# Chapter 4
# Age Discrimination and the Future Development of Elder Rights in the European Union: Walking Side by Side or Hand in Hand?

**Helen Meenan**

## 4.1 Prologue

This chapter aims to capture this moment in time for seemingly distinct bodies of law namely, elder rights, age discrimination and human rights, in the European Union (EU). In some jurisdictions, perhaps these fields would not seem so alien to one another but in the English speaking Member States of the European Union, the United Kingdom and Ireland, they do. Standing back and appraising these fields of law, reveals that discrimination and human rights sometimes inhabit the same human rights instrument and, discrimination, human rights and elder rights sometimes inhabit the same fundamental rights instruments and social charters. Standing back also enables comparisons to be made between avenues to justice for age discrimination victims and those seeking to assert human rights for older persons. In the EU, age discrimination, human rights and elder rights are often separate and sometimes together, depending on their source and function. This need not be such a daunting idea. There is also change afoot that may close some normative and implementation gaps and build more bridges between these fields of law. Once adopted, EU age discrimination law beyond employment can help build an extra bridge between discrimination law on the one hand and elder rights on the other. Indirectly, it promises to make a serious contribution to elder law (as distinct from elder rights) which strictly speaking falls within the remit of the individual EU Member States at this point in time.

H. Meenan (✉)
Kingston University, London, UK
e-mail: Helen.meenan@kingston.ac.uk

I. Doron and A.M. Soden (eds.), *Beyond Elder Law*,
DOI 10.1007/978-3-642-25972-2_4, © Springer-Verlag Berlin Heidelberg 2012

## 4.2 Introduction

> The future of elder law should include much more emphasis on issues of age discrimination in employment, in credit and in housing.[1]

Rebecca Morgan wrote these words in the predecessor to this volume and they are welcome words indeed.[2] If elder law is described as "the particular manner in which any aspect of law touches the lives of older persons",[3] surely age discrimination must be a branch on the elder law tree? If, in general, elder law encompasses later life planning, guardianship, capacity, powers of attorney and so forth, heretofore it has not connoted employment. This may go a long way to explaining why we do not readily think of age discrimination when we think of elder law. Frequently, age discrimination legislation only covers employment or, where protection outside employment exists, it frequently follows sometime after the employment field. The combined effects of demographic ageing and the international credit crisis mean that older workers may need to work for longer to finance their extra years in a climate of increased financial uncertainty, even for those who saved and planned prudently.[4,5] The time may now be right to widen our lens to include age discrimination within and outside employment in our understanding of elder law and of possible legal tools to assist the ageing and older people.

It is fair to say there are differing legal strengths and weaknesses on both sides of the Atlantic. Elder law has traditionally been far more advanced, cohesive and better understood in the USA, Canada and as far away as Australia than in the UK and Ireland. This situation is improving, especially in the UK. It is also fair to say that the USA led the development of age discrimination in employment law, decades before it was tackled by the European Union (EU). However, EU anti-discrimination law, from where most national age discrimination laws emanate, has been described as having "some of the most comprehensive and far reaching anti-discrimination legislation to be found anywhere in the world"[6] and that is even before the adoption of the proposed EU Directive which will extend anti-discrimination law beyond

[1] Morgan (2009) (hereafter, *Theories on Law and Ageing*) at p. 153.

[2] Morgan is not alone, M.B.Kapp identifies age discrimination as a legal field affecting elders, for future attention, "Those areas most ripe for future TJ analyses of effectiveness for intended beneficiaries include: regulations prohibiting age-based discrimination in employment, housing, insurance, and other matters..." in *Theories on Law and Ageing*, supra at pp. 42–43. Note TJ stands for therapeutic jurisprudence.

[3] Morgan (2009), supra at p. 145.

[4] Governments too may need elders to work to postpone paying their state pensions. The English Government has recently proposed increasing the retirement age to 66 years by 2020.

[5] Dagmar Schiek explores reasons for banning age discrimination in employment in Schiek (2011), pp. 777–799 at pp. 780–784.

[6] European Commission, Non-Discrimination and Equal Opportunities for All—a framework Strategy, COM(2005) 244 final, p. 1.

employment for religion or belief, disability, age or sexual orientation (the Goods and Services Directive).[7]

## 4.3 Discrimination and Human Rights Together and Separate in Europe

When we consider age discrimination, human rights or elder rights in Europe, a number of international conventions and instruments may already be of assistance to each of these fields. This chapter will attempt a survey of the most relevant conventions and charters viewed particularly, from inside the European Union.

1. The 27 Member States of the EU[8] are subject to three principal sources of human rights and non-discrimination: the Council of Europe with its ECHR and other instruments, the EU with its various Treaties, which together with secondary legislation (typically in the form of Directives) protect a growing number of grounds from discrimination across a growing number of fields and the recent EU Charter of Fundamental Rights (the EU Charter), which became legally binding in 2009.[9] The EU Charter incorporates rights and principles from the ECHR, fundamental rights and anti-discrimination rights, among others from a variety of sources. It is a collection of all the rights enjoyed by citizens of the EU and all the fundamental rights enjoyed by residents of the EU. It has the same legal value as the Treaties of the EU.[10] Importantly, it contains rights of the elderly for the first time in a European Union instrument.
2. Among other things, this survey will reveal normative or implementation gaps which reflect similar gaps already identified elsewhere in relation to age rights in international law.[11] Even within the EU, some Member States may not have accepted certain clauses in charters or conventions, which are a source of rights that they adhere to by virtue of their Membership of the EU. The resulting gaps may be smaller than those at the international level but exist nonetheless in the areas that

[7] European Commission, "Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation", COM(2008) 426 final.

[8] They are Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom.

[9] This was made possible by the Lisbon Treaty which came into force in 2009.

[10] Article 6.1, Treaty of the European Union.

[11] See Judge (2009) at pp. 10–13. United Nations Department of Economic and social Affairs Division for Social Policy and Development Programme on Ageing (2009), Bonn, Germany at pp. 13–16.

fall within a purely national law context. However, EU anti-discrimination law and EU fundamental rights largely offer a universal source of rights to EU citizens.

3. This chapter will reveal that within the EU, age discrimination is comparatively well protected by contrast with age discrimination under the ECHR. Closer examination will reveal that protection from age discrimination in the EU is in fact more complex, with some opportunities for Member States to avoid legislating against age discrimination for certain occupations and allowing for objective justification of age discrimination in other circumstances. Despite this, the naming and inclusion of age in EU anti-discrimination law at the same time as other newer grounds, was a triumph. This contrasts with the ECHR where age is an unnamed ground of discrimination.
4. Unlike international conventions and the ECHR, age discrimination and elder rights enjoy greater visibility in other Council of Europe Charters and in the most relevant EU instruments, discussed herein. Visibility of both age discrimination and elder rights is a welcome virtue. Visibility of rights must logically come before promotion, awareness and protection. It is the starting point.
5. The EU will soon close some gaps by acceding to the ECHR.[12] The most practical consequence of EU accession will be that the ECtHR will be the final court for human rights cases concerning the ECHR in Europe and in the EU. Heretofore cases heard by the ECJ involving human rights inspired by the ECHR but which fell within a field of EU law, could not be appealed to the ECtHR. Nor could the ECtHR find the EU or its institutions in breach of the ECHR.[13]

Above all this chapter aims to highlight that there is a vast amount of rights available to age discrimination claimants or older people within the EU. Apart from the three categories mentioned above we have elder law which remains very much a matter for EU Member States to regulate at their own level, if at all.[14] Despite any normative or implementation gaps, we may ask if there might also be some overlap between any of these areas? The most obvious would be age discrimination legislation outside employment. For older people this is the field most likely to lie in any intersection between age discrimination, human rights and elder rights. After all the right not to be discriminated against is, a human right in the ECHR and a fundamental right in the EU Charter.

From the elder law side (which is a matter for the national laws of EU Member States), good advance legal preparation for old age will assist with planning, crisis management, good family relations and empowerment of the older person but to

[12] Article 6.2 TEU provides that the EU shall accede to the ECHR and Protocol 14 to the ECHR, which entered into force on 1 June 2010, provides for accession by the EU. The Council of Europe and the EU are now in the process of drafting an accession agreement.

[13] See for example, case no. 24833/94, *Matthews v UK*, judgment of the European Court of Human Rights, 18 February 1999.

[14] Here elder law refers to domestic elder law and is distinguished from private international law, for example the Convention on the International Protection of Adults. EU Member States are generally free to sign and ratify international conventions in their own right.

what extent does it assist in the face of bad or discriminatory service delivery by a public hospital[15] or a care home in particular?[16] Here we see a role for discrimination law (where it exists) as a tool for tackling discriminatory service delivery. There is also a role for human rights for poor or degrading service delivery and to fight issues such as the devastation caused by local authorities placing older couples in separate care homes.[17] Medical and residential care for older people, are very live issues in the UK, at the time of writing. In truth at this early stage of slowly building an elder rights' culture in this part of the world, we appear to need at least four pillars[18] of law for older people. That anti-discrimination law ought to be part of the picture, was reinforced by the UN High Commissioner for Human Rights, Navi Pillay when she said, "Non-discrimination is paramount to the human rights agenda; however, old age has yet to be featured prominently as one of the grounds of discrimination at legislative and policy levels. Positive measures are necessary to eradicate discrimination and exclusion of older persons and to ensure access to services according to needs".[19]

Thankfully within EU law, age is a named anti-discrimination ground both in hard legislation for the employment field and in the proposed Goods and Services Directive. By virtue of visibility, clear anti-discrimination prohibitions and concepts and the requirement of effective sanctions in the Employment Directive, which had to be transposed into national laws by 2006 at the latest, for age discrimination, EU law is responsible for giving individuals a clear route to redress in their local courts. So far this only covers the employment field except for those EU Member States that already have their own laws, prohibiting age discrimination outside employment.

## 4.4 The ECHR and Council of Europe: A Natural Starting Point

Within the context of the European Union, the European Convention on Human Rights and Fundamental Freedoms (ECHR) is a natural place to begin. That is because it was drawn up within the aegis of the Council of Europe, an older supranational organisation than the EU with 47 state parties, including all 27 EU Member States. Indeed signing the ECHR is a *de facto* requirement of joining the European Union. This section is devoted to the most relevant Conventions, Charters and Protocols emanating from the Council of Europe. It is well known that the ECHR

[15] Parliamentary and Health Service Ombudsman (2011).

[16] See for example Martin (2011a), front page and p. 4, Martin (2011b) at p. 30 and Care Quality Commission (2011).

[17] Womack (2006), p. 8 and Brooks (2009), p. 43.

[18] This refers to elder law, elder rights, age discrimination and human rights.

[19] From Statement by the UN High Commissioner for human Rights, Navi Pillay, to mark the International Day of Older Persons, 1 October 2010, available at http://www.globalaging.org/agingwatch/Articles/unhumanright.htm

includes a prohibition on discrimination and various human rights that can potentially be utilised by older people, among others. Interestingly, neither category mentions age or the elderly. While certain rights such as, the Right to life (Article 2), prohibition of torture (Article 3), and the Right to respect for private and family life (Article 8) can be envisaged for older people, many of the rights listed, being civil and political in nature, are of no obvious use to the field of elder rights.[20]

Article 14 contains the Prohibition of Discrimination and reads as follows, "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". The very wording of this provision is immediately instructive; age may benefit as a ground embraced by the term "such as . . ." in this open list and this was confirmed by the ECtHR in 2010.[21] However, the fact that age is missing from the list may be symbolic of the time when the ECHR was drafted and there was less awareness of ageing, ageism[22] and age discrimination, compared with today.

