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AN CHÚIRT UACHTARACH

THE SUPREME COURT

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Neutral Citation [2024] IESC 20

O'Donnell C.J.

O'Malley J.

Hogan J.

Collins J.

Donnelly J.

BETWEEN

SEAMUS MALLON

Appellant

AND

THE MINISTER FOR JUSTICE, IRELAND, AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 15 May 2024

BACKGROUND

1. The Office of the Sheriff is "*one of great antiquity*", dating in England from before Norman times.[1] In Ireland, as in England, the sheriff discharged a wide variety of functions, including the enforcement of court judgments. However, in the 19th century responsibility for the execution of judgments ceased to be that of the "*high sheriff*" and became vested in "*under-sheriffs*" who in turn delegated the carrying out of the actual work of executions to bailiffs.[2]

2. Following independence and the establishment of the new court system by the Courts of Justice Act 1924, it was decided that county registrars should be responsible for the execution of court decrees. Accordingly, the Court Officers Act 1926 abolished the office of high sheriff (section 52), provided that no appointments would be made to the office of under-sheriff after the passing of that Act (section 54(1)) and provided for the transfer of the functions of under-sheriff to the relevant county registrar once the office of under-sheriff became vacant in each county or county borough (section 54(2) & (3)).

3. However, by the time that the office of Dublin under-sheriff became vacant in 1945, it was evident that it would not be practical to impose the additional burden of the functions of sheriff on the Dublin County Registrar. As a result, the Oireachtas enacted

[1] Law Reform Commission, Report on Debt Collection: (1) *The Law Relating to Sheriffs* (LRC – 1988), at page 7.

[2] Ibid.

section 12 of the Court Officers Act 1945 (hereafter "*Section 12*" and the "*1945 Act*"). The net effect of Section 12 was that the Minister for Justice ("*the Minister*") could continue to appoint sheriffs. As a result, sheriffs continue to operate in Dublin City and County and in Cork City and County. Those sheriffs are responsible for the execution of all civil judgments, including the enforcement of orders for possession. Outside Dublin and Cork, county registrars retain that function.[3]

4. In addition, Section 12 has been utilised to appoint sheriffs whose sole responsibility is the collection of revenue debts (that function being taken back from the relevant county registrar for that purpose). Although the term is not to be found in Section 12 (which simply refers to the appointment of a person to be "*the sheriff of the county or county borough*") such sheriffs are colloquially referred to as "*Revenue sheriffs*."

5. In January 1987, the Appellant ("*Mr Mallon*") was appointed "*Revenue sheriff*" for Cavan and Monaghan. His letter of appointment states that his "*single responsibility*" was "*for the execution of certificates of tax liability under section 485 of the 1967 Income Tax Act*" (now section 962 of the Taxes Consolidation Act 1997).[4]

[3] In its *Report on Debt Collection: (1) The Law Relating to Sheriffs*, the LRC recommended that the responsibilities of county registrars in the enforcement of judgments in civil cases should be ended and the sheriff system in Dublin and Cork extended to the whole country. However, that recommendation has not been implemented.

[4] Letter of 28 January 1987 from the Department of Finance to the Appellant (Exhibit "*SM1*"). It appears that Mr Mallon was subsequently appointed as "*Revenue sheriff*" for Leitrim and Longford also, though no record of his appointment as such appears to be exhibited.

6. Section 12(6) of the 1945 Act provides (*inter alia*) that the office of sheriff "*shall be non-pensionable and shall be held at the will and pleasure of the Government*" (section 12(6)(a)) and that "*the age of retirement from the office of sheriff shall be seventy years*" (section 12(6)(b)). Section 12(6)(g) provides that "*the conditions of employment of every sheriff*" shall be determined by the Minister for Finance.[5]

7. There is no provision in Section 12 (or elsewhere) for the extension or variation of that statutory retirement age. Mr Mallon was born in May 1952 and so on his appointment (aged 34) he was aware that he would be required to retire as sheriff when he reached the age of 70 in May 2022, at which point he would have held the office for 35 years.

8. Revenue sheriffs are not paid a salary. Instead, they are paid an annual retainer. As of 2021, that retainer was €25,630. An additional retainer as designated receivers of fines in the sum of €7,500 was also payable as of 2021.[6] In addition to those retainer fees, sheriffs receive fees by reference to the recoveries they make in respect of tax liabilities. Those fees are calculated in accordance with the scale of fees set out in fees orders made from time to time, currently the Sheriff's Fees and Expenses Order 2005 (SI 644/2005) and the Fines (Payment and Recovery) Act 2014 (Fees) Order 2016 (SI 549/2016).[7] From this income, Revenue sheriffs must provide the necessary clerical and other staff for the execution of their functions and discharge all relevant expenses.[8]

[5] Presumably, the terms set out in Mr Mallon's letter of appointment.

