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## AGE DISCRIMINATION IN EMPLOYMENT: UNANSWERED QUESTIONS?<sup>1</sup>

### Introduction

Age discrimination is treated differently in the family of prohibited discrimination under European Community law. This paper will focus on “direct age discrimination” in relation to retirement, which, under European Community law may be allowed as an exception to the prohibition on age discrimination in employment provided it is both “objectively justified” and achieved by “proportionate means” in accordance with an “identified legitimate interest” on the part of the Member State.

It is the European Directive establishing a general framework for equal treatment in employment and occupation,<sup>2</sup> deriving from the European Community Treaty,<sup>3</sup> which is the legal regime regulating the prohibition of discrimination on, *inter alia*, grounds of age.

Particular consideration will be given to the recent case involving the Charity, Age Concern England, and the United Kingdom Government, represented by

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<sup>1</sup> This article refers mainly to the European Court of Justice in Luxembourg on *Palacios* (C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA*, Judgement of the Court 16.10.2007) and consequences in the form of the interpretation of Council Directive 2000/78/EC. In cases of discrimination based on employee age there have been lots of other Judgments of the Court (przyp. red.).

<sup>2</sup> Council Directive 2000/78/EC, [2000] OJ L 303/16.

<sup>3</sup> Article 13 of the European Community Treaty.

the Secretary of State for Business Enterprise and Regulatory Reform. Age Concern England is challenging the legality of the United Kingdom's Age Discrimination Regulations,<sup>4</sup> in particular the Default Retirement Age of 65 years and the High Court (Administrative Division) has referred a number of questions, each for a preliminary ruling, to the European Court of Justice. This paper will evaluate and compare both the Opinion of Advocate General Mazák<sup>5</sup> and the Judgment of the European Court of Justice<sup>6</sup> in this case, concerning the interpretation of the Framework Equality Directive and the nature of age.

Should age inequality be tolerated and for what reasons?<sup>7</sup> What margin of discretion is left to the Member State in the adoption of its employment policies? Has the Court of Justice clarified the answer to these questions in its preliminary ruling of 5 March 2009?

## The Questions

In essence, three questions were referred to the European Court of Justice concerning the interpretation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.<sup>8</sup>

### Scope

The first question asked whether the *scope* of the Directive extended to national rules permitting employers to dismiss employees aged 65 by reason of retirement. In the second instance it was questioned whether there was a need under the Directive for Member States to *define* in a list the differences of treatment deemed justifiable in national law. The third question related to the *test* for objective justification.

The case of *Palacios*<sup>9</sup> answered the *first* question referred in *Age Concern England* concerning the *scope* of the Directive. Recital 14 in the Framework Equality Directive's preamble states that the Directive shall be without prejudice

<sup>4</sup> Employment Equality (Age) Regulations 2006, SI 2006 No. 1031. For a valuable criticism of the Employment Equality (Age) Regulations see C. Kilpatrick, *The new UK retirement regime, employment law and pensions*, "Industrial Law Journal" 2008, No. 1.

<sup>5</sup> Case C-388/07 *The Queen on the application of The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business and Regulatory Reform*, Opinion delivered 23 September 2008.

<sup>6</sup> Case C-388/07, *ibidem*. Judgment of the Court, 5 March 2009.

<sup>7</sup> 'the fact .. that some forms of age discrimination will be lawful because they will be justified means that unlike in other areas the issue is not simply to demonstrate that age has been removed from any decision-making process. ...age can be a relevant consideration. What is not clear is the extent to which it is permissible to take it into account.', Jonathan Swift, 'Justifying age discrimination'. "Industrial Law Journal" 2006, p. 228 at 231.

<sup>8</sup> *Ibidem*.