It is also apparent that the non-discrimination prohibition can only be engaged once another ECHR right has been infringed although there is some authority that mere engagement of another right may pass the required threshold.[23] Age has been classified as a non-choice ground by Wintemute who explains how this affects its ability to benefit from quite a few Convention rights, that is those involving the making of a choice such as, Freedom of thought, conscience and religion.[24] Age therefore does not benefit from Article 14 as easily as a choice ground would. Moreover, De Schutter reminds us that age discrimination is likely to concern employment and access to goods, facilities and services and social rights for which no right exists in the ECHR.[25] Thus clever "lawyering" is required to rely on the ECHR on behalf of a client concerned with age discrimination. Thus far it seems that assertion of other rights through more straightforward provisions of the ECHR is easier than the two-step method for discrimination in Article 14 ECHR.

[20] On a very rare occasion, elders may benefit from human rights that fall under the category of civil or political rights, see for example, *Farbtuhs v Latvia*, no. 4672/02, ECtHR Judgment 2 December 2004. A violation of Article 3 ECHR was found where an 86-year-old applicant in poor health had been sentenced for his part in detentions ordered by Stalin in 1940–1941. Mr Farbtuhs claimed his imprisonment would amount to inhuman and degrading treatment on grounds of his age and health.

[21] See, Fundamental Rights Agency of the European Union and European Court of Human Rights (2011) at p. 102, where ECtHR, *Schwizgebel v. Switzerland* (No. 25762/07), 10 June 2010 is discussed. No violation of Article 14 ECHR was ultimately found in that case.

[22] Dr Robert Butler coined the term "ageism" in 1968, to describe the prejudices and stereotypes encountered by older people, long after the ECHR was drafted.

[23] See Grief (2002), HR/3-HR/5 and De Schutter's report for the European Commission, de Schutter (2005a) at p. 21.

[24] Wintemute (2004)at pp. 370, 372, 373.

[25] de Schutter (2005b) at p.21.

## 4.5 The ECHR System

In Article 1 ECHR, the High Contracting Parties (State Parties) "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention". Thus, in the first place the State parties have agreed to secure those rights and freedoms. Where the ECHR is breached, an individual or other State Party may make an application to the ECtHR. An individual applicant comprises a person, non-governmental organisation or group of individuals who claim to be the victim of a violation of the ECHR or its Protocols by a State Party to the ECHR.[26] Such an individual will apply to the ECtHR directly only when the State in question is a party to the ECHR but has not ratified it and implemented the ECHR in national law, or when the State has implemented the ECHR and the applicant has exhausted all national remedies.[27] Whether the applicant is an individual or another State several steps are involved. Firstly, the applicant must seek to have the application declared admissible. Secondly, when admissible and the merits of the case have been examined, the Court has powers to seek a friendly settlement between the parties. If none is forthcoming, the application may proceed to a Chamber for judgment or may be referred to the Grand Chamber where it must be accepted or rejected once again. If the matter is resolved at an earlier stage before a Chamber or at a later stage before the Grand Chamber, a Committee of Ministers has the power to supervise the execution of a judgment.[28] Judgments are binding and State Parties are obliged to comply with them.[29] If the outcome of an ECtHR hearing is a finding of a violation of the ECHR by a State Party, then the Court may order that "just satisfaction"[30] be paid, this is a form of compensation which may cover both pecuniary and non-pecuniary losses.[31,32] In some cases the State may be required to amend its legislation to conform to the ECHR.[33]

---

[26] Article 34 ECHR.

[27] Article 35.1. However, the ECtHR does not act as a court of appeal from national courts. See European Court of Human Rights, *The ECHR in 50 Questions FAQ* (Provisional Edition, December 2010) Available at www.ECHR.coe.int Point, 20, p. 7 and point 26, p. 9.

[28] Article 38, ECHR.

[29] *The ECHR in 50 Questions* op cit., point 38, p. 10.

[30] Article 41, ECHR.

[31] It is worth noting that the State parties to the ECHR undertake "to abide by the final judgment of the Court in any case to which they are parties", Article 46.1.

[32] The Court also has power to grant interim measures where the applicant is at serious risk of physical danger, see *The ECHR in 50 Questions* op cit point 33, p.10 and finally, the Court can also give an advisory opinion on a question of interpretation of the ECHR, Article 32.2 ECHR and Article 47, Protocol 11 to the ECHR.

[33] Point 41, p. 11.

## 4.6 Relevant Points for Older People

The wording of Article 14 ECHR would indicate that discrimination is something which the Convention prohibits rather than being a right which is protected. While this distinction may not make much difference, it also seems clear that the prohibition on discrimination does not amount to a right to equality. For an older applicant or their advocate, the fact that Article 14 cannot operate independently of another Convention right or prohibition renders it a somewhat awkward route to combat discrimination. This is compounded by the fact that age is a non-choice ground and therefore it is more likely to engage rights and freedoms that are not protected by the Convention, as stated above. Article 14 is a less than obvious choice for combating age discrimination. However, when least expected, other provisions of the ECHR can at least be invoked in support of vulnerable older people and this route is not without potential.

One such example comes from the UK which adopted the Human Rights Act (HRA) in 1998 in order to implement most of the ECHR into national law. The HRA, like the ECHR, is only addressed to the State and its bodies. This led to problems where a local authority sub-contracted nursing home care to the private sector. In 2007 the House of Lords ruled in *YL v Birmingham City Council*[34] that the HRA did not apply to the care of an older person who the city council had placed in a private care home. The case turned on whether the private home was performing "functions of a public nature" within the meaning of the HRA.[35] Mrs YL, who suffered from Alzheimer's disease, was fighting her eviction from her care home, on the basis that it would lead to a deterioration in her condition and would make it very difficult for her husband and family to visit her.[36] She argued that the move would be an infringement of her human rights and sought a declaration that her care home performed a public function and therefore fell within the HRA. The harsh outcome in this case was mitigated by two sympathetic dissenting judgments[37] and general disapproval which led to the adoption of S. 145 of the Health and Social Care Act 2008.[38]

This provision effectively reversed the *YL* decision for state-funded users of private care homes. While the human rights gap exposed in *YL* has apparently been closed by legislation, the question of what legal or moral standard will apply to privately funded users in the same care homes, appeared to have been left open.

[34] [2007] UKHL 27, [2008] 1 A.C. 95. For a discussion of this case see, among others, Palmer (2008) pp. 141–152.

[35] S. 6(3)(b).

[36] See para. 47 of Baroness Hale's dissenting judgment, in the *YL Case* supra. The human right in view was Article 8 the right to respect for private and family life.

[37] Those of Baronness Hale and Lord Bingham.

[38] See for example, Robins (2007). See also Joint Committee on Human Rights—Eighth Report, Session 2007–2008, *Legislative Scrutiny: Health and Social Care Bill*, House of Lords Publications on the Internet, House of Commons Publications on the Internet, at paras. 1.6–1.18.

Baroness Hale, one of the dissenting judges expressed the view that, "There may be other residents in the home for whom the public have not assumed responsibility. They may not have a remedy against the home under the Human Rights Act... But they will undoubtedly benefit from the human rights values which must already infuse the home's practices...". This appears to have been taken up by the Joint Committee on Human Rights, which later reported on the Human Rights of Older People in Healthcare in 2007, and noted that, "By adopting this framework and the accompanying human rights approach to decision-making and delivery of services, the services themselves should be improved for everyone".[39] The question remains whether this approach on its own, is adequate for the other vulnerable older people who just happen to pay for their own care?

More recently, further provisions of the UK's Equality Act 2010, have come into force. These include a public sector equality duty (PSED) on public bodies to eliminate conduct prohibited by the Act, to advance equality and foster good relations between people who share a characteristic and those who do not.[40] Crucially, this Act extends the PSED to "A person who is not a public authority but who exercises public functions".[41] The Act clarifies that a public function is a function of a public nature for the purposes of the HRA.[42] Altogether this will be invaluable for older people receiving publicly–funded healthcare or residential care in the UK, as the Joint Committee on Human Rights had already reported "strong evidence . . . of historic and embedded ageism within healthcare for older people are important factors in the failure to respect and protect the human rights of older people".[43] Here, a direct link was made between ageism and the human rights of older persons. It is therefore not surprising that their Report also recommended there should be a positive duty on providers of health and residential care to promote equality for older people[44] and that "the current prohibition on age discrimination in the workplace be extended to the provision of goods, facilities and services, so as to encompass (amongst other activities) the provision of healthcare".[45]

The extension of age discrimination legislation beyond the workplace is now due to come into force in 2012 in the UK.[46] Since the *YL* case and certainly up to the

[39] Eighteenth Report of Session 2006–2007, HL 156-I/HC 378-I at para. 84.

[40] S. 149 (1) and (3)-(6).

[41] S. 149(2).

[42] S.150(5).

[43] Para. 59.

[44] Para. 64.

[45] Idem.

[46] By virtue of the Equality Act 2010, this also introduced a provision to deal with combined discrimination on dual characteristics in S. 14, the British government has decided not to take this provision forword.

time of writing, concern over the mistreatment of older people in care homes[47] and in hospitals has grown and has been the subject of other reports.[48] It is remarkable that this should be so against the background of feverish, well-publicised updating and broadening of human rights and equality provisions. The tide appears to be turning slowly in favour of older people. In the UK poor elder care receives considerable attention in the media which was quick to highlight some years ago that human rights law seemed to be failing the elderly.[49] More recently, the media has helped to publicise the elderly as targets of human rights protection.[50] However, it is still early days and the new provisions need time to take root and feed into training and practice. They will not do so in a vacuum but against a background that may include a voluntary human rights approach. This has much to recommend it in terms of the right kind of mindset for the care and healthcare of older people and indeed the care of people of all ages.

## 4.7 A Human Rights Approach

A proactive human rights approach inspired by the ECHR and adopted by its addressees may well have certain advantages over sporadic, uncertain, reactive claims against public service providers, whether speaking of discrimination or human rights. A voluntary human rights approach appears to have borne fruit in the UK where the Equality and Human Rights Commission of England and Wales (EHRC) published a report in 2009 of a human rights inquiry, to establish how far a human rights culture was embedded in service delivery by public authorities. The Inquiry found that a human rights approach had been successfully adopted by a number of health trusts and other public bodies.[51] This approach went beyond mere compliance towards improved service delivery, and more proactive and inclusive approaches where service users could participate in decision-making.[52] The public bodies in question had, in essence, voluntarily used a human rights approach to change institutional culture. The Inquiry ultimately recommended *inter alia* that human rights should be mainstreamed into the work of all those who provide relevant public services and into the decision-making processes, policies, procedures and activities of community and voluntary groups as well.[53] It recommended that the

[47] Rose (2007), Bosely (2010) and Daily Mail Dignity for the Elderly (2011) at p.2.

[48] See for example, Parliamentary and Health Service Ombudsman (2011).

[49] BBC News, *Human rights law 'fails elderly'*, 2/08/2005.

[50] Referring to plans to extend the HRA to cover publicly funded users of private care homes, see, Thomson and Sylvester (2007).

[51] *Human Rights Inquiry*, *Report of the Equality and Human Rights Commission*, June 2009, see Chap. 3, 'The Impact of Human Rights on Public Services', in particular, available at http://www.equalityhumanrights.com/uploaded_files/hri_report.pdf.

[52] Ibid and at p. 142.

[53] Ibid at p. 143 and p. 145.