[6] Section 8 of the Fines (Payment and Recovery) Act 2014 provides for the appointment of sheriffs as receivers to recover unpaid fines. This was a new source of income for sheriffs.

[7] Affidavit of Gerry McDonagh sworn on 8 November 2012, para 8.

[8] Letter of appointment, para (3).

9. At the time of his appointment, Mr Mallon was a practising solicitor in private practice. He was entitled to remain in practice while holding the position of Revenue sheriff and did so. He continues in practice now. Nothing in the terms of his appointment required Mr Mallon to devote himself full-time to the work of Revenue sheriff. There appears to be some dispute between the parties as to the precise employment status of the sheriff, but it is not necessary to resolve that dispute here.[9] Whatever may have been Mr Mallon's employment status *qua* Revenue sheriff, what is relevant is that he was able to continue in private practice as a solicitor throughout the period from his appointment to his retirement at age 70 and, since his retirement as sheriff, is once again free to devote himself full-time to his profession should he wish to do so.

10. In July 2020, the Sheriffs' Association – a representative body of which Mr Mallon was a member – made a submission to the Minister urging the amendment of Section 12(6)(b) so as to increase the retirement age for sheriffs. The submission identified a number of factors said to support such an amendment, including the fact that the retirement age for coroners had recently been increased from 70 to 72, pursuant to section 6 of the Coroners (Amendment) Act 2019, the impact of the COVID Pandemic on the earnings of sheriffs, and the fact that sheriffs were not entitled to any pension on retirement. The submission also suggested that maintaining the existing retirement age

[9] According to the State Respondents, sheriffs are self-employed. Mr Mallon says that sheriffs are statutory office holders and says that section 2(3)(a) of the Employment Equality Act 1998 as amended ("*the 1998 Act*") deems such office-holders to be employees of the State. He also relies on the reference to "*conditions of employment*" in Section 12(6)(g) of the 1945 Act as indicating that he was an employee of the State, rather than a self-employed person, even if he enjoyed considerable autonomy in performing the duties attached to his office.

of 70 would be inconsistent with Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ("*the Employment Equality Directive*" or "*the Directive*") and would involve treating sheriffs less favourably than coroners, which, it was suggested, would be "*an act of discrimination in itself*".

11. On 20 April 2021, a response was sent on behalf of the Minister indicating that "*approval beyond the age of 70 is not forthcoming.*" The email stated that the Department of Public Expenditure and Reform had explained that the standard compulsory retirement age in the public service had been consolidated "*to the greatest extent possible, at the age of 70*" following the enactment of the Public Service Superannuation (Age of Retirement) Act 2018. That, it was said, represented current Government policy and was "*a position which [the Department of Public Expenditure and Reform] seeks to implement in a consistent manner in order to protect the integrity of the policy*." That is said by Mr Mallon to be a reviewable decision but that is disputed by the Minister.

12. On 19 July 2021, Mr Mallon obtained leave to bring judicial review proceedings challenging the lawfulness of the mandatory retirement age provided for in Section 12(6). The primary reliefs sought by him were as follows:

> *"i. An Order of Certiorari … quashing the decision dated 20th April 2021 of the … Minister for Justice … insofar as the said decision purports to do the following:*

(a) Requires the Applicant to retire from his position as Sheriff on reaching the age of seventy (70) years on [ ] May 2022;

(b) Fails to properly consider the need for a legislative amendment to Section 12 of the Act of 1945 to ensure compliance with the provisions of [the Directive] and in the context of the interpretation of that Directive by the Court of Justice of the European Union.

ii. A Declaration … that Section 12(6) of the Act of 1945 is incompatible with European Union law as expressed in that Directive and that the said section is thus void and of no legal effect".[10]

13. The grounds on which these reliefs are sought are set out in detail in the Judgment of the High Court and are addressed further below. In essence, Mr Mallon contends that the mandatory retirement age in Section 12(6)(b) is objectively discriminatory on the grounds of age and that there are no or no sufficient objective and reasonable grounds capable of justifying it. It is also said that the mandatory retirement age for sheriffs is

[10] The Statement of Grounds also sought an interlocutory injunction restraining the Minister from removing Mr Mallon from office on reaching the age of 70, pending the determination of the proceedings. However, as the Judge explained (Judgment, para 30), when it did not prove possible to have the proceedings heard before his 70th birthday, Mr Mallon did not actually pursue an application for such an injunction. Instead, he applied to amend the Statement of Grounds to include a claim for "*Francovich-type damages*" and leave to make that amendment was given by the High Court (Meenan J) on 16 May 2022.

unlawfully discriminatory when compared with the mandatory retirement for coroners following the enactment of the Coroners (Amendment) Act 2019.