<sup>9</sup> Case C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA*, Judgment of the Court (Grand Chamber) 16 October 2007.

to national provisions laying down retirement ages. The Court ruled in *Palacios* that

the directive does not affect the competence of the Member State to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.<sup>10</sup>

Subsequently, in *Age Concern England*, the European Court of Justice declared that the United Kingdom Regulations do not establish a mandatory scheme of automatic retirement. Rather, they lay down the conditions<sup>11</sup> 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, the Court continued, 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.<sup>12</sup> Such national legislation, the Court concluded, must be regarded as establishing rules relating to ‘employment and working conditions, including dismissals and pay’,<sup>13</sup> therefore falling within the scope of the Directive.<sup>14</sup>

Questions two and three concerned the interpretation of Article 6 (1) of Directive 2000/78/EC. Article 6(1), subparagraph 1, reads as follows:

‘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 reason-

<sup>10</sup> *Ibidem*, para. 44. ‘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. *Ibidem*, para. 46. Advocate General Mazák, in his Opinion in *Age Concern England*, confirmed that the same reasoning clearly applied to the legislation at issue which allowed employers to dismiss employees aged 65 and over for reason of retirement, which thus fell within the scope of the Framework Equality Directive, Case C-388/07, points 34 and 35.

<sup>11</sup> Regulation 30 (1) and (2) of The Employment Equality (Age) Regulations 2006, *op. cit.*, provide that the Regulation applies in relation to, *inter alia*, an employee within the meaning of section 230 (1) of the Employment Rights Act 1996, and that nothing in Parts 2 or 3 of that Act shall render unlawful the dismissal of a person to whom the Regulation applies at or over the age of 65 where the reason for the dismissal is retirement. Ultimately, whether or not the reason for dismissal is retirement depends on the application of the criteria in Schedule 8 to the Regulations. The criteria are age, i.e. whether the employee is 65 or over or has reached the employer’s normal retirement age, and whether the procedure laid down in Schedule 6 to the Regulations has been followed. Acting in accordance with Schedule 6, and in order to rely on Regulation 30, an employer claiming that ‘the reason for the dismissal is retirement’ is required to give the employee between six months’ and one year’s notice of the intended date of dismissal. During that period the employer may request not to be dismissed by reason of retirement. The employer need not accept the employee’s request to work beyond the intended retirement age and there is no means of recourse to judicial review of the employer’s decision. Case C-388/07, Judgment of the Court (Third Chamber) 5 March 2009, paras. 9 and 13 to 16.

<sup>12</sup> Case C-388/07, *op. cit.*, para. 27. Furthermore, the Court ruled that provisions in the Regulations also deprive workers who have reached or are about to reach the age of 65 of any protection against discrimination in *recruitment* on grounds of age, thereby limiting the future participation of that category of workers in professional life. *Ibidem*.

<sup>13</sup> Within the meaning of Article 3(1)(c) of Directive 2000/78. *Ibidem*.

<sup>14</sup> *Ibidem*, para. 28.

ably 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.’

### Defined justification?

Referring to *Palacios*<sup>15</sup> as authority, the European Court of Justice in *Age Concern England* pronounced that 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. The Court ruled further that

in the absence of such precision it is important, however, that other elements, taken from the general context of the measures 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.<sup>16</sup>

Advocate General Mazák in his Opinion in *Age Concern England* had also confirmed the *Palacios* ruling in relation to the second question referred, stating somewhat broadly, ‘in view of the variety of situations in which such differences of treatment could arise, it would also arguably be impossible to establish such a list in advance without unduly restricting the scope of the justification provided for in the first subparagraph of Article 6(1).’<sup>17</sup>

The European Court of Justice went much further in spelling things out for the national court positively to ascertain in terms of both legitimate justification and also as to whether the means to achieve a public interest social policy were appropriate and necessary. The Court considered it to be 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, these legitimate aims are distinguishable from purely individual reasons, particular to the employer’s situation, such as cost reduction or improving competitiveness”, although, declared the Court, it cannot be ruled out that a national rule may rec-

<sup>15</sup> Case C-411-05, *op. cit.* *Palacios* had also dealt with the subject matter of question *two* to the effect that a defined, specific list of nationally excepted / accepted differential treatment on grounds of age is not a necessary requisite for objective justification under Article 6(1) of Directive 2000/78, if that legitimate interest is identified in the context of national law, adding that each Member State is accorded a broad discretion in the choice of policies pursued, paras. 56 and 57 and 68.