Government consult on whether a statutory duty should be placed on public authorities to take human rights into account before implementing new policies.[54] This Inquiry demonstrates that human rights are already improving important public services in the UK.[55] A human rights approach appears to add value to the existing legal framework and there may well be an argument that it is implicit in the ECHR, as Article 1 ECHR places a duty on governments to secure all the rights and freedoms in the ECHR to everyone in their jurisdiction. By contrast, the HRA states, "It is unlawful for a public authority to act in a way which is incompatible with a Convention right".[56] This would appear to create a base of compliance only in the form of a prohibition on public authorities, leaving much scope for a voluntary human rights approach and for some kind of duty to secure rights under Article 1 ECHR.

## 4.8 Protocol 12 and Solutions to Article 14 ECHR

Some long-established shortcomings with Article 14 ECHR's role as an anti-discrimination tool have been alluded to above. In 2005, Protocol 12 ECHR entered into force and contains a much broader anti-discrimination scope than Article 14.[57] Importantly it contains an independent right to non-discrimination but not a right to equality. Article 1(1), Protocol 12 reads as follows, "The enjoyment of any right *set forth by law* shall be secured without discrimination on any ground such as . . ." (emphasis added). It proceeds to list the same grounds as Article 14 and therefore once again does not specify age. The Protocol immediately promises benefits over Article 14 in that it is not restricted to discrimination in conjunction with breach of another Convention right. The protection of enjoyment of any right set forth by law may be of further benefit to older people, especially as this may also embrace international law.[58] The ECtHR had previously acknowledged that certain forms of discrimination could not be brought within the ambit of Article 14 and that then draft Protocol 12 to the ECHR would enable those to be examined.[59] This helps us

[54] At p. 149.

[55] A previous report delivered not long before this Inquiry found that a culture of respect for human rights had mostly failed to take root in public authorities in England, Scotland and Wales, see Donald et al. (2008).

[56] Article 6(1).

[57] Para. 33.

[58] See para. 29. The report is available at, www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm#EXPLANATORY REPORT. Note also the discussion by Khaliq (2001) at p. 458.

[59] Opinion of the European Court of Human Rights on draft Protocol 12 to the European Convention on Human Rights, parliamentary Assembly Doc. 8608, 5 January 2000, paras. 3 and 4, available at http://www.assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc00/EDOC8608.htm.

to rationalise the roles of each provision. Protocol 12 was intended to operate concurrently with Article 14 and not to replace it, although there is additionally an area of overlap between them.[60] The advantages of Protocol 12 over Article 14 ECHR include its freestanding nature, its far wider scope and the fact that any positive obligation under Article 1 thereof might even include some element of state responsibility in relations between private persons.[61] According to the Commentary accompanying Protocol 12, while limited, this might involve, "relations in the public sphere normally regulated by law, for which the state has a certain responsibility (for example, arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity, etc)..."[62] Thus there may be a role for Protocol 12 in discrimination in access to goods and services for older people and others, ahead of any tailor made discrimination law for this field or beyond the limits of the scope of such law.

One of the greatest benefits to older people, may actually come from Article 1 (2), Protocol 12 which "guarantees that no-one shall be discriminated against on any ground by any public authority". The Explanatory Report to Protocol 12 confirms that discretionary powers, acts or omissions of public authorities are all in view.[63] There are some predictable restrictions to Article 1(2), however. According to the Explanatory Report, both Article 1(1) and 1(2) are subject to the possibility of objective justification. This extract helps to clarify the limits of the right to non-discrimination,

> distinctions for which an objective and reasonable justification exists do not constitute discrimination. In addition, it should be recalled that under the case-law of the European Court of Human Rights a certain margin of appreciation is allowed to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background...[64]

## 4.9 The Sting in the Tail

The ECHR and Protocol 12 both require signature and ratification in national law to have full effect within the State Party. Only 19 of all the 27 EU Member States have signed Protocol 12. Of those only seven have signed *and* ratified it, namely Cyprus,

[60] Paras. 32 and 33, *Explanatory Report* op cit.

[61] Explanatory Report Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, at paras. 24–26.

[62] Idem at paras. 27–28, note, it is understood that purely private matters would not be affected.

[63] At para. 22.

[64] At para. 19.

Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain. While signature of the ECHR is a *de facto* requirement to join the EU,[65] unanimous signature and ratification of its protocols, is only compulsory for procedural and institutional protocols. Protocols adding further rights for protection such as, Protocol 12 are optional for any State party. There is the possibility of a gap in protection from discrimination in some EU Member States compared to others, should all remaining EU Member States not sign and ratify Protocol 12 ECHR. The UK has neither signed nor ratified Protocol 12 and has voiced a number of objections to signing it.[66] In 2009, the ECtHR decided its first and so far only case under Protocol 12, in *Sejdić and Finci v. Bosnia and Herzegovina* and found that racial discrimination had taken place.[67]

## 4.10 The European Social Charter

The issue of non-signature and/or non-ratification also raises its head for EU Member States that are party to the European Social Charter (ESC) 1961, another human rights' instrument of the Council of Europe. The ESC guarantees a number of social rights under the broad headings of Housing, Health (including, accessible, effective health care facilities for the entire population), Education, Employment, Social Protection, Movement of Persons (including the right of family reunion) and non-discrimination,[68] which did not include age as a named ground. In 1996 the ESC was revised and the Revised European Social Charter (RESC) came into effect in 1999 and was intended to gradually replace the ESC.[69] The RESC contains 31 rights and principles including a new right in Article 23, "The right of elderly

[65] Note Article 49 Treaty on European Union requires an applicant state to respect and promote a range of values set out in Article 2 thereof, including human rights.

[66] Not least that '"Rights set forth by law" may extend to obligations under other international human rights instruments to which the UK is a party", Joint Committee on Human Rights Seventeenth Report, Session 2004/05, prepared 31/3/05 see at, www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9906.htm. This is curious given that it is referring to instruments which it has already signed. Presumably the UK was referring to clauses that it had not accepted within such instruments.

[67] When two people of Jewish and Roma origin complained that they could not stand for election, [GC] (Nos. 27996/06 and 34836/06), 22 December 2009.

[68] This contained two limbs: the first deals with equal pay between women and men in employment, the second guaranteed all nationals and foreigners legally resident or working in the territory that rights in the Charter shall apply regardless of seven named grounds of discrimination.

[69] Note as stated in the Preamble to the RESC.

persons to social protection".[70] However, a large number of rights appear to have a broad enough application to encompass older people as well. For example, they commence with "Everyone has the right to . . ." "Anyone. . ." "All workers. . ." or "Workers". Thus there may also be a degree of overlap with Article 23[71] which in any event is not concerned with age discrimination in employment.[72]

Apart from a right to non-discrimination on grounds of sex, there is no general non-discrimination clause in the main body of the RESC. Instead Article E secures the enjoyment of any right set forth in the RESC without discrimination on an open list of grounds which does not contain age but is preceded by familiar terminology, "on any ground such as". There is some evidence that age is encompassed by this provision.[73]

## 4.11 RESC Acceptance, Ratification and Redress

Out of the 47 State parties of the Council of Europe, 43 have ratified at least one version of the European Social Charter. However, at the time of writing only 30 States have ratified the RESC[74] and, of the 27 EU Member States, only 18 have ratified the RESC. The ESC permits Member States not to accept certain articles, provided they accept a certain number overall. According to the Explanatory

---

[70] With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of:
  a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
  b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them;
- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:
  a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
  b. the health care and the services necessitated by their state;
- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

[71] However, it seems clear from the text of Article 23 that it mainly refers to post-retirement elders.

[72] This is examined under Article 1(2) concerning non-discrimination in employment, see for example Council of Europe, European Committee of Social Rights *European Social Charter (revised) Conclusions 2009*, at p. 70.

[73] See Frequently Asked Questions, 2, available at http://www.coe.int/T/F/Droits_de_l'Homme/Cse/FAQ_eng.asp.

[74] On 10 May 2010, Montenegro's ratification took effect and it became the thirtieth state to ratify the RESC.

Report, States must accept not less than 16 articles. Thus, 7 EU Member States have not accepted Article 23 RESC on rights of the elderly. Article 23 is one of the non-hardcore provisions, which may reduce its chances of being accepted, as Member States must accept six of the nine hardcore provisions.[75] Article 23 does not appear to confer rights directly on older people but the European Committee of Social Rights[76] reads it as requiring the provision of adequate resources for the elderly and requiring the introduction of age discrimination legislation to protect them.[77] This is a distinct advantage over Article 14 ECHR, Protocol 12 ECHR and Rights of the Elderly in the EU Charter below.

Unlike the ECHR, which operates through judicial mechanisms, relying on national courts and ultimately on the ECtHR, the ESC ensures compliance through two separate non-judicial avenues. The RESC's main compliance mechanism is through States reporting on compliance with the ESC and the Committee of Social Rights reaching conclusions on these reports. If a Member State does not comply, a recommendation to change law or practice may ensue. The other avenue is a collective complaint procedure which has been in effect since 1998.[78] There are four categories of non-governmental organisations (NGOs) entitled to lodge complaints with an emphasis on employer and employee organisations. However, organisations with a consultative status with the Council of Europe and national NGOs are included for countries that have accepted this possibility.[79] Once a complaint is declared admissible, it is followed by a public hearing before a Committee of Independent Experts, which produces a report. The Committee of Ministers may then adopt a resolution and recommend certain measures by the State to conform to the ESC.

It might be easy to dismiss the ESC and RESC as their profile is lower than that of the ECHR; however, their compliance procedures add something useful and different to existing approaches. Their focus is on collective rights, state reporting and collective complaints rather than primarily individual complaints.[80] There are also indications that the RESC is growing in profile and importance.[81] At the

---

[75] See paras. 122–123 Explanatory Report, available at http://conventions.coe.int/Treaty/en/Reports/Html/163.htm.

[76] This committee assesses the conformity of State parties with the ESC.

[77] See, EU Network of Independent Experts on Fundamental Rights, *Report of the Situation of Fundamental Rights in the European Union and its Member States in 2005*, at p. 205, available at http://cridho.cpdr.ucl.ac.be/documents/Download.Rep/Reports2005/CFR-CDFConclusions2006-EN.pdf.

[78] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints Strasbourg, 9.XI.1995.

[79] Idem, at Article 2 but only if the Member State recognises them for this purpose.

[80] Although the ECHR allows for both.

[81] Note remarks on the importance of the RESC, of Terry Davis, Secretary General Council of Europe, Address to the seminar, 'The European Social Charter: the next 10 years', Strasbourg, 3 May 2006. Seminar to mark the tenth anniversary of the European Social Charter (revised) remarks.

conference to celebrate the tenth anniversary of the RESC in 2006, Colm O'Cinneide remarked that, "Only through effective implementation of the Charter will we achieve an indivisibility of protection between social and civil-political rights".[82] Furthermore, they are important as together with the ECHR they underpin a number of rights in the European Union Charter of Fundamental Rights (the EU Charter).

## 4.12 The Charter of Fundamental Rights of the European Union

The EU Charter, initially drawn up and proclaimed into life in 2000, was intended to gather together all the rights that are available to individuals in the EU, whether from EU law or international conventions, in a single instrument. An updated version of the EU Charter is now legally binding and came into force at the same time as the Lisbon Treaty[83] in 2009.[84,85] Viviane Reding, Vice-President of the European Commission,[86] has described the EU Charter as, "the most modern codification of fundamental rights in the world..."[87] The Preamble to the Charter states that the EU places the individual at the heart of its activities and that "it is

[82] Colm O'Cinneide, General Rapporteur, Strasbourg 3 May 2006 www.coe.int/t/dghl/monitoring/socialcharter/Presentation/10Anniversary/OCinneadeGeneralReport10Anniv_en.asp.