14. The Minister opposes the claim. She makes a number of preliminary jurisdictional objections. First, she contends that the communication of 20 April 2021 was not a justiciable decision amenable to judicial review. It was the 1945 Act, rather than the Minister, that required Mr Mallon's retirement and any amendment of the Act was, the Minister said, a matter for the Oireachtas and not for her. Secondly, it is said that Mr Mallon's complaint of discrimination should properly have been pursued by way of complaint to the Workplace Relations Commission ("*the WRC*") pursuant to the 1998 Act rather than by way of judicial review proceedings. As to the substance, the Minister's essential contention is that there is ample justification for the mandatory retirement age of 70 and that the position of coroners is materially different to that of sheriffs.

15. The proceedings came for hearing before the High Court (Phelan J) on 21 and 22 June 2022. The proceedings were heard on affidavit, without oral evidence.

THE HIGH COURT JUDGMENT

16. Phelan J delivered a comprehensive judgment on 5 October 2022 ([2022] IEHC 546).

17. She held that the "*decision*" of 20 April 2021 was not a decision amenable to *certiorari* (para 56). However, even in the absence of any decision amenable to judicial review, the High Court had jurisdiction to grant declaratory relief in judicial review proceedings in relation to the compatibility of primary legislation with the requirements of EU law (para 57).

18. As to the Minister's objection that any challenge to Section 12(6)(b) ought to have been pursued before the WRC, rather than by way of judicial review, the Judge held that a complaint of discrimination to the WRC could have been maintained by Mr Mallon under section 77(6A)(b)(ii) of the 1998 Act and that he had failed to exhaust the statutory remedy before pursuing proceedings. However, the remedies available from the WRC and the Court were not identical and, in the Judge's view, Mr Mallon could properly elect to pursue the wider relief sought by him in the proceedings and the Court had jurisdiction to determine his application. While the Court had a discretion to refuse to consider the application, the Judge did not consider it appropriate to exercise such a discretion in the particular circumstances here (paras 59-72).

19. The Judge then addressed the substantive complaints made by Mr Mallon. In light of the decision of the CJEU in Case C-411/05 *Palacios de la Villa* and of the High Court (McKechnie J) in *Donnellan v Minister for Justice* [2008] IEHC 467, there was, in her view, no doubt that the mandatory retirement age in Section 12(6)(b) was discriminatory on age grounds unless it could be brought within Article 6 of the Employment Equality Directive (as transposed by section 34(4) of the 1998 Act). The "*core question*" was whether it had been demonstrated that section 12(6)(b) was "*objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and whether the means of achieving that aim are appropriate and necessary*" (para 78).

20. As to the aims of Section 12(6)(b), the Judge considered that no direct assistance was to be derived from the terms of the 1945 Act but that did not preclude its justification (paras 81-82). The Judge accepted the Respondents' evidence as to the aims of a standard retirement age and accepted that the adoption of a standard retirement age of 70 was to allow for planning at the level of the individual and at the level of the organisation, the creation of an age balance in the workforce, personal and professional dignity, intergenerational fairness, and standardising the retirement age in the public service (para 84). On her analysis of the CJEU jurisprudence, including *Palacios de la Villa*, Case C-341/08 *Petersen*, Case C-45/09 *Rosenbladt*, Joined Cases C-159/10 and C-160/10 *Fuchs & Köhler* and Case C-141/11 *Hörnfeldt*, the Judge was satisfied that the aims identified by the Minister were policy aims which fell within the broad discretion of the State and were legitimate aims within the meaning of Article 6(1) of the Directive (para 92). The fact that the policy objectives identified by the Respondents

did not apply with equal force to all persons working in the public service and that considerations in respect of the office of sheriff were not identical to the considerations arising in respect of the positions in the public service (including the fact that there were only a small number of sheriffs), did not undermine the legitimacy of those policy objectives (paras 94-97). Accordingly, she concluded that the Respondents had discharged the burden on them of identifying legitimate aims for the mandatory policy *vis-à-vis* the office of sheriff (para 98).

21. The Judge then addressed the issue of whether the mandatory retirement age of 70 was appropriate and necessary. In essence, that required a proportionality assessment to be undertaken. While the Judge considered it legitimate to question whether the "*blunt*" application of a mandatory retirement age justified by reference to general considerations delivered a proportionate means of pursuing the legitimate aims identified, particularly in the absence of any flexibility or discretion having regard to the specific features of the position of sheriff (para 107), *Donnellan* suggested that the absence of flexibility on a case-by-case basis or role-by-role basis did not, of itself, render a measure disproportionate. Even so, a Ministerial power to vary a mandatory retirement age might be considered more flexible than a power to introduce variations by primary legislation (para 109).