<sup>16</sup> Case C-388/07, *op. cit.*, paras. 44 and 45.

<sup>17</sup> Case C-388/07, *op. cit.*, point 54.

ognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.<sup>18</sup> The Court stressed that 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.<sup>19</sup> It is noteworthy that the Court underlined the importance of the prohibition of discrimination on grounds of age, in giving a strong direction to the national court.

### **Legitimate justification?**

In giving its preliminary ruling the Court appropriately provided further clarification designed to guide the national court in its interpretation. Ultimately, it is for the national court to ascertain whether the “aims contemplated” by the Regulation’s Default Retirement Age 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.<sup>20</sup> In summary, the Court concluded that Article 6(1) of Directive 2000/78 must be interpreted as meaning that it does not preclude a national measure which, like the United Kingdom 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 State’s discretion in matters of social policy, that “the means chosen were appropriate and necessary” to achieve that aim.<sup>21</sup>

### **Proportionality?**

The Court, additionally, was assertive concerning the principle of proportionality, ruling that 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”

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<sup>18</sup> Case C-388/07, *op. cit.*, para. 46.

<sup>19</sup> *Ibidem*, para. 47.

<sup>20</sup> *Ibidem*, paras. 48 and 49.

<sup>21</sup> *Ibidem*, para. 52.

such legitimate social policy objective as may be identified, whether the Default Retirement Age and its related procedure, as a means intended to achieve that aim, is, 'appropriate and necessary'.<sup>22</sup> In that connection, and condoning the authority of *Mangold*<sup>23</sup> the Court heeded that it must be observed that, in choosing the means capable of achieving their social policy objectives, the Member States enjoy broad discretion.<sup>24</sup> However, the Court emphasised,

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 be reasonably be considered that the means chosen are suitable for achieving that aim.<sup>25</sup>

This promising ruling is progressively positive in directing the court to consider the question of proportionality in the national context. The national court is endowed with an active role in ascertaining the appropriateness and necessity of the chosen means from the evidence provided by the national government. This ruling compares favourably with the negative wording and passive interpretation adopted by Advocate General Mazák in his Opinion in *Age Concern England*.

It is submitted that the question of proportionality was not adequately addressed, admittedly by the parties to the proceedings in *Age Concern England*, but also by Advocate General Mazák! The question as to whether the Default Retirement Age was an appropriate and necessary means in order to achieve the United Kingdom Governments' stated legitimate policy objectives, of workforce planning and of avoiding an adverse impact on the provision of occupational pensions and other work related benefits,<sup>26</sup> was not raised specifically by *Age Concern England*.<sup>27</sup> As such, an assessment of the Default Retirement Age *vis à vis* the principle of proportionality was deemed to be a matter for the High Court to determine.<sup>28</sup> Advocate General Mazák gave no guidance to the High Court in this respect.

Advocate General Mazák, was very reticent concerning the principle of proportionality in *Age Concern England*, as he was also in the Opinion he gave

<sup>22</sup> *Ibidem*, para. 50.

<sup>23</sup> Case C-144/04 *Werner Mangold v. Rüdiger Helm*, Judgment of the Court (Grand Chamber), 22 November 2005, para 63.

<sup>24</sup> Case C-388/07, *op. cit.* para. 51.

<sup>25</sup> *Ibidem*.

<sup>26</sup> Explanatory Memorandum, paras. 7.10 and 7.11, *op. cit.*, SI 2006 No. 1031.

<sup>27</sup> Albeit some muted reference was made to proportionality at the outset of the oral hearing. Case C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business Enterprise and Regulatory Reform*, Report for the Oral Hearing, Judge Rapporteur Pernilla Lindh, para. 15; [www.curia.europa.eu](http://www.curia.europa.eu).