[83] Formally known as, the Treaty on the Functioning of the European Union, signed at Lisbon on 13 December 2007 and entered into force on 1 December 2009, OJ [2007] C 306 Vol. 50 17 December 2007, also available at http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML.

[84] The new version of the Charter was proclaimed at Strasbourg on 12 December 2007, the most recent version is published in [2010] OJ C 83/389 and is also available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:EN:PDF.

[85] The legal status of the Charter is now confirmed in Article 6(1) of the Treaty on European Union as amended by the Lisbon Treaty, "The Union recognises the rights, freedoms and principles set out in the Charter ... which shall have the same legal value as the Treaties". For a brief history of the Charter and the Lisbon Treaty, see Piris (2010), pp. 147–154 and pp. 158–160.

[86] She is also the European Commissioner for Justice, Fundamental Rights and Citizenship.

[87] Viviane Reding continues, "The Charter entrenches all the rights found in the European Convention on Human Rights... The Charter, however, goes further and also enshrines other rights and principles, including economic and social rights resulting from the common constitutional traditions of the EU Member States, the case law of the European Court of Justice and other international instruments. In the Charter, we also find the so-called 'third generation' fundamental rights, such as data protection, guarantees on bioethics and on good and transparent administration. And Article 53 of the Charter makes it clear that the level of protection provided by the Charter must be at least as high as that of the Convention. Often it will go beyond..." speaking at, 'Towards a European Area of Fundamental Rights: The EU's Charter of Fundamental Rights and Accession to the European Convention on Human Rights', High Level Conference on the Future of the European Court of Human Rights, Interlaken, 18 February 2010.

necessary to strengthen the protection of fundamental rights ... by making those rights more visible in a Charter". The Charter makes it clear that its provisions are addressed to the institutions, bodies, offices and agencies of the Union and to the Member States only when they are implementing Union law.[88] Thus in areas that fall outside the purview of the EU Treaties, Member States are not legally bound by the Charter and their actions may well be judged by other treaty bodies in accordance with other European and international instruments to the extent to which they have accepted or ratified their provisions.[89]

Importantly, the Charter must now be respected at each stage of law-making in the EU.[90,91] This is a clear and central role for the Charter; it has also been used as a tool of interpretation by the European Court of Justice even before it became legally binding.[92] The Charter does not contain or create any remedies or legal actions. Rights contained within it are only actionable if they are justiciable elsewhere in EU law. In any event, there are very restricted opportunities in EU law for an individual to bring a direct[93] or any action before the ECJ. The most important mechanism involving the individual is in fact the preliminary ruling procedure[94] where it is the national court that refers a question of interpretation of EU law in a case before it,[95] to the ECJ, whose judgement is delivered back to the national judge to apply judiciously to the facts of case. Discrimination cases generally arrive in the ECJ by means of this procedure. The Charter is divided into seven chapters. Article 21, Non-discrimination and Article 25, Rights of the Elderly are contained within the Equality Chapter and shall be examined below.

Meanwhile, in 2011 the EU ratified the UN Convention on Rights of Persons with Disabilities. This is the first time the EU has become a party to an international human rights treaty. It is unlikely that this Convention (or the ECHR in due course) will be the last. It is difficult to speculate on whether a future UN Treaty on rights of older persons would be signed and ratified by the EU given that so much of elder

[88] Article 51.

[89] However, signing the ECHR is enough to enable individuals to bring actions before the ECtHR. Ratification of the ECHR enables the matter to commence and potentially be disposed of in national courts.

[90] European Commission, 2010 *Report on the Application of the EU Charter of Fundamental Rights*, COM(2011) 160 final, at p. 2.

[91] The European Commission has committed itself to producing an annual report on its enforcement see, Communication from the Commission Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:EN:PDF.

[92] See for example, Case C-173/99 *The Queen v Secretary of State for Trade and Industry, ex parte: Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU),* (2001) ECR I-4881.

[93] See for example Article 263 Lisbon Treaty concerning the review of legality of acts of EU institutions; an individual must first prove that he has legal standing.

[94] Article 267 Lisbon Treaty.

[95] Where an interpretation is essential to resolve the national case.

care, elder law and elder rights traditionally appeared to fall outside the EU Treaties. Only time will tell, if this will be resolved in light of the recent Rights of the Elderly contained in the EU Charter, which now has the same weight as the EU Treaties and in light of the commitment to fight age discrimination, evidenced by EU age discrimination legislation.[96] The EU will also be affected by rapid demographic ageing.[97] An international convention on rights of older persons signed by the majority or, all its Member States in the first place, would be a boon for older people and would provide clarity and guidance to those who provide care or medical assistance to them, in particular.

## 4.13 Age Discrimination and Rights of the Elderly in the EU Charter on Fundamental Rights

Looking at discrimination and rights of the elderly in the EU Charter, we depart from some of the trends that we have found in human rights instruments of the Council of Europe for instance, non-denomination of age in discrimination provisions. In addition non-discrimination and human rights in EU instruments apply to all EU Member States without the opportunity to sign and then not ratify them, or to select only certain hard-core clauses, for example,[98] as we have seen in the Council of Europe instruments discussed above.[99] That is because the entry into force of all EC and EU Treaties, including the Lisbon Treaty and the EU Charter, depends on ratification by all EU Member States. Moreover, EU anti-discrimination Directives apply to all Member States. Thus at this point in time, the EU instruments under discussion arguably support the universality and indivisibility of human rights more than the Council of Europe instruments discussed above. However, the assertion of rights under EU non-discrimination law may be more difficult for a third country national (TCN) residing in the EU[100] than for TCNs asserting their rights under Article 14 ECHR or Protocol 12.[101]

---

[96] For the EU's competence to enter into agreements with international organisations, see Articles 216–218, Lisbon Treaty.

[97] See among others, Commission Communication of 12 October 2006 "The demographic future of Europe – From challenge to opportunity" [COM(2006) 571 final available at, http://europa.eu/legislation_summaries/employment_and_social_policy/situation_in_europe/c10160_en.htm

[98] The RESC, for instance.

[99] However, we shall see that some of the EU non-discrimination Directives give opportunities to Member States not to apply a small number of provisions e.g. not to apply age provisions to armed forces.

[100] See Article 3(2) of the Employment Equality Directive and the Race Equality Directive, respectively and see the Preamble to these Directives.

[101] The rights and freedoms in the ECHR apply to everyone within the jurisdiction of the state party, see Article 1 ECHR. Similarly, Protocol 12 also applies to everyone.

Some terminology in the EU Charter is confusing.[102] The term "rights" within the Charter, encompasses rights and, also principles, which may have to be implemented; and certain Articles may contain elements of both rights and principles.[103] Article 21(1) is the main discrimination clause of the Charter and contains a broad prohibition against discrimination and appears to take the form of a right rather than a principle. It reads, "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited".[104] This includes, but goes well beyond, the six grounds, including age, that are contained in Article 19 Lisbon Treaty (LT) (and its predecessor Article 13 EC Treaty).[105] Here we find both choice and non-choice discrimination grounds together, but only some enjoy a law-making base in the LT and hard law protecting them. The remaining grounds contained in Article 21.1 are mainly based on Article 14 ECHR and have no law-making base in EU law. For this to occur however, Article 19 LT would first need to be amended to name the additional grounds and then existing discrimination legislation would need to be amended or new legislation adopted. Thus the EU Charter, an instrument of certain legal weight and considerable importance, which embraces all EU fundamental and human rights from whatever source, is not without its own apparent gaps.

This is very different from the apparent priority in the ECHR for so-called choice grounds compared with non-choice grounds. Both do better within the corpus of EU anti-discrimination law. This, however, also reflects the organic development of EU anti-discrimination law, which has by now a long enough history of protecting non-choice anti-discrimination grounds, starting with sex (and nationality)[106] followed much later by race. These reflected a real need at different stages when they were adopted in the European Economic Community and later when it evolved into the EU. The grounds in Article 21 of the Charter are drawn from three sources including, Article 13 EC and Article 14 ECHR.[107] Article 13 EC was introduced by the Treaty of Amsterdam 1997 and permits the Council of the European Union voting unanimously, to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

[102] The Explanations that accompany the Charter are invaluable.

[103] See the Charter's Explanations on Article 52(5) which state, "In some cases, an article of the Charter may contain both elements of a right and a principle, e.g. Articles 23, 33 and 34", available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF.

[104] Article 21(2) prohibits discrimination based on nationality in accordance with the EC Treaty, as amended.

[105] The six grounds are sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation.

[106] Largely, in the context of the right to free movement of people.

[107] The third source is Article 11 of the Convention on Human Rights and Biomedicine and pertains to genetic heritage.

This was re-numbered as Article 19 in the LT.[108] While sex has traditionally been dealt with comprehensively elsewhere in the EC Treaty and secondary legislation, two Directives adopted in 2000 on the heels of Article 13 EC have provided the first avenue to litigation and redress for the remaining grounds.[109] They are discussed below. Meanwhile, the Explanations of the Charter clarify the status of the rights in the Charter that are drawn only from Article 14 ECHR.[110]

Article 25 of the Charter contains the rights of the elderly, "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life". Recognising and respecting the rights of the elderly suggests that Article 25 contains a right in the form of a principle.[111] It is also arguable that Article 25 contains a social right; therefore it is more like a programmatic right than a right that may be justiciable elsewhere in EU law.[112] This may also be supported by the nature of the sources for this article which the Explanations reveal as Article 23 of the RESC[113] and Articles 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers. This recalls the dichotomy that the EU Member States that have not accepted Article 23 RESC on rights of the elderly only respect it within the sphere of implementation of EU law and not within a purely national law context.

Early academic debates concerning the borderline between rights and principles in the Charter,[114] which is very relevant for the rights of the elderly, have now been resolved.[115] The Explanations accompanying the Charter explain that "subjective rights shall be respected, whereas principles shall be observed. . .**Principles** may be

[108] Article 19 LT also contains some amendments on legislative technique for example, Article 19 improves the role of the European Parliament from a consultative one under Article 13 EC to a consenting role.

[109] Note however, Council Directive 2004/113 EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L373/37, 21 December 2004, which was adopted under Article 13 EC.

[110] Article 52.3, Charter provides "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

[111] Meenan (2007), op cit. at pp. 64–65.

[112] Idem.

[113] As noted above, only a small number of EU Member States have accepted this provision.

[114] See Meenan (2007) pp. 39–82 at pp. 53–57 and pp. 65–68, where a number of academic opinions are discussed.

[115] The adopted 2007 version of the Charter and the revised Explanations which accompany it see, for example, Article 52 Scope of guaranteed rights, to which Article 52(4)–52(7) have been added. Note Article 52(5) in particular, "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts in the ruling on their legality".

adopted through legislative or executive acts... accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. **They do not however give rise to direct claims for positive action by the Union's institutions or Member State authorities**". (emphasis added) In summary, no provision in the Charter is directly justiciable by an individual in the EU, not least because the Charter is addressed to the EU institutions, bodies and agencies and Member States solely in the implementation of EU law. Rights of the elderly are really principles and they are not justiciable elsewhere in EU law. Thus, rights of the elderly in the EU Charter do not appear to create or reiterate any cause of action in EU or national courts. Nor for that matter is there any judicial complaint mechanism elsewhere the Charter.[116]

So far we have seen quite a number of general rights which older people (in addition to others) may access, elder rights, human rights, anti-discrimination and equality rights in the EU. We also see an attempt in the EUCFR to bring all of these together for the first time in a single code. It would be understandable for the non-lawyer in particular to be bewildered by the range of rights, differing approaches and quirks of each system. This is not to mention the varying legislative and implementation gaps which are partly remedied through membership of the EU. However, each source and system arguably brings something to the table and may produce different strengths for different stages and challenges throughout the life course. Against this background, EU age anti-discrimination law provides visibility, universality, protection, and enforcement of rights to nearly all within EU borders, notwithstanding opportunities for objective justification and derogation which are not uncommon in EU law.

