

JUDGMENT OF THE COURT (Third Chamber)

5 March 2009*

In Case C-388/07,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (United Kingdom), made by decision of 24 July 2007, received at the Court on 9 August 2007, in the proceedings

The Queen on the application of:

The Incorporated Trustees of the National Council on Ageing (Age Concern England)

v

Secretary of State for Business, Enterprise and Regulatory Reform,

* Language of the case: English.

AGE CONCERN ENGLAND
THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J. Klučka, U. Löhmus and P. Lindh (Rapporteur), Judges,

Advocate General: J. Mazák,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 2 July 2008,

after considering the observations submitted on behalf of:

- The Incorporated Trustees of the National Council on Ageing (Age Concern England), by R. Allen QC, A. Lockley, Solicitor, and D. O’Dempsey, Barrister,

- the United Kingdom Government, by E. Jenkinson, acting as Agent, and D. Rose QC,

- the Italian Government, by I.M. Braguglia, acting as Agent, and W. Ferrante, avvocato dello Stato,

— the Commission of the European Communities, by J. Enegren and N. Yerrell, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 September 2008,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation 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).

- ² The reference was made in the course of proceedings challenging the legality of the transposition of Directive 2000/78 in the United Kingdom between The Incorporated Trustees of the National Council on Ageing (Age Concern England) and the Secretary of State for Business, Enterprise and Regulatory Reform.

Legal background

Community legislation

- 3 Recital 14 in the preamble to Directive 2000/78 states:

‘This Directive shall be without prejudice to national provisions laying down retirement ages.’

- 4 Recital 25 in the preamble to Directive 2000/78 states:

‘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.’

- 5 According to Article 1 thereof, ‘[t]he purpose of [Directive 2000/78] 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’.

6 Article 2 of Directive 2000/78, 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;

- (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
 - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

 - (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national

legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

...'

7 Paragraph 1 of Article 3 of Directive 2000/78, entitled 'Scope', provides:

'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:

...

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

...'

- 8 According to paragraph 1 of Article 6 of Directive 2000/78, entitled ‘Justification of differences of treatment on grounds of age’:

‘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.’

National legislation

- 9 The referring court explains that prior to 3 April 2006 there were no legislative provisions within the United Kingdom which prevented discrimination on grounds of age in relation to employment and occupation. Employers were able to dismiss employees who had reached the employer's normal retiring age, or, in the absence of such a normal retiring age, the age of 65. Sections 109 and 156 of the Employment Rights Act 1996 ('the 1996 Act') provided that employees could not claim any redundancy payment in such circumstances.
- 10 On 3 April 2006, the United Kingdom of Great Britain and Northern Ireland transposed Directive 2000/78 by adopting the Employment Equality (Age) Regulations 2006, SI 1031/2006 ('the Regulations'), which entered into force on 1 October 2006.
- 11 Regulation 3, in Part 1 of the Regulations, defines the circumstances in which a discriminatory practice may be considered to be unlawful as follows:
- '(1) For the purposes of these Regulations, a person ("A") discriminates against another person ("B") if —
- (a) on grounds of B's age, A treats B less favourably than he treats or would treat other persons, or

(b) A applies to B a provision, criterion or practice which he applies or would apply equally to persons not of the same age group as B, but —

(i) which puts or would put persons of the same age group as B at a particular disadvantage when compared with other persons, and

(ii) which puts B at that disadvantage,

and A cannot show the treatment or, as the case may be, provision, criterion or practice to be a proportionate means of achieving a legitimate aim.’

¹² Parts 2 and 3 of the Regulations define the circumstances in which discrimination is unlawful under the Regulations.

¹³ By way of exception, Regulation 30 provides:

‘(1) This regulation applies in relation to an employee within the meaning of section 230(1) of the 1996 Act, a person in Crown employment, a relevant member of the House of Commons staff, and a relevant member of the House of Lords staff.