<sup>28</sup> C-388/07, *op. cit.*, point 21.

in *Palacios*,<sup>29</sup> in both cases, it is submitted, erring on the side of extreme caution. Generally, he stated that it ‘should be observed, that it is perhaps more usual for people to feel treated less favourably on the grounds of age with regard to a minimum retirement age – ‘since in general, retirement seems to be perceived more as a social right than as an obligation.’<sup>30</sup> In *Age Concern England*, Advocate General Mazák referred to, and adopted, in his Opinion<sup>31</sup> the negatively worded ruling in part handed down by the European Court of Justice in *Palacios*, to the effect that the means to achieve an objectively justified legitimate aim would be deemed to be appropriate and necessary if ‘it is *not* apparent that the means put in place to achieve that aim of public interest are *inappropriate* and *unnecessary* for the purpose.’<sup>32</sup>

### Objectively and reasonably justified?

As regards the third question submitted for a preliminary ruling, which appeared to be devoid of substance, Advocate General Mazák was of the opinion that ... no importance should be attached to the use of the word ‘reasonably’ in addition to ‘objectively’ – in Article 6(1) of Directive 2000/78. He continued, referring to the cases of *Mangold* and *Palacios*, ‘the Court appears to apply the joint expression ‘objectively and reasonably’ to denote the legitimacy of the aim pursued by the national measure in question.’<sup>33</sup>

The European Court of Justice took this a step further, explaining that Article 6(1) of the Framework Equality Directive 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 the Directive if they are ‘objectively and reasonably’ justified. The Court conceded that the word ‘reasonably’ does not appear in Article 2(2)(b) of the Di-

<sup>29</sup> Case C-411/05 *Félix Palacios de la Villa v. Cortefiel Servicios SA*, Opinion of Advocate General Mazák, delivered on 15 February 2007. In his Opinion in *Palacios*, contrary to the European Court of Justice, he was of the view that retirement ages were closely linked with social and employment policies where the primary powers remained with the Member States and that the insertion of Recital 14 was intended to ensure that dismissal by way of retirement was excluded from the scope of the Directive. Points 64, 65.

<sup>30</sup> *Ibidem*, point 69. The question of proportionality, the ruling of the European Court of Justice and the Opinions of Advocate General Mazák in *Palacios* and also Advocate General Mazák’s Opinion in *Age Concern England* are considered in more detail in, Ryland D, ‘Retired: Justified; A Question of Proportionality?’, paper delivered at the international conference entitled ‘The Relevance of Age in Labour Relations and Social Security’, organised by the Universities of Vigo, Valencia and Girona, held on 5 November 2008 in Baiona, Spain, forthcoming in a Book of the Conference proceedings, *La relevancia de la edad en la relación laboral y de seguridad social*, Thomson Aranzadi, 2009.

<sup>31</sup> Case C-388/07, *op. cit.*, point 87.

<sup>32</sup> Case C-411/05, *op. cit.*, para. 77 (*emphasis added*). This, despite the ECJ in *Palacios* having ruled in that case, at para. 71, ‘However, it is important to ensure that the national measures laid down in that context do not go beyond what is appropriate and necessary to achieve the aim pursued by the Member State concerned.’

<sup>33</sup> Case C-388/07, *op. cit.*, point 79.

rective in the context of objectively justifying indirect discrimination. However, the Court considered it to be 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. According to the Court, therefore, no particular significance should be attached to the fact that that word was used only in Article 6(1) of the Directive.<sup>34</sup> It is significant that the Court went on to state that

it is important to note that Article 6(1) of the Directive 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.<sup>35</sup>

This latter declaration substantively adds to the onus already placed on the Member States to justify the legitimacy of the aim pursued in adopting the Default Retirement Age of 65. In its published Consultation on the draft Employment Equality (Age) Regulations 2006,<sup>36</sup> the government explain:<sup>37</sup>

In setting the default age, we have taken careful note of a number of representations we received in the course of consultations, which made it clear that significant numbers of employers use a set retirement age as a necessary part of their workforce planning. Whilst an increasing number of employers are able to organise their business around the best practice of having no set retirement age for all or particular groups of their workforce, some nevertheless still rely on it heavily. This is our primary reason for setting the default retirement age.