## 4.14 Age Discrimination in EU Law

The Treaty of Amsterdam revolutionised and revitalised EU discrimination law in 1997. Prior to this, European law[117] recognised two grounds of discrimination, sex and nationality, that had been contained in the original EEC[118] Treaty 1957 and for which a large body of secondary legislation and case law had already built up. Age was one of five new anti-discrimination grounds for which Article 13 EC (now Article 19 Lisbon Treaty) was merely a law-making base and thus conferred no direct rights or avenues of recourse on the individual citizen. It was by no means

---

[116] Article 43 of the Charter however permits EU citizens to petition the European Ombudsman, in limited circumstances "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role".

[117] Referring to the law of the European Community later referred to as the law of the European Union.

[118] European Economic Community.

certain that age would be included in the first wave of legislation adopted under that provision. During the drafting of the Amsterdam Treaty and later when the European Commission was deciding on priorities for anti-discrimination legislation, age had a lower profile than some of its fellow family of newer grounds, especially race[119] and disability.[120] This lower profile for age in European Union policy and soft law reflected a pretty erratic picture for protection from age discrimination across EU Member States. There was generally little or nothing in the way of constitutional protection from age discrimination. Countries that banned age limits in recruitment did not necessarily outlaw discrimination within employment, for example.[121] This picture began to change in the late 1990s when Ireland adopted comprehensive discrimination law in employment protecting nine grounds, including age.[122] This was quickly followed by Irish law protecting the same nine grounds from discrimination outside employment.[123] These laws were a useful model, though not the only model, for EU discrimination laws adopted in 2000.

In 2000 the Council of the European Union adopted two Directives under Article 13 EC. It was predictable, given racial and political unrest in certain parts of the EU, that the first of these was the Race Directive,[124] which prohibits discrimination on grounds of racial or ethnic origin in employment, vocational guidance and training, working conditions, membership of employers', workers' and professional associations. The Race Directive goes further than the employment field and applies to discrimination in social protection, including, social security and healthcare, social advantages, education and access to and supply of goods and services available to the public, including housing. Thus race became the first Article 13 anti-discrimination ground in EU law to be protected beyond employment. In 2000 the Council adopted the Employment Equality Directive[125] which establishes a general framework for equal treatment on grounds of religion or belief, disability, age and sexual orientation in employment and occupation.

The Employment Directive covers the same material scope as the Race Directive as regards employment and vocational training and shares the same basic structure prohibiting direct and indirect discrimination, harassment, instructions to

[119] For a discussion of the history and rationale for the Race Directive see Bell (2007) infra at pp. 178–183.

[120] For a discussion of the profile of age among the Article 13 grounds see, Meenan (forthcoming).

[121] For an early picture of national age discrimination laws across European countries including a much smaller European Union, see Age Discrimination in Europe (1994), pp. 13–16.

[122] The Employment Equality Act, 1998, since amended.

[123] The Equal Status Act 2000, note this Act and the Employment Equality Act 1998 were amended by the Equality Act 2004 largely in order to comply with the Employment Equality Directive and Race Directive, both adopted in 2000.

[124] Council Directive 2000/43 of 29 June 2000 implementing the principle of Equal treatment between persons irrespective of racial or ethnic origin OJ 2000, L 180/22.

[125] Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16.

discriminate, and requiring, Member States to protect employees from victimisation. Each Directive provides for the possibility of objective justification of indirect discrimination, genuine occupational requirements and permits Member States to adopt positive action measures and requires them to lay down sanctions that are effective, proportionate and dissuasive. However, the Race Directive also requires Member States to designate a body to promote equal treatment without discrimination on grounds of race or ethnic origin. This is a major point of difference from the Employment Directive, which requires no such national body to promote equality on any of its grounds, including age.

When these Directives were adopted many academics referred to there being a hierarchy of protection in the EU, with race and sex at the pinnacle and age at the bottom.[126] This is explained primarily by the Race Directive's greater material scope and its requirement of a national promotional body. Apart from these contrasts, which were also shared by the other Article 13 grounds, by far the greatest reason for age occupying the lowest floor of the so-called hierarchy of protection are the specialist provisions of the Employment Directive, concerning age. The protection gap enjoyed by Race has been slowly narrowing, firstly with the adoption of a new Article 13 Directive in 2004, implementing the principle of equal treatment between men and women in access to and supply of goods and services (hereafter the Sex Equality in Goods and Services Directive).[127]

This Directive also requires a national body to promote sex equality but with a smaller field of protection.[128] Secondly, in 2008 the Council adopted a Proposal for a Directive implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation[129] in social protection,[130] healthcare, social advantages, education, access to and supply of goods and services which are available to the public including, housing (the Goods and Services Directive). This proposal, though apparently in its final stages, has been stalled for some time. We shall see that a key "age" provision in the proposed Goods and Services Directive mirrors closely one in the Employment Equality Directive, also concerning age.

## 4.15 Age Within the Employment Directive

These European Directives provide for a minimum level of protection but Member States may provide a higher level of protection if they wish. On the face of the Employment Directive, age enjoys parity of esteem with the other grounds in that

---

[126] European Commission (2004), pp. 12–14.

[127] Directive 2004/113/EC [2004] OJ L 373/37.

[128] As it does not cover the content of media, advertising or education.

[129] 2.7.2008 COM(2008) 426 final.

[130] Including, social security.

it shares all the key common concepts with them. However, the Directive does acknowledge differences between the grounds.[131] For example, it requires the Member States to provide reasonable accommodation for disabled persons.[132] There are also other tailor-made clauses around occupational requirements.[133] It is arguable that these and other provisions help to make the Directive workable and help to house the differing grounds in the same important anti-discrimination instrument with common goals. The Directive also reflects the fact that unanimous voting by the Member States was required (under what was then Article 13 EC) for the adoption of legislation, thus some provisions have been informed by compromise. Some of these issues are evident in the Recitals to the Directive, which explain the rationale for the Directive and key provisions. The key Recitals for age are:

> Recital 14 "This directive shall be without prejudice to national provisions laying down retirement ages".

There was considerable academic debate as to the meaning of this short Recital and what bearing it had on the increasingly important issue of retirement ages.[134] The European Court of Justice's second judgment on age and the Employment Directive provided an excellent early opportunity to interpret it. In *Palacios de la Villa v Cortefiel Servivios SA*,[135] a case on the legality of the mandatory retirement age of 65 in Spanish collective agreements, the ECJ interpreted Recital 14 as stating that the Directive does not affect the Member States' choice of retirement ages. However, this does not prevent the Directive from applying to the conditions of termination of employment when the chosen retirement age has been reached[136] as, they prevent "his future participation in the labour force".[137]

This judgment was helpful as retirement is not mentioned in the body of the Directive but dismissal is; therefore, for the purposes of these cases the question is whether the conditions for dismissal at 65 (or at the given retirement age) fall within

---

[131] Barry Fitzpatrick captures the heart of this process when he states, "It is necessary when approaching new equality grounds, to take an integrated but differentiated approach integrated in the sense that many of the legal definitions (and practical implications) of new grounds are common to those of pre-existing grounds, but also differentiated in that each new ground presents issues and controversies which are particular to that ground. The latter perspective is not to endorse a hierarchy of inequality but rather to acknowledge the differences between them". Barry Fitzpatrick in Meenan (2007), op cit. at p. 313.

[132] At Article 5.

[133] For example, Member States may keep legislation permitting a difference of treatment on grounds of religion or belief where the ethos of the church or organisation requires it for the nature of the occupation involved, provided any difference in treatment does not justify discrimination on another ground, Article 4(2).

[134] Some of the interpretations are referred to in Meenan (2007), at p. 303.

[135] Case C-411/05 [2007] ECR I-8531.

[136] At para. 44.

[137] Para. 45.

the purview of the Directive. In *Palacios de la Villa* we also see the ECJ refer again to the likely *future* impact of a measure on older workers. In *Mangold v Rudiger Helm*, the ECJ's first judgment on age under the Directive, the ECJ was very moved by the future impact of a German rule that permitted employers to award fixed-term contracts to all workers over 52, an indefinite number of times, without objective reason. In deciding that the rule exceeded what was appropriate and necessary to achieve its legitimate labour policy aim it stated,

> This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its member's working life of being excluded from the benefit of stable employment.[138]

There is a sense that the Court is alive to the potential for older workers to be pawned off with work or working conditions that might not be so acceptable to other workers. A more recent judgment in *Ole Andersen v Region Syddanmark*[139] continues this theme. The ECJ referring to a Danish law that prevented older workers who were entitled to an old age pension, from accepting severance pay and deferring their pension in order to seek new employment, stated that "the measure at issue . . . thus forces workers to accept an old-age pension which is lower than the pension which they would be entitled to if they were to remain in employment for more years, leading to a significant reduction in their income in the long term".[140]

The *Mangold* case was also important as the ECJ declared that the principle of non-discrimination on grounds of age was already a general principle of European Union law.[141] While this was indeed news and was criticised by some writers[142] and even a small number of Advocates General of the ECJ in later cases,[143] it helped to raise the profile of age in EU non-discrimination law and to resolve the case in hand. In *Seda Kucudeveci*, the ECJ has since confirmed that the principle of non-discrimination on grounds of age is a general principle of EU law which is given effect in the Employment Directive.[144]

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

[138] Case C-144/04 [2005] ECR I-9981. Para. 64.

[139] Full title, *Ingeniorforeningen i Danmark, acting on behalf of Ole Andersen v Region Syddanmark*, Case C-499/08, [2011] ECR not yet reported.

[140] Para. 46.

[141] Paras. 74 and 75.

[142] See for example Eriksson (2009) at pp. 734–735 and at footnotes 30 and 31.

[143] See for instance Opinion of Mazak AG in *Palacios de la Villa*, op. Cit., at paras. 83–97.

[144] Case 555/07 [2010] ECR I-365. Paras. 20–21.

This Recital sheds some light on the limits of discrimination law for all the grounds in the Directive. The person applying for or performing the job must be able to do it. Despite much academic argument on the merits of transferring reasonable accommodation to other grounds,[145] this has not happened at EU level. In any event, Recital 18 swiftly builds on the issue of capability as follows,

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

In *Colin Wolf v Stadt Frankfurt am Main*,[146] the ECJ referred *inter alia* to Recital 18[147] in deciding that a maximum recruitment age of 30 was essential for intermediate career fire-fighters in Frankfurt, Germany. Moreover, this requirement did not exceed what was necessary and appropriate in light of the aims of the operational capacity and proper functioning of the fire service. The Court decided that physical fitness was a genuine occupational requirement of that job and was a characteristic related to age. It was significant in this case that the German Government produced scientific data from studies in industrial and sports medicine as evidence that respiratory capacity, musculature and endurance diminish with age.[148] The Court noted that the German Government was not contradicted on this evidence, which led it to conclude that "very few officials over 45 years of age have sufficient physical capacity to perform the fire-fighting part of their activities".[149] This contrasted with other judgments where a certain age was chosen, with no evidence to support it, such as *Mangold* when the age at which older workers could be awarded a fixed term contract instead of an indefinite contract of employment, was gradually reduced to 52 years.