(2) Nothing in Parts 2 or 3 shall render unlawful the dismissal of a person to whom this regulation applies at or over the age of 65 where the reason for the dismissal is retirement.

(3) For the purposes of this regulation, whether or not the reason for a dismissal is retirement shall be determined in accordance with sections 98ZA to 98ZF of the 1996 Act.’

- 14 Whether or not the reason for a dismissal is retirement depends on the application of the criteria in Schedule 8 to the Regulations. Those criteria are age, depending on whether the employee is 65 or over or, as the case may be, has reached ‘the normal retirement age’ fixed by the employer, and whether the procedure in Schedule 6 to the Regulations has been followed. On the basis of those criteria, Schedule 8 determines, with respect to 14 types of situations, whether retirement is the reason for dismissal.
- 15 Schedule 6 to the Regulations provides that an employer who intends to claim that ‘the reason for the dismissal is retirement’ in order to rely on Regulation 30 must give the employee between six months’ and one year’s notice of the intended date of dismissal. During that period the employee may make a request not to be dismissed by reason of retirement. The employer must consider such a request, although it is not obliged to accept it.
- 16 According to the order for reference, no specific mechanism is laid down in the Regulations or elsewhere for review by the courts of the compatibility with the principle of equal treatment laid down by Directive 2000/78 of the employer’s decision with respect to such a request.

17 The national court also states that Regulation 7(4) supplements Regulation 30 by permitting employers, in relation to recruitment, to discriminate on grounds of age against persons at or over the age of 65. Regulation 7 provides:

‘(1) It is unlawful for an employer, in relation to employment by him at an establishment in Great Britain, to discriminate against a person —

(a) in the arrangements he makes for the purpose of determining to whom he should offer employment;

(b) ...

(c) by refusing to offer, or deliberately not offering, him employment.

...

(4) Subject to paragraph (5), paragraph (1)(a) and (c) does not apply in relation to a person —

- (a) whose age is greater than the employer's normal retirement age or, if the employer does not have a normal retirement age, the age of 65; or

- (b) who would, within a period of six months from the date of his application to the employer, reach the employer's normal retirement age or, if the employer does not have a normal retirement age, the age of 65.

- (5) Paragraph (4) only applies to a person to whom, if he was recruited by the employer, regulation 30 (exception for retirement) could apply.

...

- (8) In paragraph (4) "normal retirement age" is an age of 65 or more which meets the requirements of section 98ZH of the 1996 Act.'

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

¹⁸ The National Council on Ageing (Age Concern England) ('Age Concern England') is a charity which aims to promote the welfare of older people. By its action before the national court, Age Concern England challenges the legality of Regulations 3(1), 7(4) and 30 of the Regulations on the ground that they do not properly transpose Directive 2000/78. In essence, it submits that, by providing in Regulation 30 for an

exception to the principle of non-discrimination where the reason for the dismissal of an employee aged 65 or over is retirement, the Regulations infringe Article 6(1) of Directive 2000/78 and the principle of proportionality.

19 Before the national court, the United Kingdom authorities submitted that, in accordance with recital 14 in the preamble to Directive 2000/78 which provides that the directive 'shall be without prejudice to national provisions laying down retirement ages', the provisions of the Regulations at issue in the main proceedings do not fall within the scope of the directive. In the alternative, they submitted that those provisions are consistent with Article 6 of the directive.

20 It is in those circumstances that the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay the proceedings before it and to refer the following questions to the Court for a preliminary ruling:

'In relation to ... Directive 2000/78...:

[As regards] [n]ational retirement ages and the scope of the Directive[:]

(1) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement?

(2) Does the scope of the Directive extend to national rules which permit employers to dismiss employees aged 65 or over by reason of retirement where they were introduced after the Directive was made?

(3) In the light of the answers [to the preceding questions,]

— were section 109 and/or 156 of the 1996 Act, and/or

— are Regulations 30 and 7, when read with Schedules 8 and 6 to the Regulations,

national provisions laying down retirement ages within the meaning of recital 14?