22. In the Judge's view, however, an "*important distinction*" between sheriffs and workers within the public service generally was that sheriffs were already the subject of specific legislative consideration and provision. That being so, the Judge did not consider that the application of a mandatory retirement age to them, even without a ministerial power

to vary, could be said to be too blunt to satisfy the requirements of proportionality (para 110). As regards the lack of an occupational pension scheme for sheriffs, the Judge noted that all workers were entitled to access the State Pension (Contributory) if they had made sufficient contributions or, if not, the State Pension (Non-Contributory). Furthermore, a sheriff was not precluded from exercising another professional activity, such as that of solicitor in the case of Mr Mallon, with no age limit.

23. As for the different treatment of coroners, the Judge was satisfied from the evidence that the Oireachtas had introduced a specific increase in the retirement age for coroners in order to retain experience and expertise within the coroner system. She accepted that, from a policy point of view, a particular need to retain expertise was identified in the case of coroners that had not been identified in respect of sheriffs. The special provision for coroners did not, in the circumstances, amount to unlawful discrimination (para 112). There was also, in the Judge's view, a proper basis for treating public sector workers recruited between 2004 and 2012 differently, given the accrued rights that such workers enjoyed.

24. The Judge expressed her conclusions on the issue of whether the mandatory retirement age was necessary and appropriate as follows:

> *"115 … I accept that the fixing of a mandatory retirement age is effective in achieving intergenerational fairness and avoids difficulties within the workforce occasioned by health and capacity issues more prevalent in old age. I am satisfied that where the mandatory retirement age is fixed at 70 years of age*

generally and keeps ahead of the State pension age, a proper balance is maintained between competing interests. I further accept that in taking the decision to select 70 as the age in respect of persons to whom it has more recently applied and to maintain in respect of those to whom it has more recently applied (including sheriffs), consideration was given to the benefits of having a specific age limit which both reflected an increase in longevity but simultaneously respected the existence of a retirement horizon. It is clear the Legislature were seeking to strike a balance in arriving at the age of 70. I am satisfied that in so doing they were within the boundaries of discretion afforded under the Directive.

116. In all the circumstances, in view of the discretion afforded to the State in pursuing social and employment policies, I am satisfied that the mandatory retirement measure adopted by the State in respect of sheriffs is appropriate and necessary for the achievement of the aims identified to justify that measure."

25. The Judge accordingly refused the reliefs sought. She made no order as to costs.

LEAVE TO APPEAL

26. By a Determination of 24 February 2023, this Court granted Mr Mallon leave to appeal to this Court ([2023] IESCDET 28). In its Determination, the Court identified the following four core issues:

1. *Is a national measure such as s. 12(6)(b) of the 1945 Act which provides for a mandatory retirement age of 70 compatible with Council Directive 2000/78/EEC, as transposed into Irish law by the Employment Equality Act, 1998 (as amended)?*

2. *Is there a test of compatibility required in assessing the validity of mandatory retirement ages; and if so what factors are validly to be considered, such as age, health, or other indicia?*

3. *Can such mandatory limits be set in relation to defined groups based on general probabilities of age, health and competence, as opposed to individual characteristics on an individualised assessment?*

4. *Does the decision of the Minister not to amend the statute, which forms the basis of this application, constitute a decision amenable to judicial review or is such a decision not justiciable within the courts?*

SUBMISSIONS OF THE PARTIES

27. The parties provided detailed written submissions which Conor Power SC (for Mr Mallon) and Andrew Fitzpatrick SC (for the State Respondents) spoke to and developed at the hearing of the appeal. However, rather than setting out the parties' arguments *in extenso* at this point, I shall address those arguments in the course of analysing the issues in the appeal and expressing my conclusions on those issues.

ANALYSIS

Age Discrimination, the Employment Equality Directive and Public Sector Mandatory Retirement Ages

General

28. Discrimination in employment on grounds of age has been prohibited in this jurisdiction since the enactment of the 1998 Act. However, the protections of the 1998 Act did not extend to persons under the age of 18 or persons that had reached the age of 65: section 6(3). In *In re the Employment Equality Bill 1996* [1997] 2 IR 321, this Court rejected the contention that a materially identical provision in the Employment Equality Bill 1996 breached Article 40.1 of the Constitution.

