governed by the UN Convention, with the result that that convention may be relied on in order to interpret that directive (judgment of 11 September 2019, *Nobel Plastiques Ibérica*, C-397/18, EU:C:2019:703, paragraphs 39 and 40 and the case-law cited), in so far as that convention, in particular Article 19 thereof, contains specific requirements in order to enable persons with disabilities to live with the same autonomy as others and with choices equal to others.
- 41 Third, the respect of that right to autonomy and freedom of choice guarantees human dignity, within the meaning of Article 1 of the Charter and Article 1 of the GG, having regard to the fact that the personal assistance concerns all areas of life and that, accordingly, the person providing that assistance would inevitably and profoundly interfere in the personal and intimate areas of the life of the person in receipt of that assistance. Therefore, the wishes of the disabled person concerned who is in receipt of personal assistance services should be respected, provided that those wishes are, in the particular case, reasonable.
- 42 Fourth, as regards the provisions of EU law that may justify direct discrimination on grounds of age, in circumstances such as those in the main proceedings, the referring court is uncertain whether it is possible for one of the grounds referred to in Article 2(5) of Directive 2000/78, such as the protection of the rights and freedoms of others, to be regarded as capable of justifying such discrimination, while stating that, according to it, a good many factors support the view that persons with disabilities should be guaranteed a right to free choice as regards personal assistance.
- 43 Furthermore, that court does not rule out that such discrimination may be justified under Article 4(1) of that directive. Thus, the referring court is uncertain, in particular, whether, for the purposes of that provision, the wish expressed by a disabled person, in the context of his or her right to self-determination, that the person providing the personal assistance be within a certain age range, constitutes a ‘characteristic’ and, in addition, whether a preference for such an age range may constitute a ‘genuine and determining occupational requirement’.
- 44 Moreover, the question arises whether the fact that a national legislature pursues the objective, by way of the right of persons with disabilities to express their legitimate wishes and to make choices freely when personal assistance services are provided, of strengthening those persons’ personal autonomy in their daily life as well as their motivation to participate in the community could be a ‘legitimate objective’, within the meaning of Article 6(1) of Directive 2000/78.

45 Lastly, the referring court is uncertain whether Article 7 of that directive, seeking to ensure full equality in practice, is relevant for the purpose of justifying discrimination on grounds of age in a situation such as that in the main proceedings.

46 In those circumstances, the Bundesarbeitsgericht (Federal Labour Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Can Article 4(1), Article 6(1), Article 7 and/or Article 2(5) of [Directive 2000/78], read in the light of the requirements of the [Charter] and of Article 19 of the [UN Convention], be interpreted as meaning that, in a situation such as that in the main proceedings, direct discrimination on grounds of age may be justified?’

Consideration of the question referred

47 By its question, the referring court asks, in essence, whether Article 2(5), Article 4(1), Article 6(1) and/or Article 7 of Directive 2000/78, read in the light of the provisions of the Charter and Article 19 of the UN Convention, must be interpreted as precluding the recruitment of a person providing personal assistance from being subject to an age requirement pursuant to national legislation under which account is to be taken of the individual wishes of persons who are entitled to personal assistance services as a result of their disability.

48 As a preliminary point, it should be stated, first, that the situation at issue in the main proceedings comes within the scope of Directive 2000/78, since a procedure for the recruitment of a person providing personal assistance in which it is required that the candidates be ‘preferably between 18 and 30 years old’ concerns ‘conditions for access to employment ... including selection criteria and recruitment conditions’, within the meaning of Article 3(1)(a) of that directive.

49 Second, it appears that the rejection received by J.M.P. from AP Assistenzprofis after she submitted her application was on account of her age and therefore constitutes ‘direct discrimination’ on grounds of age, within the meaning of Article 2(2)(a) of Directive 2000/78.

50 In those circumstances, it must be ascertained whether that difference of treatment on grounds of age may be justified having regard to Directive 2000/78.

51 As regards Article 2(5) of that directive, which it is appropriate to examine at the outset, it must be pointed out that, pursuant to that provision, that directive is to 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.

52 It follows from the Court’s case-law that, in adopting that provision, the EU legislature, in the area of employment and occupation, intended to prevent and adjudicate on a conflict between, on the one hand, the principle of equal treatment and, on the other, the necessity of ensuring public order, security and health, the prevention of criminal offences and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society. The legislature thus decided that, in certain cases set out in Article 2(5) of Directive 2000/78, the principles established by the directive do not apply to measures incorporating differences in treatment on one of the grounds referred to in Article 1 of that directive, on condition, however,

that those measures are necessary for the attainment of the abovementioned objectives (judgment of 12 January 2023, *TP (Audiovisual editor for public television)*, C-356/21, EU:C:2023:9, paragraph 70 and the case-law cited).