[As regards] [t]he definition of direct age discrimination: justification defence[:]

(4) Does Article 6(1) of the Directive permit Member States to introduce legislation providing that a difference of treatment on grounds of age does not constitute discrimination if it is determined to be a proportionate means of achieving a legitimate aim, or does Article 6(1) require Member States to define the kinds of differences of treatment which may be so justified, by a list or other measure which is similar in form and content to Article 6(1)?

[As regards][t]he test for the justification of direct and indirect discrimination[:]

(5) Is there any, and if so what, significant practical difference between the test for justification set out in Article 2(2) of the Directive in relation to indirect discrimination, and the test for justification set out in relation to direct age discrimination at Article 6(1) of the Directive?’

The questions referred for a preliminary ruling

The first three questions

- 21 By its first three questions, which should be examined together, the referring court asks essentially whether rules such as those at issue in the main proceedings fall within the scope of Directive 2000/78.
- 22 Following the judgment in Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, all the interested parties which have submitted observations to the Court agree that the Regulations fall within the scope of Directive 2000/78.
- 23 In that connection, it must be recalled that Directive 2000/78 is designed 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 age (see *Palacios de la Villa*, paragraph 42).

- 24 More particularly, it follows from Article 3(1)(c) of Directive 2000/78 that the directive applies, within the framework of the competence conferred on the Community, 'to all persons ... in relation to ... employment and working conditions, including dismissals and pay'.
- 25 It is true that, according to recital 14 in its preamble, Directive 2000/78 is to be without prejudice to national provisions laying down retirement ages. However, that recital merely states that the directive does not affect the competence of the Member States to determine retirement age and it does not in any way preclude the application of the directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached (*Palacios de la Villa*, paragraph 44).
- 26 It is apparent from the order for reference that Regulation 30 of the Regulations has the effect of authorising the dismissal of a worker aged 65 or over if the reason is retirement. Furthermore, Regulation 7(4) of the Regulations provides that an employer may discriminate in recruitment on grounds of age with respect to persons who, if they were employed, would be liable to be covered by Regulation 30 of the Regulations. Finally, with respect to workers under 65, it follows from Regulation 3 in conjunction with Regulation 30 that any dismissal by reason of retirement must be regarded as discriminatory unless the employer shows that it is 'a proportionate means of achieving a legitimate aim'.
- 27 It follows that regulations such as those at issue in the main proceedings do not establish a mandatory scheme of automatic retirement. They lay down the conditions under which an employer may derogate from the principle prohibiting discrimination on grounds of age and dismiss a worker because he has reached retirement age. As a result, such regulations may directly affect the length of the employment relationship between the parties and, more generally, the pursuit by the worker concerned of his professional or trade activity. Furthermore, a provision such as Regulation 7(5) of the Regulations deprives workers who have reached or are about to reach the age of 65 and are covered by Regulation 30 of any protection against discrimination in recruitment on grounds of age, thereby limiting the future participation of that category of workers in professional life.

28 National legislation of that kind must be regarded as establishing rules relating to 'employment and working conditions, including dismissals and pay' within the meaning of Article 3(1)(c) of Directive 2000/78 and, therefore, it falls within the scope of that directive.

29 That finding cannot be called into question by the fact that such national legislation was introduced after the directive was adopted, a fact highlighted by the second question from the referring court.

30 In those circumstances, the answer to the first three questions referred is that national rules such as those set out in Regulations 3, 7(4) and (5) and 30 of the Regulations at issue in the main proceedings fall within the scope of Directive 2000/78.