The government appear to be acting solely to appease the private employers' association the Confederation of British Industry (CBI)! According to the governments' Report on the Consultation,<sup>38</sup> 'Many of those who commented from the union point of view on the default retirement age (DRA) found the evidence for it weak and appearing to favour the convenience of employers.'<sup>39</sup> Furthermore, 'On the whole, employers and employer organisations such as the CBI held firmly to the belief that the right to retire staff at age 65 remained a vital management tool'<sup>40</sup>.

It will prove a hard task indeed for the United Kingdom government to satisfy the high burden of proof in providing evidence of a legitimate public interest reason of social policy for adopting the Default Retirement Age, and not that of

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<sup>34</sup> Case C-388/07, *op. cit.*, para. 65.

<sup>35</sup> *Ibidem*.

<sup>36</sup> Department of Trade and Industry, *Equality and Diversity: Coming of Age*, July 2005.

<sup>37</sup> *Ibidem*, para. 6.1.14.

<sup>38</sup> Department of Trade and Industry, *Equality and Diversity Coming of Age*, Report on the Consultation on the draft Employment Equality (Age) Regulations 2006, March 2006.

<sup>39</sup> *Ibidem*, para. 6.1.

<sup>40</sup> *Ibidem*, para. 6.2.



the interests of private employers.<sup>41</sup> Given the fact that, in today's economic climate and high unemployment, the same financial arguments can apply in respect of older workers who will need to work longer in order adequately to provide for themselves,<sup>42</sup> the government will be hard pressed to promote the economic situation as evidence of the need to remove older workers from the workforce in the private sector. Moreover, the United Kingdom government has opened itself up to allegations of double standards in that it has abolished the ability of public service employers to retire employees aged 65,<sup>43</sup> but not that of private employers.

### A Question of Principle

It may now be said that the judgment of the Court of Justice in *Mangold*<sup>44</sup> is safely confined to history, as far as the existence of a general principle of Community law prohibiting discrimination on the specific grounds of age is concerned, in the light of the respective Opinions of Advocate General Mazák in *Palacios*,<sup>45</sup> and Advocate General Sharpston in *Bartsch*.<sup>46</sup> It is significant that the European Court of Justice in its ruling in *Age Concern England* referred to the principle of age discrimination,<sup>47</sup> and, it is submitted, correctly so.

<sup>41</sup> See M. Sargeant, *The Employment Equality (Age) Regulations 2006: a legitimisation of age discrimination in employment*, "Industrial Law Journal" 2006, p. 209.

<sup>42</sup> Paul Cann, Director of Policy and External Relations for Help the Aged, 'Challenging financial circumstances mean that it is even more important for older workers to be able to choose to work for longer if they want to.' 'We're fighting on to scrap forced retirement, say Age Concern and Help the Aged', Age Concern, [www.ageconcern.org.uk/AgeConcern/fighting-on-release-050309.asp](http://www.ageconcern.org.uk/AgeConcern/fighting-on-release-050309.asp). A "Financial Times"/Harris survey of 1,126 adults in Britain conducted in early May, found that 60 per cent of respondents would support working beyond the current State pension age in order to receive a bigger pension. Ros Altmann, a pensions economist, said that Britain's demographics point towards the path of economic decline unless older people can be kept in the workplace because the country is not producing enough young people to keep the nation economically active. She continued to state that reforms were badly needed to make it easier for older workers to slip into part time from full time employment and to retrain. 'Age policy and retirement policy are stuck in the 1940s,' she said. Norma Cohen, 'Opinions shift as longer working lives favoured', "Financial Times", 26 May 2009, 3.