In *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*[150] (hereafter Age Concern England), the Court gave its views on the level of discretion left to Member States, "in choosing the means capable of achieving their social policy objectives, the Member States enjoy broad discretion… Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough . . . and do not constitute evidence on the basis of which it

[145] *Critical review of academic literature*, op cit. at p. 20.

[146] Case C-229/08 [2010] ECR I-1.

[147] Paras. 38 and 39.

[148] Para. 41.

[149] Idem.

[150] Case C-388/07 [2009] ECR I-1569.

could reasonably be considered that the means chosen are suitable for achieving the aim".[151]

Recital 19 builds on Recitals 17 and 18,

> Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces...[152]

Some Recitals are given more concrete expression in the main body of a Directive just as Article 3(4) of the Directive elaborates on Recital 19,

> Member States may provide that this Directive, in so far as it relates to discrimination on grounds of disability and age, shall not apply to the armed forces.

In reality only six EU Member States including the UK and Ireland, have made an express exemption for their armed forces from age and disability provisions of the Directive,[153] while some other Member States kept in place the age and capability requirements of their armed forces in their regulations without declaring an exemption for them.[154]

## 4.16 The Most Intriguing Age Provisions

Recital 25 reads as follows,

> 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.

This Recital acknowledges that apart from essential characteristics of a job catered for by the device of genuine occupational requirements, there may be occasions when a difference in treatment on grounds of age may be legitimate. We shall see that this occurs when a Member State is pursuing legitimate employment policy, labour market and vocational training objectives. This Recital also acknowledges the widespread use of age across the EU as a work and man-power organisational tool in employment law and policy, employment contracts, collective agreements and vocational training. It helps to highlight a very great difference between age and all other grounds in the Article 13 Directives, namely, that it has traditionally been acceptable

[151] Para. 51, see also *Mangold, Palacios de la Villa* op cit. and *Rosenbladt*, Case C-45/09 [2011] IRLR 51 [2011] ECR not yet reported.

[152] This Recital was inserted at the request of the United Kingdom.

[153] European Commission, (2011) at pp. 55–56.

[154] Idem.

to make employment laws and employment decisions based on a given age far more often and, in a wider range of circumstances, than for other grounds.

Bell and Waddington remind us that there are occasions when anti-discrimination grounds are relevant to perform a job or use a service or good.[155] In this regard, they differentiate between a ground such as sex in the context of pregnancy, which may affect *availability* to perform a job, use a service or good, or age and disability, which may be relevant in limiting *ability* to perform a job, use a service or good. However, they argue, "Some of the grounds covered by EC equality law can be regarded as truly irrelevant to the employment/access decision in that they have no effect on the ability or availability to perform work or use services or goods. This is arguably the case for gender (as opposed to sex), race and ethnic origin, and sexual orientation".[156] This helps to highlight how acceptable it is to use age as a "relevant" characteristic in these domains. However, a deeper or different scrutiny might make us more wary of blithely accepting age rules/decisions as the norm or as acceptable. The Article 13 Directives do not cater for cases of multiple or intersectional discrimination. One danger of permitting differences in treatment for workers of a certain age or age group is that they may damage one particular sub-group more than another. We may enquire if a rule affects older women more than older men or whether it affects older workers with caring responsibilities more than older workers without caring responsibilities, for example. Even though being a carer is not protected by EU discrimination law, it may be in some EU Member States and further scrutiny may give rise to fresh information about the profile of those most affected by the age-based rule. Recital 25 also serves to remind us that the 27 EU Member States are a heterogeneous group and the employment provisions in each Member State may reflect their different contexts and challenges. It also introduces us to the idea that some age discrimination may be justifiable.

Article 6 of the Employment Directive gives practical expression to the ideas in Recital 25 and is entitled *Justification of differences of treatment on grounds of age*. Article 6.1 permits Member States to provide that differences of treatment based on age will not be 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 the means of achieving that aim are appropriate and necessary". It then gives examples of permissible differences in treatment.[157] Article 6 is unique in the Article 13

[155] Bell and Waddington (2003), pp. 349–369.

[156] Bell and Waddington (2003), op cit. At footnote 62 they clarify that access is being used in this context to signify access to goods and services.

[157] "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

Directives that are in force, as it provides an additional method for justifying only one ground of discrimination, namely age. When the Directive was first drafted, Article 6 was originally understood as justifying direct age discrimination only.[158] It now seems to be understood in some quarters, as also capable of justifying indirect discrimination.[159] It would appear that there may well be an additional means of justifying both direct and indirect age discrimination in EU law, to the opportunity for objectively justifying indirect discrimination which is available to all grounds in the Directive.[160] Numhauser-Henning reminds us that the traditional view is that direct discrimination may never be justified but has reported on an increasing trend in EU law towards justifications for direct discrimination.[161]

There are three necessary steps to justifying age discrimination in line with Article 6.1. First, is there a difference in treatment based on age? Second, is there a legitimate objective which objectively and reasonably justifies the difference in treatment based on age? Third, are the means used to achieve the objective appropriate and necessary? Article 6.1 is vague, inelegant and seemingly, open-ended. It attracted a fair amount of criticism, particularly in the early days of the Directive when the debate centred on the hierarchy of protection referred to above. However, technically speaking, despite any flaws it appeared to work as a testing mechanism in *Mangold* which was the first case to apply it. Much may depend though on how generous the ECJ is in accepting a legitimate aim put forth by a Member State. At the time of writing, a recent judgment *Georgiev*[162] showed the ECJ bending over backwards to indicate what legitimate aims might be imputed to the regulation of compulsory retirement of university professors in Bulgaria and that it might be prepared to accept in that context.

The Court reiterated[163] that even when an aim is not clear from the legislation,[164] this does not mean the legislation does not pursue a legitimate aim. It

---

recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement".

[158] The Proposal for the Directive referring to Article 5 (now Article 6), states "... This Article provides a non-exhaustive list of differences of treatment on grounds of age which shall not constitute direct discrimination, provided they are objectively justified..." European Commission, COM(1999) 565 final, Brussels, 25.11.1999 at p. 10.

[159] See European Commission (2011) at p. 23 which clearly states that Article 6 permits justification of direct and indirect age discrimination. Note discussion of the borderline between direct and indirect age discrimination in the context of Article 6 in Meenan(2003) at pp. 20–21.

[160] Article 2(b)(i). Note also Article 2(b)(ii) in relation to appropriate measures to be taken by employers in relation to persons with a particular disability.

[161] Numhauser-Henning at pp. 173–174.

[162] *Vasil Ivanov Georgiev v Tehnichesi universitet – Sofia, filial Plovdiv* Joined Cases C-250/09 and C-268/09 ECR not yet reported.

[163] Referring to three decided cases under Article 6, *Palacios de la Villa, Age Concern England* op cit. and Case C-341/08 *Petersen*.

[164] Or from the case file in this case.

is important to identify the aim in order to assess its compatibility with the Directive.[165] While this is a job for the national court, the ECJ, after the general submissions of the university, the Bulgarian Government and the more specific submissions of other governments and the European Commission, indicated that a legitimate aim linked to employment and labour market policy, "such as the delivery of quality teaching and the best possible allocation of posts for professors between the generations"[166] might be appropriate.

*Gerhard Fuchs, Peter Kohler v Land Hessen*,[167] concerned the compulsory retirement of state prosecutors at the age of 65 in one region of Germany. Mr Fuchs and Mr Kohler applied to work beyond 65 which they were permitted to request, until the age of 68, if it is in the interests of the civil service. Their request was rejected on appeal. However, the German court doubted that compulsory retirement at age 65 was compatible with the Employment Directive, especially as that age was chosen when the view was that fitness for work declined after that age. When current research showed that fitness for work varies from person to person, the legislature raised the retirement age to 67 for other federal civil servants and private sector employees.[168] The ECJ was asked whether the Employment Directive precluded this law if it has one or more of the following aims, "the creation of a 'favourable age structure', planning of staff departures, promotion of civil servants, prevent of disputes or achieving budgetary savings".[169] All parties agreed that the compulsory retirement at 65 created a difference of treatment on grounds of age.

The ECJ then examined if there was a legitimate aim for the rule. Although none was clearly stated in the legislation, the ECJ was prepared to accept those[170] put forward by the national court and concluded that "the aim of establishing an age structure that balances young and old civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy".[171] However, the national court was concerned that the measure met the interests of the employer rather than the public interest as required by Article 6(1) of the Directive. Furthermore, could the fact that the measure was adopted by a single region of Germany for only some of its staff, render it, not in the public interest? The ECJ found that the aims in this case, which take account of the

[165] Para. 43.

[166] Para. 68.

[167] Case C-159/10, C-160/10, Judgment 21 July 2011.

[168] Para. 24.

[169] Para. 32.

[170] Note budgetary savings is absent.

[171] Para. 50.

interests of the civil service, may be regarded as being aims of public interest as they were motivated by ensuring a high-quality service and were related to employment and labour market policy.[172] Nor did the fact that it was adopted at regional level prevent it from pursuing a legitimate aim in line with Article 6(1).[173]

The ECJ then addressed whether the rule was appropriate and necessary to achieve the legitimate aims? It recalled that Member States enjoy a broad discretion in the means used to achieve their aims, but they may not frustrate the principle of non-discrimination on grounds of age, which must be read in light of the right to engage in work recognised in Article 15(1) of the EU Charter of Fundamental Rights. Moreover, attention must be paid to the participation of older workers in the workforce.[174] The ECJ also recalled the *Palacios de la Villa* case where it accepted the compulsory retirement of certain older workers in Spain as encouraging recruitment and not unduly prejudicing older workers if they are entitled to a reasonable pension.[175] It decided that the rule affecting Mr Fuchs and Mr Kohler did not exceed what was appropriate and necessary as they retired on a full pension, with a possibility of working until 68 if they request it and it is in the interests of the civil service.[176] As regards the aim of budgetary considerations, it clarified that while they can underpin a Member State's social policy they cannot constitute a legitimate aim within the meaning of Article 6(1) of the Directive.[177]

The second question referred to the ECJ in this case revisited the issue raised in *Age Concern England* of what evidence is required to demonstrate that a measure is appropriate and necessary to achieve a legitimate aim. In *Age Concern England* the ECJ made clear that "mere generalisations" indicating that a measure was likely to contribute to employment policy would not be enough and the Directive imposed a burden on Member States of establishing to a high standard of proof the legitimacy of their aim. In *Fuchs* the ECJ adds to this saying that the evidence supporting the choice of measure may include verifiable data but also forecasts, which by their nature, may be uncertain.[178] The third question addressed the inconsistency of requiring state prosecutors to retire at 65 while raising the retirement age to 67 for certain other employees. The ECJ decided that the law at issue did not lack

[172] The ECJ pointed out in para. 52 that in *Age Concern England* op cit. at para. 46 that It had already clarified that aims are 'legitimate' if they have a public interest distinguishable from purely individual reasons particular to the employer's situation but it could not be ruled out that a national rule may, in pursuing that aim recognise a certain flexibility for employers.

[173] Para. 55.

[174] Paras. 61–63.

[175] Para. 66, the ECJ also referred to the *Rosenbladt* case op cit. in support of this point.

[176] Paras. 67–68.

[177] Para 74.