29. In doing so, the Court held that classifications based on age could not be regarded as, of themselves, constitutionally invalid (at 346). Discrimination based on age was not clearly within the ambit of Article 40.1 of the Constitution (at 347). The age limit of 65 reflected the threshold at which a significant number of the population left the workplace and the choice of such a threshold "*could not plausibly be characterised … as irrational or arbitrary*" (347-348). Addressing the separate exclusion of certain categories of public service employees from the age discrimination provisions of the Bill, the Court made it clear that, in its view, discrimination on the grounds of age fell "*into a different constitutional category from distinction on grounds such as sex or race*" (349). While the issue has not arisen directly, there is no indication in this Court's subsequent Article 40.1 jurisprudence that age is to be regarded as a "*suspect*" ground:

see eg *Murphy v Ireland* [2014] IESC 19, [2014] 1 IR 198, *X v Minister for Social Protection* [2019] IESC 82, [2021] 3 IR 528 and *Donnelly v Minister for Social Protection* [2022] 2 ILRM 185.

30. In the circumstances, it is perhaps unsurprising that Mr Mallon has not sought to assert that Section 12(6)(b) is invalid having regard to Article 40.1 of the Constitution.

31. This jurisdiction is by no means unique in considering that classifications based on age are different to classifications on grounds such as gender or race. A similar approach was taken by the US Supreme Court in *Massachusetts Board of Retirement v Murgia* 427 US 307 (1976) (cited by this Court in *In re Employment Equality Bill 1996*), in which the court declined to treat a classification based on age as "*suspect*". In her judgment in *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, [2012] 3 All ER 1301, Lady Hale SCJ noted that age is a "*relative newcomer*" to the list of characteristics protected against discrimination.[11] Until comparatively recently, differentiating on the basis of age was considered "*obviously relevant*" for the purpose of termination of employment and it was still considered that age may be a relevant consideration for many more purposes than is so with the other protected characteristics. She suggested that age "*is different*" because it is not "*binary*" in nature but "*a continuum that changes over time*": none of us can do anything to stop the passage of time and younger employees will eventually benefit from a provision which favours older employees, such as an incremental pay scale while older employees will already have benefitted

[11] See also what was said by Advocate General Mazák in his Opinion in *Palacios de la Villa*, at para 88.

from provisions favouring younger people, such as a mandatory retirement age: at [2] – [4].[12]

The Directive

32. In November 2000 the Council adopted the Employment Equality Directive, Article 1 of which identifies its purpose as being to lay down "*a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment*." Article 2(1) of the Directive provides that the principle of equal treatment means that "*there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1*." Member States were required to take the necessary steps to implement the Directive by 2 December 2003, though they could, if necessary, have an additional period of 3 years from that date i.e. a total period of 6 years: Article 18.

33. In November 2005 – prior to the expiry of that extended transposition period – the CJEU (Grand Chamber) gave judgment in Case C-144/04 *Mangold*, holding – rather

[12] See also Advocate General Mazák's Opinion in Case C-388/07, *Age Concern England*, at para 74 where he observed that the "*particularly nuanced*" approach to different treatment based on age adopted in the Directive "*is reflective of a genuine difference between age and the other grounds mentioned in Article 2 of the directive*." Age is not, he went on, "*by its nature a 'suspect ground', at least not so much as for example race or sex*". Age "*is fluid as a criterion*" and whether differential treatment constitutes age discrimination "*may not only be a question of whether it is founded directly or indirectly on age, but also a question of what age it relates to*." As a result, it may be "*much more difficult than for example in the case of differentiation on grounds of sex to establish where justifiable differentiations on the basis of age are ending and unjustifiable discrimination is starting*."

controversially – that the principle of non-discrimination on grounds of age was to be regarded as a general principle of Community law, the observance of which was not conditional upon the expiry of the transposition period. The effect of that decision was to give the Directive direct horizontal effect.

34. In this jurisdiction, the Directive was implemented by the Equality Act 2004 which (*inter alia*) amended the 1998 Act by substituting a new sub-section for section 6(3). As so amended, section 6(3) no longer excludes the application of the Act to persons aged 65 or more.

35. Article 3 of the Directive sets out its scope, providing that it shall apply to all persons, as regards both the public and private sectors (including public bodies) in relation to (*inter alia*) "*employment and working conditions, including dismissals and pay*". No express reference is made to retirement age in Article 3 and recital 14 of the Preamble provides that the Directive "*shall be without prejudice to national provisions laying down retirement ages*." In challenges to mandatory retirement regimes in a number of different Member States, it was argued that mandatory retirement was wholly outside the scope of the Directive. As a result, courts in Spain[13] and in England and Wales[14] made references directed to that question.

[13] Case C-411/05, *Palacios de la Villa* (reference from the Juzgado de lo Social n 33 de Madrid).