- 53 As Article 2(5) of Directive 2000/78 establishes an exception to the principle prohibiting discrimination, it must be interpreted strictly (judgment of 12 January 2023, *TP (Audiovisual editor for public television)*, C-356/21, EU:C:2023:9, paragraph 71 and the case-law cited).
- 54 In the present case, it must be ascertained, first, whether the difference of treatment at issue in the main proceedings is the result of a measure laid down by national law, in accordance with Article 2(5) of that directive.
- 55 In that regard, it is apparent from the file before the Court that the national legislation at issue in the main proceedings, namely Paragraph 8(1) of the SGB IX, read in conjunction with Paragraph 33 of the SGB I, provides that, when deciding on personal assistance services and in the performance of those services intended to promote the disabled person's participation in the community, the legitimate wishes of the persons entitled to receive those services are to be respected, in so far as those wishes are reasonable and by taking account of those persons' personal circumstances, age, sex, family and religious and philosophical needs.
- 56 It thus appears that, by using wording that is sufficiently precise in its nature, that legislation authorises, or even requires, the providers of personal assistance to respect, when giving effect to the personal assistance to be provided to the disabled persons concerned, those persons' individual wishes, including, as the case may be, those relating to the age of the person entrusted with that assistance, and to adopt individual measures applying that legislation by taking account of those wishes, including the wish to make the recruitment of that person subject to an age requirement. In those circumstances, and subject to verification which it is for the referring court to carry out, the difference of treatment on grounds of age at issue in the main proceedings is the result of a measure laid down by national law, within the meaning of Article 2(5) of Directive 2000/78.
- 57 Second, it is appropriate to examine whether that measure pursues one of the objectives set out in Article 2(5) and in particular that of 'the protection of the rights and freedoms of others'.
- 58 In that regard, as is apparent from the order for reference, the legislation under which that measure was adopted pursues an objective of protecting the self-determination of persons with disabilities, by guaranteeing those persons' right to express their wishes and to make choices freely as regards decisions on the personal assistance services and their provision, since those services concern all areas of life and extend considerably into the private and intimate areas of the life of the person in receipt of them. That legislation thus seeks to guarantee the right of persons with disabilities to organise how they live their life in as self-determined and independent a manner as possible.
- 59 As stated by the Advocate General in point 63 of his Opinion, that objective comes within the scope of Article 2(5) of Directive 2000/78, inasmuch as it is intended to protect the right to self-determination of persons with disabilities, in accordance with which those persons must be able to choose how, where and with whom they live.

- 60 That right necessarily means that they must be able to shape the service that will be provided to them, which includes determining the selection criteria for the person entrusted with that service and being actively involved in the process of hiring that person.
- 61 In that regard, it is important to point out that the right to express wishes and to choose freely referred to in paragraph 58 above gives specific expression to the right of persons with disabilities to measures aimed at ensuring their independence, social and occupational integration and participation in the life of the community, which forms part of the rights recognised by EU law, in accordance with Article 26 of the Charter.
- 62 In addition, respect for the self-determination of persons with disabilities is also an objective enshrined in Article 19 of the UN Convention, the provisions of which may be relied on for the purpose of interpreting Directive 2000/78, including Article 2(5) thereof. That directive must be interpreted, to the extent possible, in a manner consistent with that convention (see, to that effect, judgment of 11 September 2019, *Nobel Plastiques Ibérica*, C-397/18, EU:C:2019:703, paragraph 40 and the case-law cited).
- 63 Third, it is important to ascertain whether a difference of treatment on grounds of age, such as that at issue in the main proceeding, is the result of a measure that is necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of that directive and, in particular, the protection of the right to self-determination of the disabled person concerned in the provision of personal assistance services.
- 64 In the present case, it appears that the stated preference in the job offer in question for an age range from 18 to 30 years is rooted in A.'s personal need to receive personal assistance accompanying her in all areas of her daily social life as a 28-year-old student, and such assistance therefore concerns the private and intimate areas of her life, having regard to general tasks relating not only to the organisation of her daily life, including the planning of her highly personal needs, but also to the management of her social and cultural life. It is apparent from the file before the Court that that preference for a certain age range was *inter alia* explained by the fact that the person providing the assistance had to be able to fit easily in A.'s personal, social and university circle.
- 65 Accordingly, in a situation such as that in the main proceedings, taking account of the preference for a certain age range expressed by the disabled person in receipt of personal assistance services is likely to promote respect for that person's right to self-determination in the provision of those personal assistance services, inasmuch as it appears reasonable to expect that a person within the same age range as the disabled person will fit more easily in that person's personal, social and university circle.
- 66 Subject to verifications which it is for the referring court to carry out, having regard to all the facts of the main proceedings, it thus appears that a difference of treatment on grounds of age such as that at issue in the main proceedings is the result of a measure that is necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of Directive 2000/78.
- 67 Consequently, since a difference of treatment on grounds of age could be justified having regard to Article 2(5) of that directive, subject to it being the result of a measure that is necessary for the protection of the rights and freedoms of others, within the meaning of that provision, it is not necessary to ascertain whether it could also be justified under Article 4(1), Article 6(1) and/or Article 7 of Directive 2000/78.

- 68 Having regard to all the foregoing considerations, the answer to the question referred is that Article 2(5) of Directive 2000/78, read in the light of Article 26 of the Charter and Article 19 of the UN Convention, must be interpreted as not precluding the recruitment of a person providing personal assistance from being subject to an age requirement pursuant to national legislation under which account is to be taken of the individual wishes of persons who are entitled to personal assistance services as a result of their disability, if such a measure is necessary for the protection of the rights and freedoms of others.

Costs

- 69 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 2(5) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in the light of Article 26 of the Charter of Fundamental Rights of the European Union and Article 19 of the United Nations Convention on the Rights of Persons with Disabilities, which was approved on behalf of the European Union by Council Decision 2010/48/EC of 26 November 2009,

must be interpreted as not precluding the recruitment of a person providing personal assistance from being subject to an age requirement pursuant to national legislation under which account is to be taken of the individual wishes of persons who are entitled to personal assistance services as a result of their disability, if such a measure is necessary for the protection of the rights and freedoms of others.

[Signatures]