The fourth question

31 By its fourth question, the referring court asks essentially whether Article 6(1) of Directive 2000/78 must be interpreted as requiring Member States to specify the kinds of differences of treatment on grounds of age which are not covered by the principle of non-discrimination. It is apparent from the file that that question seeks to determine whether Article 6(1) precludes a provision such as Regulation 3 of the Regulations, pursuant to which a difference in treatment on grounds of age does not constitute discrimination if it is shown to be 'a proportionate means of achieving a legitimate aim'. Since the referring court has limited its question to the interpretation of Article 6(1) of the directive, it is unnecessary for the Court to give a ruling on the interpretation of other provisions of the directive, in particular Article 4.

- 32 It must be noted at the outset that, in accordance with Article 1 thereof, the purpose of Directive 2000/78 is to combat, as regards employment and occupation, certain types of discrimination, including discrimination on grounds of age, with a view to putting into effect in the Member States the principle of equal treatment.
- 33 Under Article 2(1) of Directive 2000/78, for the purposes of the directive, the ‘principle of equal treatment’ is to mean that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive. By virtue of Article 2(2)(a), for the purposes of the application of Article 2(1), direct discrimination is to be taken to occur where one person is treated less favourably than another in a comparable situation, on any of the grounds referred to in Article 1 of Directive 2000/78.
- 34 Regulation 3 of the Regulations allows an employer to dismiss workers under the age of 65 — who do not fall within the scope of Regulation 30 — when they reach the retirement age fixed by the employer if such a measure constitutes ‘a proportionate means of achieving a legitimate aim’. Such legislation must be regarded as imposing less favourable treatment on workers who have reached that retirement age as compared with all other working persons. Such legislation is therefore liable to give rise to a difference of treatment directly on grounds of age, as referred to in Article 2(1) and (2)(a) of Directive 2000/78.
- 35 However, it is clear from the first subparagraph of Article 6(1) of Directive 2000/78 that such differences of treatment on grounds of age do not constitute discrimination prohibited under Article 2 thereof ‘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’. The second subparagraph of Article 6(1) lists several examples of differences of treatment with characteristics such as those referred to in the first subparagraph.

- 36 Age Concern England submits that, by having recourse, in the second subparagraph of Article 6(1) of Directive 2000/78, to a list of objective and reasonable justifications, the Community legislature intended to impose on Member States the obligation to set out in their instruments of transposition a specific list of the differences of treatment which may be justified by reference to a legitimate aim. Article 6(1) of Directive 2000/78 therefore precludes national legislation providing that a difference of treatment on grounds of age, of whatever kind, is not unlawful if it can be shown that it constitutes a proportionate means of achieving a legitimate aim.
- 37 According to Age Concern England, the Regulations do not specify any of the circumstances which may justify a difference of treatment liable to constitute direct discrimination on grounds of age and do not contain any specific provision of the type envisaged in recital 25 in the preamble to Directive 2000/78.
- 38 The United Kingdom Government disputes that interpretation and submits that Member States are not required to draw up a list of the differences in treatment which may qualify for the exemption under Article 6(1) of Directive 2000/78.
- 39 The Italian Government puts forward essentially the same argument, relying on the latitude afforded to Member States in transposing directives.
- 40 The Commission of the European Communities maintains that the principle of non-discrimination on grounds of age is a fundamental principle of Community law, referring in that regard to Case C-144/04 *Mangold* [2005] ECR I-9981, paragraph 75, and to Article 21(1) of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), and that any exception to that principle must be justified by a public social policy objective. It interprets Article 6(1) of Directive 2000/78 as explained by recital 25 in the preamble thereto as providing for a limited form of exception to that fundamental principle which is justified by particular social policy considerations specific to a given Member State. The

provisions of Article 6(1) thus imply, in the Commission's submission, that a specific national measure has been adopted reflecting a particular set of circumstances and objectives.