<sup>43</sup> 'Only six months ago mandatory retirement ages were scrapped for civil servants but the Government failed to change the law to benefit all UK employees. Ministers face accusations of double standards from the 1.3 million people who are already working past state pension age (60 for women, 65 for men) many of whom cannot afford to retire.' 'We're fighting on to scrap forced retirement, say Age Concern and Help the Aged', Age Concern, [www.ageconcern.org.uk/AgeConcern/fighting-on-release-050309.asp](http://www.ageconcern.org.uk/AgeConcern/fighting-on-release-050309.asp).

<sup>44</sup> Case C-144/04, *op. cit.* The Court's reasoning in *Mangold* on whether a justified legitimate objective on the part of a Member State has been achieved by appropriate and reasonable means, at paras. 63 and 64, still deserves consideration and was quoted as authority and applied assertively by the European Court of Justice in its direction to the High Court in *Age Concern England*.

<sup>45</sup> Case C-411/05, *op. cit.*, points 80, 82, 83, 87, 88, 94 and 96.

<sup>46</sup> Case C-427/06 *Birgit Bartsch v. Bosch and Siemens Hausgeräte (BSH) Altersfürsorge GmbH*, Opinion delivered on 22 May 2008, points 42, 43, 59 and 60. For a more detailed exposé, see D. Ryland, *Age Discrimination in Employment: Questions of Principle and Proportionality*, [in"] *British and American Politics*, ed. I. Albu, Romania, forthcoming 2009.

<sup>47</sup> Case C-388/07, *op. cit.*, paras. 51 and 52.

### Concluding comments

There is a tension between, on the one hand, the European Community/Member State shared equality competence and, on the other, the individual competence of each Member State in respect of its own employment/social policy. This is all the more apparent when the focus is on age related measures in statistically high aging populations. In addition, the fact that the Directive explicitly applies to horizontal situations and relations between employees and private company employers, which is novel in a Directive, albeit a framework Directive, accounts for the caution and wider margin left to the Member States to balance the competing interests in accordance with the prevailing situation and policy in that Member State. This explains why *age* discrimination may be “justified so widely” and indeed have its “own separate provision” to this end in Article 6 (1) of the Directive, which is unique.

Should age inequality be tolerated, and for what reasons? Yes, according to the European Court of Justice’s interpretation of the Equality Framework Directive, but only for a public interest reason relating to a social policy objective and not to appease the interests of private employers! The European Court of Justice in *Age Concern England* has with this specifically stated public interest limitation “narrowed to that extent” the broad margin of discretion attributed to Member States in the adoption of their employment policies in its previous rulings in *Mangold* and *Palacios*. Furthermore, Member States will be subject to a high evidential standard in proving that their intended objective in adopting the Default Retirement Age and procedures was a legitimate social policy objective in the public interest. Age has been elevated as a result of the Court’s ruling from the seemingly socially acceptable status accorded by Advocate General Mazák to this ‘less suspect’<sup>48</sup> member of the family of prohibited discriminatory treatment. The Court of Justice has, in its assertive ruling, clarified the question of proportionality by positively attributing to the national court the duty to ensure that the United Kingdom Government provide evidence that the Default Retirement Age is the most appropriate and reasonable means to achieve its legitimate social policy aim; that its public interest objective could not be achieved by less restrictive means which do not discriminate against persons aged 65 years and over.

The ruling of the European Court of Justice has confirmed that the Default Retirement Age with its procedures, even though not constituting a mandatory retirement age, falls within the scope of the European Framework Equality Directive, which was to be expected following the Court’s previous ruling in *Palacios*, albeit in different circumstances. A stronger interpretation of what would

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<sup>48</sup> Case C-388/07, Opinion of Advocate General Mazák, *op. cit.* ‘Age is not by its nature a ‘suspect ground’, at least not so much as for example race or sex. Simple in principle to administrate, clear and transparent, age based differentiations, age limits and age related measures are, quite to the contrary, widespread in law and in social and employment legislation in particular.’ Point 74.

be acceptable if a Member State merely generalises in context as to what would constitute a legitimate public interest in order to derogate from the principle of direct discrimination on grounds of age is most welcome. Ultimately, this would depend on the means employed to attain that social objective being deemed to be appropriate and necessary. A positive obligation is placed on the national court, as a result of the ruling of the European Court of Justice in *Age Concern England*, actively to look at all of the evidence in order to ascertain whether the Member State in this case has complied with the principle of proportionality in adopting the Default Retirement Age or whether the social policy objective could have been achieved by means less restrictive to those workers aged 65 and over.