[14] Case C-388/07, *Age Concern England* (reference from the High Court of England and Wales, Queens Bench Division (Administrative Court)).

36. *Palacios de la Villa* was the first of those references to reach the Luxembourg court. In his Opinion, Advocate General Mazák expressed the view that national provisions providing for the setting of a compulsory retirement age fell outside the scope of the Directive. In his view, it would be "*very problematic to have this Sword of Damocles*" hanging over every national provision providing for retirement ages and the Community legislature was aware of that problem and therefore inserted recital 14 to make it clear that it did not intend the scope of the Directive to extend to rules setting retirement ages (paras 63-65).

37. However, the CJEU (Grand Chamber) disagreed. In its view, national provisions laying down retirement ages came within Article 3(1)(c) of the Directive and therefore were within its scope (paras 45-47). Recital 14 meant only that the Directive did not affect Member State competence to determine retirement ages and "*does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached*" (para 44). The Court repeated that finding in *Age Concern England* (at paras 34-35).

38. In her Judgment, Phelan J refers to this aspect of the CJEU's decision in *Palacios de la Villa* and also refers to the decision of the High Court in *Donnellan v Minister for Justice, Equality and Law Reform* [2008] IEHC 467. In *Donnellan*, the State argued that *Palacios de la Villa* was distinguishable on the basis that the contested retirement age was laid down by law (in the form of the Garda Síochána (Retirement) Regulations 1951 (SI 132/1951)), rather than in a collective agreement (as in *Palacios de la Villa*).

A retirement age prescribed by law, it was argued, fell outside the scope of the Directive. That argument was firmly rejected by McKechnie J. Even in the absence of the CJEU's decision, he would have held as a matter of first principles that a construction of the Directive that excluded statutory mandatory retirement regimes from its scope "*would be inherently incompatible with the whole purpose, thrust and tenor of the Directive*" as it would enable the Directive to be bypassed: *Donnellan*, para 67. Having regard to both *Palacios de la Villa* and *Donnellan*, Phelan J was satisfied that Section 12 of the 1945 Act must be regarded as establishing rules relating to "*employment and working conditions, including dismissals and pay*" within the meaning of Article 3(1)(c) of the Directive and therefore it came within its scope: para 77. That holding is not challenged on appeal.

39. But if age is a prohibited ground under the Directive – as the express terms of the Directive make clear it is – and if mandatory retirement rules come within the scope of the Directive – as the Grand Chamber in *Palacios de la Villa* ruled that they do – the Directive itself and the CJEU's caselaw on it nonetheless recognise the distinctive nature of age discrimination and differentiations based on age: see generally Ó Cinnéide, *Age Discrimination and the European Court of Justice: EU Equality Law Comes of Age* (January 2009).[15]

40. Thus, while making it clear that the prohibition of age discrimination is an "*essential part*" of meeting the aims set out in the Employment Guidelines agreed at Helsinki in

[15] See also the same author's paper, *Age Discrimination and European Law (*European Commission, 2005) at pages 13-14.

2000. Recital 25 also acknowledges that differences in treatment in connection with age may be justified in certain circumstances and therefore require specific provision which may vary in accordance with the situation in Member States. Recital 25 further emphasises that it is essential to distinguish between, on the one hand, differences in treatment which are justified, in particular by legitimate employment policy, labour market and/or vocational training objectives and, on the other, discrimination which must be prohibited.

41. These considerations are reflected in Article 6 of the Directive which provides, in Article 6(1), that notwithstanding Article 2(2) – which identifies what constitutes direct and indirect discrimination for the purpose of Article 2(1) – Member States "*may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*." Such differences of treatment "*may include, amongst others*" any of the measures at Article 6(1)(a) – (c). Article 6(1) provides for a justification of differences of treatment directly based on age which "*is unique among the forms of discrimination prohibited under the directive*."[16] Equally, there is no equivalent provision in either Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of

[16] Opinion of Advocate General Mazák in *Age Concern England*, para 75.

employment and occupation (recast) or Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

42. Ó Cinnéide says of the CJEU's age discrimination decisions – which are considered further below – that they "*have recognised the distinctive nature of age discrimination*". The court "*has given a relatively wide margin of discretion to Member States wishing to make use of age-based distinctions, where States can make [a] reasonably strong case to support the use of such distinctions*". Thus, he observes, the CJEU has both affirmed the status of the prohibition on age discrimination and the fundamental importance of anti-discrimination norms in general, while developing "*a workable and nuanced jurisprudence in the field of age equality*."[17]