- 41 In that connection, it must be recalled that, under Article 249 EC, a directive is to be binding, as to the result to be achieved, upon each Member State to which it is addressed, but is to leave to the national authorities the choice of form and methods. Member States have the obligation, when they transpose a directive, to ensure that it is fully effective, whilst retaining a broad discretion as to the choice of methods (see, in particular, Case C-216/05 *Commission v Ireland* [2006] ECR I-10787, paragraph 26).
- 42 The transposition of a directive into domestic law does not moreover always require that its provisions be incorporated formally in express, specific legislation. Thus, the Court has held that the implementation of a directive may, depending on its content, be effected in a Member State by way of general principles or a general legal context, provided that they are appropriate for the purpose of guaranteeing in fact the full application of the directive and that, where a provision of the directive is intended to create rights for individuals, the legal position arising from those general principles or that general legal context is sufficiently precise and clear and the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts (see, to that effect, Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23, and Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7). A directive may also be implemented by way of a general measure provided that it satisfies the same conditions.
- 43 In accordance with those principles, Article 6(1) of Directive 2000/78 cannot be interpreted as requiring Member States to draw up, in their measures of transposition, a specific list of the differences in treatment which may be justified by a legitimate aim. Moreover, it is clear from the words of that provision that the legitimate aims and the

differences in treatment referred to therein are purely illustrative, as evidenced by the Community legislature's use of the word 'include'.

44 Consequently, it cannot be inferred from Article 6(1) of Directive 2000/78 that a lack of precision in the national legislation as regards the aims which may be considered legitimate under that provision automatically excludes the possibility that the legislation may be justified under that provision (see, to that effect, *Palacios de la Villa*, paragraph 56).

45 In the absence of such precision, it is important, however, that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary (*Palacios de la Villa*, paragraph 57).

46 It is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered 'legitimate' within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.

47 It is ultimately for the national court, which has sole jurisdiction to determine the facts of the dispute before it and to interpret the applicable national legislation, to determine whether and to what extent a provision which allows employers to dismiss workers who have reached retirement age is justified by 'legitimate' aims within the meaning of Article 6(1) of Directive 2000/78.

- 48 However, when giving a preliminary ruling the Court may, where appropriate, provide clarification designed to give the national court guidance in its interpretation (see, inter alia, Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 40 and the case-law cited).
- 49 It is for the national court to ascertain whether the aims contemplated by Regulation 3 of the Regulations are legitimate within the meaning of Article 6(1) of Directive 2000/78, in that they are covered by a social policy objective such as those related to employment policy, the labour market or vocational training.
- 50 It is also for the national court to ascertain, in the light of all the relevant evidence and taking account of the possibility of achieving by other means such legitimate social policy objective as may be identified, whether Regulation 3 of the Regulations, as a means intended to achieve that aim, is, according to the actual wording of Article 6(1) of Directive 2000/78, 'appropriate and necessary'.
- 51 In that connection, it must be observed that, in choosing the means capable of achieving their social policy objectives, the Member States enjoy broad discretion (see, to that effect, *Mangold*, paragraph 63). However, that discretion cannot have the effect of frustrating the implementation of the principle of non-discrimination on grounds of age. Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim (see, by way of analogy, Case C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623, paragraphs 75 and 76).
- 52 Having regard to the foregoing, the answer to the fourth question referred is that Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which, like Regulation 3 of the Regulations, does not contain a precise list of the aims justifying derogation from the principle prohibiting

discrimination on grounds of age. However, Article 6(1) offers the option to derogate from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim.

The fifth question

53 The fifth question referred for a preliminary ruling seeks to determine whether the conditions to which, under Article 6(1) of Directive 2000/78, any derogation from the principle prohibiting discrimination on grounds of age is subject, differ significantly from those laid down in Article 2(2)(b) of that directive as regards indirect discrimination.