[178] Paras. 78–82. In the end it is for the national court to assess under the rules of national law, the probative value of the evidence which could also include statistical evidence.

coherence because it was possible for prosecutors to request to continue working until 68; the fact that the retirement age for different German employees had been increased to 67 did not render the other rule invalid.[179]

The joined Cases of *Sabine Hennigs v Eisenbahn-Bundesant* and *Land Berlin v Alexander Mai*[180] concerned two public sector employees in Germany and the determination of their pay according to a collective agreement called, BAT. Under the BAT, initial pay on taking up a position was decided by the age of the applicant. Thereafter classification on each pay grade depended on the job performed by the employee but within each group his basic salary was determined according to his age and every two years his basic pay moved up to the next age group. However, complicated provisions applied for employees who joined after the month in which they reached 31 or 35 years of age, whereby only half of the period from that birthday to their present age was included. Thus, entirely comparable workers could receive very different pay according to when their thirty first or thirty fifth birthdays fell. The German court sought interpretation on whether the principle of non-discrimination on grounds of age contained in article 21 of the EU Charter as given expression in the Employment Directive, must be interpreted as precluding a measure in a collective agreement which provides that within each salary group, the basic pay step is calculated by reference to an employee's age?

In the first place the ECJ clarified that the social partners may like Member States provide for differences in treatment on grounds of age further to Article 6(1) of the Directive, and enjoy the same discretion as Member States in their choice of aim and means of achieving it. They too must comply with the Directive. The German court stated that the higher pay of older workers was justified by their longer professional experience and rewards loyalty to the firm. Lower courts that had heard this case regarded the higher pay of older employees on their appointment based on age and regardless of experience, as compensation for their greater financial needs.[181] This aspect was rejected by the ECJ, it had not been shown that there was a direct correlation between the age of employees and their financial needs.[182] However, the basic aim of rewarding experience was a legitimate one within the meaning of Article 6(1).

However, the ECJ found that the BAT went beyond what was appropriate and necessary to achieve this aim as it could result in awarding an older employee with no experience a sum equivalent to a younger employee with considerable experience. The principle of non-discrimination on grounds of age must be interpreted as precluding a rule which provides that the basic pay on appointment, of a public sector employee is determined by reference to his age.[183] *Sabine Hennigs* also

[179] Paras. 92–98.

[180] Cases C-297/10 and C-298/10, Judgment 8 September 2011, not yet reported.

[181] Paras. 69–70.

[182] Para. 70.

[183] Para. 78.

concerned the BAT but she was transferred to a new pay scheme that did not rely on age categories for the calculation of pay but relied on objective criteria. The question was whether transitional arrangements, whereby initial pay was based on pay under the old discriminatory system was precluded by EU law? The ECJ found that even though this arrangement discriminated according to age, it aimed to avoid losses of income for existing older employees and enabled the social partners to switch to the new objective pay scheme.[184] Moreover, the arrangements were transitional and temporary and the discriminatory effects would disappear in time.

One of the most factually interesting age cases to date is, *Prigge and others v Deutsche Lufthansa*,[185] where a German court sought a ruling as to whether Articles 2(5) (the protection *inter alia* of health), 4(1) (GDOQs) and 6(1) of the Employment Directive precluded a national age limit of 60 for airline pilots for reasons of air safety, established in collective agreements. Under German rules many airline pilots' employment contracts were automatically terminated at age 60. However, Germany also subscribed to international legislation which permitted pilots to fly over the age of 60 and up to the age of 64 if, they were part of a multi-pilot crew and were the only pilot on the crew who had attained age 60. Pilots aged 65 were no longer allowed to fly in commercial air transport. Interestingly, other German rules contained in different collective agreements did not set an age limit of 60 for pilots.[186]

The ECJ established that the Directive applied to the clause in the collective agreement as it concerned the employment conditions of pilots and they experienced less favourable treatment, than younger pilots. It decided that the Directive must be interpreted in light of the rule's objectives of guaranteeing air traffic safety and the protection of health. However, in light of the national and international law which permitted pilots to fly above the age of 60, the "age 60 rule" in the collective agreement was not "necessary" to achieve the objective of the protection of health.[187] Article 4(1) permits Member States to provide for a difference in treatment based on a characteristic related to any of the protected grounds if, it constitutes a "genuine and determining" occupational requirement (GDOQ) provided the objective is legitimate and the requirement is proportionate. The ECJ stated that it is essential that airline pilots have particular physical capabilities and that it was "also undeniable that those capabilities diminish with age" therefore, possessing particular physical capabilities may be considered as a GDOQ for airline pilots and that the possession of such capabilities is related to age.[188] Once again the rule failed for inconsistency with international and national legislation. The ECJ could find no apparent reason from the information given or presented to it, why

[184] 95–99.

[185] Case C-447/09, Judgment 13 September 2011, not yet reported.

[186] These rules even applied to other companies in the Deutsche Lufthansa group, see para. 30 of the Judgment.

[187] Para. 63.

[188] Para. 67.

pilots could no longer fly above the age of 60 even with some restrictions. For these reasons the rule was a disproportionate requirement within the meaning of Article 4(1) of the Directive. Finally, the ECJ decided that the "age 60 rule" could not be tested under Article 6(1) as the aim of air safety does not fall within the aims allowed by it which refer to employment policy and related objectives.[189]

Of the fourteen judgments so far delivered by the ECJ, thirteen arose from referrals by a national court or tribunal seeking interpretation[190] on whether certain national rules fall within the Directive and may be justifiable in light of Article 6.1.[191] However, three of these were decided by the ECJ primarily by relying on other provisions in the Directive namely, Article 4(1) concerning genuine occupational requirements in *Wolf* and Article 2(5)[192] concerning public health of patients in *Petersen* and the compulsory retirement age of dentists. The ECJ decided the *Prigge* case under both Articles 4(1) and 2(5) as noted above. It is surprising how many age references there are compared to all other grounds in Article 19, Lisbon Treaty except sex. Sex has been protected in EC law since the late 1950s therefore it has a head start of half a century and concerns roughly half the population. So far, the number of discrimination cases decided by the ECJ on grounds of age generally dwarfs by a ratio of up to 14 to 1,[193] the number of cases on the remaining Article 19 grounds.

Many explanations for this phenomenon are possible. First and foremost, is the long-standing widespread use of chronological age across the EU Member States, in employment and training. The most common instances concern recruitment ages, retirement ages, fixed term contracts for older workers and calculation of service periods for younger and older workers. Second, workers of any age do not feel the same need for privacy as a victim of sexual orientation or religious discrimination might. Third, regular media coverage of age cases at EU and national levels helps to spread knowledge of age discrimination law. Fourth, growing public awareness of our longer lives, later pensions, smaller public purse and the increased financial insecurity of our times may encourage older workers to fight back against unfair employment decisions, more than they would have done before the Directive, when few EU Member States had their own age discrimination law or unfair dismissal rights for those working after retirement age. However, it may now be prudent to

[189] Para. 82.

[190] This follows the preliminary ruling procedure, a well worn path in European law whereby a national court refers a question for interpretation of European law to the ECJ. The interpretation is then sent back to the national court which applies it to the case before it, Article 267 (TFEU) (ex Article 234 EC).

[191] The other case, *Susanne Bulicke v Deutsche Buro Service GmbH*, Case C-246/09, concerned Articles 8 and 9 of Dir. 2000/78.

[192] Article 2(5) provides "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".

[193] Depending on the ground.

re-evaluate the culture of acceptance of age as a "relevant" characteristic in the workplace, in light of our much longer lives and, our more unpredictable ability to finance them. Do age limits which long pre-date the Directive, and may well be outdated, stand up to scrutiny against our extra years in generally better health?

## 4.17 Monitoring and Compliance

The European Commission is required by the Employment and Race Directives to report on their application in the Member States every five years.[194] This has revealed that most of the rules containing age distinctions were maintained as they were prior to the Employment Directive. Furthermore, only a few Member States had comprehensively surveyed their measures with age distinctions for compatibility with the Directive.[195] This is required by the compliance provision, Article 16. Due to the prevalence of age restrictions, age would benefit from the compliance requirements in Article 16 more than other grounds would.[196] Perhaps some age discrimination references heard by the ECJ could have been avoided if Member States had tested their measures containing age distinctions for compliance with the Directive. However, it is also arguable that only the most obviously flagrant provisions might have been caught by this method. This early body of judgments is probably very necessary for guidance to national courts and may also be helpful to any Member who may contemplate a late review of their age laws for compliance with the Directive, in particular but not exclusively, Article 6(1).

## 4.18 Looking to the Future in the EU

Despite a slow start compared with other jurisdictions, the EU compensated for time lost by most of its Member States, with its Employment Directive in 2000 which required its Member States to outlaw age discrimination in employment. As a body of law, EU anti-discrimination law is probably not perfect but it is dynamic, sophisticated and reflects better than ever, the diversity of the European population. The processes under which it is conceived and monitored are now reasonably

[194] Article 19, Directive 2000/78.

[195] European Commission (2011), pp. 93–96.

[196] Article 16 requires Member States to take measures to ensure that, "(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished; (b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be declared null and void or are amended".

reflective and consultative. It still leaves a significant role for the ordinary individual to play their part in developing judicial interpretation of EU law, by means of the preliminary ruling procedure whereby their small case may be referred by their national court to the ECJ. It seems that many ordinary people are bringing age claims in their local courts.

Of potentially greater excitement in the context of this chapter as a whole is the prospect of the Goods and Services Directive. It is similar to the Employment and the Race Directives especially in the forms of discrimination it prohibits, remedies and enforcement. It applies to all persons in the public and private sectors in relation to social protection, including social security and healthcare, social advantages, education and access to and supply of goods and services which are available to the public including, housing.[197] One of the great advantages of this draft Directive is that it requires the Member States to designate a body for the promotion of equal treatment on all of its protected grounds.[198] This provision will help to close the gap in the so-called hierarchy of protection between race and sex and the remaining Article 19 grounds, even further. Race and sex have enjoyed the benefit of such a body both inside and outside employment for some time already. However, it would leave another gap. Religion or belief, age, disability and sexual orientation would be without a promotional equal treatment body for employment and vocational training. A Member State is still free to designate that any of its promotional bodies also cover any field it wishes. This has occurred in Ireland where all grounds are covered inside and outside employment and in the UK, the Equality and Human Rights Commission (EHRC) has a similar statutory responsibility.[199]

## 4.19 EU Law and Justifying Age Discrimination Outside Employment

The proposal for the Goods and Services Directive contains two permissible exclusions from age discrimination law. The first Article 2.6 corresponds roughly with Article 6.1 of the Employment Directive and provides 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 justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In

[197] Article 3.

[198] Article 12, such a body must provide independent assistance to victims of discrimination, conduct independent surveys on discrimination and publish independent reports and make recommendations on any issue relating to such discrimination.

[199] "to promote equality, to promote and monitor human rights; and to protect, enforce and promote equality across the nine 'protected' grounds – age, disability, gender, race, religion and belief, pregnancy and maternity, marriage and civil partnership, sexual orientation and gender reassignment", see the EHRC website at, www.equalityhumanrights.com/about-us/.

> particular, this Directive shall not preclude the fixing of a specific age for access to social benefits, education and certain goods or services.

This provision is immediately far more concise and, for that, more elegant than Article 6 of the Employment Directive. The Explanatory Memorandum (contained in the Proposal for the Directive),[200] provides the following guidance, "as exceptions to the general principle of equality should be narrowly drawn, the double test of a justified aim and proportionate way of reaching it (i.e. in the least discriminatory way possible) is required".

The second permitted exclusion is contained in Article 2.7,

> ...in the provision of financial services Member States may permit proportionate differences in treatment where, for the product in question, the use of age or disability is a key factor in the assessment of risk based on relevant and accurate statistical data.