Public Sector Mandatory Retirement Ages

43. At the time of this Court's decision in *In re the Employment Equality Bill*, the standard retirement age for civil servants in the State was 65: section 8 of the Civil Service Regulation Act 1956. That could be extended in certain circumstances: section 8(4). The regime has changed significantly in the period. Section 3 of the Public Service Superannuation (Miscellaneous Provisions) Act 2004 removed the compulsory retirement age for new entrants to the public service generally (though continuing to provide for retirement ages for certain specific sectors, such as An Garda Síochána). Pre-2004 entrants continued to be governed by the 1956 Act. That remained the position until the enactment of the Public Service Pensions (Single Scheme and Other

[17] Ó Cinnéide, *op cit*

Provisions) Act 2012, section 13(2) of which established a general retirement age of 70 for new entrants (public servants recruited between 2004 and 2012 were not affected). Finally, section 3 of the Public Service Superannuation (Age of Retirement) Act 2018 amended the Public Service Superannuation (Miscellaneous Provisions) Act 2004 so as to increase the compulsory retirement age for most pre-2004 public servants to 70.

44. The Public Service Pensions (Single Scheme and Other Provisions) Act 2012[18] and the Public Service Superannuation (Miscellaneous Provisions) 2004 (as amended by the Public Service Superannuation (Age of Retirement) Act 2018)[19] each contain provisions for increasing the prescribed retirement age by Ministerial orders. However, no such order has been made to date.

45. Many public offices and agencies are subject to mandatory retirement rules which form part of the specific statutory code that governs them. Thus, as already noted, sheriffs must retire at age 70 by virtue of Section 12(6)(b) of the 1945 Act. It was originally proposed that sheriffs would retire at age 65, subject to the possibility of their term being extended up to a maximum of age 70, but in the course of the Bill's passage through the Dáil, the Government accepted an opposition amendment providing instead

[18] In section 13(2). Section 13(2) does not prescribe the criteria to be taken into account in making such an order.

[19] In section 3A(2) (inserted by section 3 of the 2018 Act). Section 3A(3) sets out a number of matters to which the Minister must have regard before making such an order, including (a) the likely effect of such an order on recruitment, promotion and retention of staff in the public service as a whole; (b) the pensionable age applicable at the time of making the order; (c) any evidence of an increase in normal life expectancy in the State and (d) the likely cost (if any) resulting to the Exchequer.

for retirement at age 70. As already noted, the 1945 Act does not make any provision for the extension of that retirement age.[20]

46. Judges at all levels are now subject to mandatory retirement at age 70 (Superior Courts judges retired at 72 prior to the enactment of the Court and Court Officers Act 1995 and the retirement age for District Judges was 65 – albeit extendable to 70 – prior to the enactment of the Courts Act 2019). As Phelan J explains in her Judgment, the Public Service Superannuation (Age of Retirement) Act 2018 also amended a host of other statutes to apply a retirement age of 70 (or, in the event that a Ministerial order is made raising that age, that higher age) to various other statutory offices and boards.

47. There are a number of parts of the public service that are subject to a lower retirement age, including An Garda Síochána, prison officers, firefighters and members of the Permanent Defence Forces.

48. Reference must also be made here to the position of coroners, given their central role in Mr Mallon's case. As enacted, section 11(1) of the Coroners' Act 1962 provided that every coroner appointed under the Act "*shall, unless he sooner dies, resigns or is removed from office, hold office until he reaches the age of seventy years*." Section 6 of the Coroners (Amendment) Act 2019 substituted "*seventy two*" for "*seventy*". A further amendment to the Coroners Act 1962 made in 2020 – so as to provide for the

[20]An *ad hoc* and one-off exception to the requirement for retirement at age 70 was made by section 6(2) of the Court Officers Act 1951, which provided that the age of retirement of the then serving sheriff in Dublin City should be seventy-two years.

appointment as temporary coroners of persons otherwise qualified for appointment but who have not attained the age of 75 – also featured in debate.[21]

49. Retirement ages in private-sector employment are not regulated by statute (other than the provisions of the 1998 Act itself).

Pensionable Age and the State Pension

50. Reference should also be made in this context to pensionable age for the purposes of what is now the Social Welfare Consolidation Act 2005. As of the time of the enactment of the 1945 Act, a non-contributory and means-tested pension, the "*Old Age Pension*" (now the State (Non-Contributory) Pension), was payable from age 70: Old Age Pension Acts. A broad contributory pension scheme was only introduced in 1961, pursuant to the Social Welfare (Amendment) Act 1960. Again, pensionable age for the purposes of that scheme (called the Old Age Pension (Contributory) but now known as the State Pension (Contributory)) was 70. As just mentioned, for the purposes of both the State Pension (Non-Contributory) and the State Pension (Contributory), pensionable age is currently set at 66.