54 Age Concern England submits that the test for justification laid down in Article 6(1) of Directive 2000/78 is stricter than that under Article 2(2). Article 6(1) limits the derogations allowed exclusively to measures which are justified as being objective and reasonable. That twofold requirement, which is unique in secondary Community legislation, is directly inspired by the judgment of the European Court of Human Rights in *Gaygusuz v. Austria* of 16 September 1996 (*Reports of Judgments and Decisions* 1996-IV, p. 1141, § 42), concerning discrimination on grounds of sex or race. Age Concern England submits that, since the principle of non-discrimination on grounds of age is a general principle of Community law, as is clear from paragraph 75 of *Mangold*, any justification for a difference in treatment on grounds of age liable to constitute direct discrimination must be subject to a very high standard of scrutiny, equivalent to that applied by the European Court of Human Rights in respect of discrimination on grounds of sex or race.

- 55 The United Kingdom Government considers that the combined use in Article 6(1) of Directive 2000/78 of the words 'reasonably' and 'objectively' is not significant. It is inconceivable that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, but that the justification would not be reasonable. Furthermore, that provision refers not only to situations of direct discrimination but also to situations of indirect discrimination, as shown by the example of minimum conditions of seniority or professional experience required for access to employment set out in the second subparagraph, (b), of Article 6(1). Generally, objective and proportionate justifications may be relied on to rebut a complaint of discrimination, both in Community law and under the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. The introduction of a test for direct age discrimination that is different from that applicable to indirect discrimination would lead to legal uncertainty, whereas the prohibition of discrimination on grounds of age is subject to numerous qualifications and exceptions for which there are no equivalents as regards discrimination on grounds of race or sex.
- 56 The Italian Government submits that Article 2(2) and Article 6(1) of Directive 2000/78 do not have the same scope. Article 6(1), in referring to 'legitimate employment policy, labour market and vocational training objectives', implies that the derogations from the principle of non-discrimination on grounds of age are broader than those governed by Article 2(2)(b) of Directive 2000/78.
- 57 The Commission submits that no particular significance should be attached to the fact that Article 2(2) of Directive 2000/78 does not refer to the reasonableness of the justification of a measure likely to constitute discrimination. The key distinction between that provision and Article 6(1) of the directive relates to the question of who has to provide a justification, its nature and how it is to be evidenced. As regards Article 6(1), it is clear from paragraph 57 of *Palacios de la Villa* that the legitimate aim pursued by the Member State concerned must be capable of being identified either directly from the wording of the measure in question or from its general context, including by recourse to official documents. By contrast, as regards Article 2(2) of the directive, the focus is on whether an employer can justify his employment practices.

58 It must be held that the scope of Article 2(2)(b) and that of Article 6(1) of Directive 2000/78 are not identical.

59 Article 2 defines the concept of discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. It draws a distinction, in paragraph 2, between, on the one hand, discrimination directly on those grounds and, on the other, 'indirect' discrimination which, although based on an apparently neutral provision, criterion or practice, would put persons on account of their religion, their belief, their disability, their age or their sexual orientation at a particular disadvantage compared with other persons. Only provisions, criteria or practices liable to constitute indirect discrimination may, by virtue of Article 2(2)(b) of Directive 2000/78, escape classification as discrimination, that being the case, under Article 2(2)(b)(i), if it is a 'provision, criterion or practice ... objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'. For differences in treatment constituting direct discrimination, Article 2(1) of the directive does not provide for any derogation.

60 For its part, Article 6 of Directive 2000/78 establishes a scheme of derogation specific to differences of treatment on grounds of age, on account of the recognised specificity of age among the grounds of discrimination prohibited by the directive. Recital 25 in the preamble to that directive makes clear that it is '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'.

61 As stated in paragraph 35 of this judgment, Article 6(1) of Directive 2000/78 authorises Member States to provide, notwithstanding Article 2(2) thereof, that certain differences of treatment on grounds of age do 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'. The second subparagraph of Article 6(1) lists several examples of differences in treatment with

characteristics such as those referred to in the first subparagraph, which, as a rule, may be regarded as 'objectively and reasonably justified' by a legitimate aim.