Furthermore, while endorsing the precedents of *Mangold* and *Palacios* to the effect that Member States enjoy broad discretion in the employment/social policies they adopt and also the means undertaken to achieve these, the European Court of Justice in *Age Concern England* has emphasised further that Member States are subject to a high standard in discharging the burden of proof as to whether the discriminatory policy is capable of being objectively justified, in the first place, in accordance with the European Equality Framework Directive. Again, the question as to whether the United Kingdom Government will be able to assuage this high burden of proof attributed to them by the European Court of Justice will be a matter for the national administrative division of the High Court to determine, or maybe even the higher Court, on Appeal.<sup>49</sup>

It is as yet undecided whether the United Kingdom's reasons for legislating in the Regulations for the Default Retirement Age can be justified objectively by a legitimate social policy objective, or whether the Government was acting to appease the interests of private employers. It remains to be seen whether the evidence submitted to the High Court Administrative Division in the United Kingdom is sufficient to satisfy the high evidential standard placed on the government by the European Court of Justice in order to justify directly discriminatory treatment in permitting employers to retire employees on the grounds of age. Then it will be for the national court to decide whether the social policy objective could be achieved by rules which do not discriminate against those aged 65 and over. One leading commentator has advocated,

perhaps the substantial form of equality that we should aim for through the Age Discrimination Regulations is one that is rooted in considerations of efficiency, and in human rights, requiring employers to respect the dignity of their employees when taking decisions that affect them; requiring employers to take decisions that are rational, reasoned and transparent; and prohibiting mere stereotyping on grounds of age.<sup>50</sup>

<sup>49</sup> See the comment on the potential protracted outcome of the referral to the European Court of Justice by the High Court in *Age Concern England*, on the part of Eversheds Solicitors, in 'Joblessness brings rise in ageism cases', "The Financial Times", 3 March 2009, p. 4.

<sup>50</sup> J. Swift, *op. cit.*, at 244. Between 2000 and 2007, the percentage of those over the age of 65 who held jobs rose from 5.2 to 6.8, a rise of about 20 per cent, according to the Office of National Statistics. Norma Cohen, 'Clarity needed on levels of responsibility', "The Financial Times", 26 May 2009, p. 3.

The interpretation of European Community law by the European Court of Justice in answer to the questions so phrased has been clarified and reinforced as a result of the ruling of the European Court of Justice in *Age Concern England*. The Court, without alluding to the anachronistic ruling in *Mangold*, soundly and correctly, it is submitted, refers to the principle of age discrimination. The ruling of the European Court of Justice was much more assertive than the Opinion of Advocate General in safeguarding and promoting the principle of non discrimination on grounds of age.

The outcome of the case in the application of the law to the facts remains to be decided in the United Kingdom Courts. That is, if the case proceeds to be heard in the High Court. The United Kingdom government proposes to review its Default Retirement Age in 2011.<sup>51</sup> Age Concern England currently is pressing for the government to abolish it straight away<sup>52</sup> in the light of the positive ruling of the European Court of Justice. The questions may remain “unanswered in application to the facts” in the United Kingdom Courts, should the government comply with Age Concern’s request, in the circumstances.

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<sup>51</sup> Para. 7.12, *op. cit.* SI 2006 No. 1031.

<sup>52</sup> BBC Radio 4 News, 26 May 2009. ‘We’re fighting on to scrap forced retirement, say Age Concern and Help the Aged’, Age Concern, [www.ageconcern.org.uk/AgeConcern/fighting-on-release-050309.asp](http://www.ageconcern.org.uk/AgeConcern/fighting-on-release-050309.asp).