The Explanatory Memorandum clarifies that this refers to insurance and banking services and is in recognition of the fact that age and disability may be essential for the assessment of risk for some products and therefore of price. It argues that if insurers are not allowed to take age and disability into account at all, then additional costs would have to be borne by the rest of the pool of those insured, which would result in higher overall costs and lower availability of cover for consumers.[201] We will have to wait and see if, even at this late stage this provision remains in the Directive when it is adopted. Doubt is cast by a recent judgment of the ECJ in *Association belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*,[202] concerning the Sex Equality in Goods and Services Directive[203] and the use of sex in calculating insurance premiums and benefits. This Directive permitted a derogation from its own rule that gender must not be used as a factor in calculating insurance premiums after 21 December 2007.[204] The ECJ decided that taking sex into account in this way was in principle discriminatory despite the fact that the Directive allowed Member States to progressively phase out this practice.[205] The problem for the ECJ was that no time limit was effectively put on this possibility and the ECJ declared the provision invalid from 21 December 2012.[206]

[200] At p. 8.

[201] P. 8.

[202] Case C-236/09, Judgment 1 March 2011.

[203] Directive 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ [2004] L373/37.

[204] The derogation allowed Member States to charge different premiums to men and women, if calculations are based on reliable, regularly updated data available to the public. It must now cease from 21 December 2012, on the basis that otherwise there was a risk that EU law would allow the derogation from the principle of equal treatment between men and women, to persist indefinitely, see para. 31 of the judgment.

[205] Article 5(2).

[206] The derogation pulled against another provision in the Directive which required Member States to abolish such practices by 21 December 2007, see Article 5(1).

In the meantime, it is well worth noting a positive recent development. The Lisbon Treaty introduced a broad mainstreaming provision for all the Article 19 grounds, Article 10, "In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[207] Writing about mainstreaming in EU policy, Jo Shaw previously reflected "it is none the less hard to see a more authoritative expression of a public desire to eradicate discrimination than Article III-118 CT provides. On the other hand the dangerously open terms of the text provide little in themselves".[208] Despite this regret, Article 10 is a major advance for EU equality law. In varying degrees and methods, mainstreaming for disability, gender and race already existed in the EU. This provision contributes toward greater equality among the Article 19 grounds and as a real tool to combat discrimination at the level of EU governance.

## 4.20 Conclusion

The Goods and Services Directive, once adopted may bring us closer to Rebecca Morgan's and others' vision of the place and usefulness of age discrimination law to the sphere of elder law. The problems of the *YL* case in the UK highlight potential gaps in human rights protection for individuals who benefit from the ECHR. How could human rights or age discrimination assist a self-funding care home resident? One example might be where a private home caters both for recuperating or rehabilitating adults (of different ages) and also provides residential care for older people[209] and the elder care is of a lower or negligent standard. If the home provides care to a blend of private and publicly-funded persons then human rights values may help to provide guidance as to what is an acceptable level of care. After all, the only difference between who benefits from human rights protection and who does not, is who is paying for their care not even, where the care takes place at least in the UK. Age discrimination legislation might not have helped in Mrs YL's particular case but might do so in the situation described, above. It is difficult to imagine age discrimination helping older couples that are placed in separate care homes.

At the end of this chapter, the question remains which avenue do you choose to pursue a human rights claim, an elder rights or an age discrimination claim if you are an EU citizen? That will depend on further questions being answered. These will likely include. Who will the action be against? If a private party then more likely than not, human rights is not viable. What are you hoping to achieve? Is it a matter of personal compensation or persuading a State to rectify law or practice? The former may point to human rights or age discrimination (depending on the issue). The latter

[207] Article 10.

[208] Discussing the draft predecessor to Article 10.

[209] This kind of home is not uncommon in Ireland, for example.

may point to the ESC/RESC. Who is taking the claim? Individuals are likely to favour human rights or EU discrimination law however, the ECHR and RESC can conceive of group complaints which are not, apart from any role for campaigning and promotional bodies, a feature of EU anti-discrimination law. The ECJ often amalgamates cases with identical legal issues but this is not the same thing.

The EU Charter acts as a standard of behaviour and interpretation for EU Member States when they are implementing EU law. It also serves as a compendium, showing the citizens all rights available to them, but redress, when any is available, will be located elsewhere in the large corpus of EU law. Thus far, elder rights in EU law are really principles and have no redress mechanisms, as they begin and end with the EU Charter and are not found elsewhere in EU treaties, nor have they been implemented into legislative acts. However, given the interpretive and guiding role of the Charter and their novelty in EU law, there may be scope for Article 25 of the Charter to yet have more influence and potential than we imagine. Discrimination within the ECHR may be envisaged in a narrow range of issues for clients concerned with fields mainly outside employment, against the state or a state body. For clients concerned with age discrimination in employment or training, the clearest path to redress appears to be EU age discrimination law as implemented in the national law of Member States. An action may be brought against a private or public employer. In due course, EU age discrimination protection in goods and services will also have the clear advantage of being addressed to private and public purveyors of goods and services.

Implementation gaps are a fact of life. This is amply demonstrated by EU Member States that are bound by international, Council of Europe and other treaties by virtue of their membership of the EU, but pick and choose what to sign, accept and ratify in their purely national capacity. Arguably, this is their prerogative. What is very clear is that there is an apparent abundance of rights available to elders in the EU, whether speaking of age discrimination, human rights or rights of the elderly. How to pull them all together so that they make sense for older people and their attorneys is one of the present challenges. Another challenge is identifying any remaining spaces between the available rights at their different levels. What is interesting is that we have often treated so many fields as being separate when discrimination and human rights often inhabit the same convention or instrument and in the case of the EU Charter the right to equality and rights of the elderly are housed together in the equality chapter. Any historic separateness now seems increasingly artificial. The right not to be discriminated against is a human right. The more overarching right to dignity which underpins so much of European human rights and national human rights culture is acknowledged in relation to both Council of Europe and EU instruments.[210] This is an obvious right and value to guide the care and welfare of

[210] Note however, Article 1, EU Charter of Fundamental Rights, Human Dignity, “Human dignity is inviolable. It must be respected and protected”. The Explanations op cit., explain *inter alia* that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected even where a right is restricted”. Note the reference to dignity in Article 25 Rights of the elderly.

older persons. Reasons of space and its frequently un-enumerated quality made the right to dignity unsuitable for exploration in this particular chapter, but it too needs to be examined further when considering the future of elder law.

Age has benefited from a stage of productive and inclusive activity in EU equality law and fundamental rights. However, at this point in time the rights of the elderly in the EU Charter remain to be fully explored. In the EU and arguably also in the UK, we are living in an exciting era of equality and human rights. It would be a shame if age's place at these various tables were compromised in the hands of legal practitioners through lack of awareness, knowledge, training or will. Education in all its meanings at all stages of life for the public, lawyers, governments and students is the key.

## References

(1994) Age discrimination in Europe. Eur Ind Relat Rev 247:13–16

Bell M (2007) EU anti-racism policy: the leader of the pack? In: Meenan H (ed) Equality law in an enlarged European Union – understanding the Article 13 Directives. Cambridge University Press, Cambridge

Bell M, Waddington L (2003) Reflecting on inequalities in European equality law. Eur Law Rev:349–369

Bosely S (2010) Care homes forcing elderly to have feeding tubes fitted. The Guardian, Wednesday, 6 January 2010

Brooks C (2009) Despair of couple forced apart by the NHS. Daily Mail, Friday, 3 July 2009, p 43

Care Quality Commission (2011) News stories, *New excellence scheme for adult social care*, 28 February 2011. http://www.cqc.org.uk//newsandevents/newsstories.cfm?cit_id=37165&FAArea1=customWidgets.content_view_1&usecache=false

Daily Mail Dignity for the Elderly (2011) Elderly care home patients 'left starving and abused'. Daily Mail, Tuesday, April 19, 2011

de Schutter O (2005a) The prohibition of discrimination under European Human Rights Law relevance for EU Racial and Employment Equality Directives. European Communities, p 21

de Schutter O (2005b) Report, The prohibition of discrimination under European Human Rights Law. European Communities Publications Office, Luxembourg

Donald A, Watson J, McClean N (2008) Human Rights in Britain since the Human Rights Act 1998: a critical review, Research Report 28. Equality and Human Rights Commission, April 2008

Eriksson A (2009) European Court of Justice: broadening the scope of European non discrimination law. Int J Constitut Law:731

European Commission (2004) Critical review of academic literature relating to the EU Directives to combat discrimination. European Communities, pp 12–14

European Commission (2011) Developing anti-discrimination law in Europe The 27 EU Member States compared November 2010. Publications Office of the European Union, Luxembourg

Fundamental Rights Agency of the European Union and European Court of Human Rights (2011) Handbook on European non-discrimination law, p 102

Grief N (2002) European convention on human rights: a critique of the United Kingdom Government's refusal to sign and ratify Protocol 12. Eur Law Rev Human Rights Survey HR/3 (2002), HR/3-HR/5

Parliamentary and Health Service Ombudsman (2011) Care and Compassion? Report of the Health Service Ombudsman on ten investigations into NHS care of older people. Fourth report of the Health Service Commissioner for England. The Stationery Office, London, February 2011

Judge L (2009) Background briefing paper, “The Rights of Older People: International law, Human Rights Mechanisms and the Case for New Normative Standards”. International symposium on the rights of older people hosted by age concern England in collaboration with HelpAge International and the International Federation on Ageing, January 2009 at pp 10–13
Khaliq U (2001) Protocol 12 to the ECHR: a step forward or a step too far? Public Law 457:458
Martin D (2011a) Political Correspondent, 600 Die of Thirst in Care Homes. Daily Mail, Monday, January 31, 2011, front page and p 4
Martin D (2011b) A third of care homes are failing the elderly. Daily Mail, Tuesday, March 1, 2011, p 30
Meenan H (2003) Age equality after the Employment Directive. Maastricht J Eur Comp Law:9–38
Meenan H (2007) Reflecting on age discrimination and rights of the elderly in the European Union and the Council of Europe. Maastricht J 14:39–82
Meenan H (2011) Age discrimination in the European Union: a work in progress? In: Ellis E, Mendez-Pinedo ME (eds) Equality into reality. University of Iceland Press. ISBN 978-9979-54-919-2
Morgan R (2009) The future of elder law. In: Doron I (ed) Theories on law and ageing. The jurisprudence of elder law. Springer, New York
Numhauser-Henning A (2007) EU sex equality law post Amsterdam. In: Meenan H (ed) Equality law in an enlarged European Union – understanding the Article 13 Directives. Cambridge University Press, Cambridge, pp 145–177
Palmer E (2008) Case comment ‘The liability of “functional public authorities” for breach of ECHR rights: the House of Lords endorses a palpable gap in human rights protection’. Medical Law Rev:141–152
Piris J-C (2010) The Lisbon Treaty. A legal and political analysis. Cambridge University Press, Cambridge
Robins J (2007) Law Lords leave elderly out in cold. The Observer, Sunday, 24 June 2007
Rose D (2007) Elderly people suffering abuse and neglect in residential care homes. The Times, August 15, 2007
Schiek D (2011) Age discrimination before the ECJ-conceptual and theoretical issues. Common Market Law Rev 48:777–799
Thomson A, Sylvester R (2007) Human Rights Act to protect elderly. Daily Telegraph, 29 September 2007
United Nations Department of Economic and Social Affairs Division for Social Policy and Development Programme on Ageing (2009) Report of the Expert Group Meeting “Rights of Older Persons”, 5–7 May 2009, Bonn, Germany, pp 13–16
Wintemute R (2004) “Within the ambit”: how big is the “Gap” in Article 14 European Convention on Human Rights? Eur Human Rights Law Rev 4:366
Womack S (2006) News, Care home separations “may breach human rights”. Daily Telegraph, Saturday, 4 February 2006, p 8