62 Article 6(1) of Directive 2000/78 allows Member States to introduce into their national law measures providing for differences in treatment on grounds of age which fall in particular within the category of direct discrimination as defined in Article 2(2)(a) of that directive. It is indeed to that extent, in particular, that Article 6(1) must be interpreted as applying, in accordance with the first subparagraph thereof, '[n]otwithstanding Article 2(2)' of that directive. That option, in that it constitutes an exception to the principle prohibiting discrimination, is however strictly limited by the conditions laid down in Article 6(1) itself.

63 It is clear from the order for reference that the dispute in the main proceedings concerns the legality of national provisions governing the conditions for dismissal by reason of retirement age. In so far as they introduce conditions governing dismissal which are less favourable with respect to workers who have reached retirement age, those provisions provide for a form of direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78.

64 By contrast, the interpretation of Article 2(2)(b) of Directive 2000/78, which concerns exclusively indirect discrimination, does not appear necessary for the resolution of the dispute in the main proceedings.

65 However, since the referring court is uncertain as to the existence of a difference in the application of the criteria set out in Article 2(2)(b) of Directive 2000/78 as compared with the application of the criteria in Article 6(1), it must be stated that the latter provision gives Member States the option to provide, within the context of national law, that certain forms of differences in treatment on grounds of age do not constitute

discrimination within the meaning of that directive if they are ‘objectively and reasonably’ justified. Although the word ‘reasonably’ does not appear in Article 2(2)(b) of the directive, it must be observed that it is inconceivable that a difference in treatment could be justified by a legitimate aim, achieved by appropriate and necessary means, but that the justification would not be reasonable. Accordingly, no particular significance should be attached to the fact that that word was used only in Article 6(1) of the directive. However, it is important to note that the latter provision is addressed to the Member States and imposes on them, notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued.

⁶⁶ Although there is no need in this case to give a ruling on whether that standard of proof is higher than that applicable in the context of Article 2(2)(b) of Directive 2000/78, it must be stated that, if a provision, a criterion or a practice does not constitute discrimination within the meaning of the directive, by reason of an objective justification within the meaning of Article 2(2)(b) thereof, it is as a consequence not necessary to have recourse to Article 6(1) of the directive, which, as is clear from paragraph 62 of this judgment, is intended in particular to permit the justification of certain differences in treatment which, but for that provision, would constitute such discrimination.

⁶⁷ In light of the foregoing, the answer to the fifth question is that Article 6(1) of Directive 2000/78 gives Member States the option to provide, within the context of national law, for certain kinds of differences in treatment on grounds of age if they are ‘objectively and reasonably’ justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary. It imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification. No particular significance should be attached to the fact that the word ‘reasonably’ used in Article 6(1) of the directive does not appear in Article 2(2)(b) thereof.

Costs

⁶⁸ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

- 1. National rules such as those set out in Regulations 3, 7(4) and (5) and 30 of the Employment Equality (Age) Regulations 2006 fall within the scope of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.**
- 2. Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which, like Regulation 3 of the Regulations at issue in the main proceedings, does not contain a precise list of the aims justifying derogation from the principle prohibiting discrimination on grounds of age. However, Article 6(1) offers the option to derogate from that principle only in respect of measures justified by legitimate social policy objectives, such as those related to employment policy, the labour market or vocational training. It is for the national court to ascertain whether the legislation at issue in the main proceedings is consonant with such a legitimate aim and whether the national legislative or regulatory authority could legitimately consider, taking account of the Member States' discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim.**
- 3. Article 6(1) of Directive 2000/78 gives Member States the option to provide, within the context of national law, for certain kinds of differences in treatment**

on grounds of age if they are ‘objectively and reasonably’ justified by a legitimate aim, such as employment policy, or labour market or vocational training objectives, and if the means of achieving that aim are appropriate and necessary. It imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification. No particular significance should be attached to the fact that the word ‘reasonably’ used in Article 6(1) of the directive does not appear in Article 2(2)(b) thereof.

[Signatures]