[21] Section 7 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 inserted a new section 11B into the Coroners Act 1962 which provides for the appointment of temporary coroners by the Minister "*in exceptional circumstances arising due to the number or nature of deaths resulting from a pandemic, catastrophic event or other occurrence leading to mass fatalities*." Anyone otherwise qualified for appointment who has not attained the age of 75 at the time of his or her appointment may be appointed as such a temporary coroner.

51. Mr Mallon has confirmed that he is in receipt of the State Contributory Pension.

The Preliminary Objections

Did the Minister make any reviewable decision here?

52. I agree with the Judge that the email sent on the Minister's behalf on 20 April 2021, in belated response to the Sheriffs' Association's submission of 6 July 2020, is not a decision amenable to *certiorari*. As I also agree with her that that is not fatal to the application here, I can deal with this issue relatively briefly.

53. The mandatory retirement age for sheriffs was fixed by the Oireachtas in 1945. Had the 1945 Act empowered the Minister to vary that retirement age, and had she been asked to do so and refused, that decision would no doubt be one amenable to judicial review. But that is not the position here (an argument was made on appeal that it may have been open to the Minister to make regulations under the European Communities Act 1972 amending Section 12(6)(b) of the 1945 Act, but the Minister was never requested to make any such regulations and no such argument was made in the High Court; in the circumstances, that argument cannot be entertained now). Any amendment of Section 12(6)(b) is a matter for the Oireachtas, not for the Minister, and it is Section 12(6), rather than any position taken by the Minister, that is the real object of Mr Mallon's complaint. The email of 20 April 2021 – which in reality was no more than a statement of Government policy - did not alter or affect any rights or interests of Mr Mallon. The position remained precisely as it was before that email was sent, namely that, in common with all other sheriffs appointed under Section 12, he was required to retire at

age 70. It seems entirely artificial to characterise that email as constituting a reviewable decision amenable to *certiorari* and courts are, correctly, sceptical of such contrived disputes: *Moore v. Minister for Arts* [2018] IECA 28, [2018] 3 IR 265 at 271.

54. In that regard, the position here appears to be on all fours with that in *R v Secretary of State for Employment ex p Equal Opportunities Commission* [1995] 1 AC 1. There the EOC had written to the Secretary of State asking him to reconsider the statutory thresholds for continuous working, limiting the right of employees not to be unfairly dismissed, and the right to redundancy pay on the basis that such thresholds indirectly discriminated against female employees. The Secretary of State replied to the effect that the statutory thresholds were justifiable. The EOC and another party sought to judicially review the letter. Giving the principal speech in the House of Lords, Lord Keith held that the letter did not constitute a reviewable decision: it did no more than state the Secretary of State's view that the threshold provisions in the statute were justifiable and in conformity with European law and "*the real object of the E.O.C.'s attack is these provisions themselves*": at 26F. However, he went on to hold (and the majority of the House of Lords agreed) that judicial review was nonetheless available for the purpose of seeking a declaration that specific UK primary legislation was incompatible with European law: 26G-27H (see also the speech of Lord Browne-Wilkinson).

Is the Appellant entitled to seek declaratory relief?

55. Relying on the analysis in *R v Secretary of State for Employment ex p Equal Opportunities Commission*, the Judge held that she had jurisdiction to grant declaratory relief in judicial review proceedings in relation to the compatibility of primary legislation with EU law, whether or not there was any decision amenable to judicial review: Judgment, para 57. I did not understand the State Respondents to dispute that holding as a matter of principle. Certainly, no point appears to have been taken by the State at any stage that the proceedings should have taken the form of plenary proceedings rather than proceedings for judicial review. That Mr Mallon had sufficient interest to seek such relief was not – and could not have been – challenged. Rather, the State makes a quite different objection, namely that the Appellant ought to have pursued any discrimination claim by way of an application for redress to the Workplace Relations Commission pursuant to section 77 of the 1998 Act and that any question of the compatibility of Section 12(6)(b) with EU law could (and should) have been determined in such proceedings.

Should Mr Mallon have pursued a complaint in the WRC?

56. The Judge carefully considered the State's objection. She concluded that Mr Mallon could have pursued a complaint to the WRC and that, having regard to the decision of the CJEU (Grand Chamber) in Case C-378/17 *Minister for Justice and Equality v Workplace Relations Commission*, the WRC could have disapplied section 12(6)(b) if persuaded that it was inconsistent with the Directive.

57. Case C-378/17 *Minister for Justice and Equality v Workplace Relations Commission* also involved the Employment Equality Directive. A number of applicants for entry into An Garda Síochána were refused entry because they were older than the upper age limit for entry fixed by the Garda Síochána (Admissions and Appointments) Regulations 1998 (as amended). They each made a complaint of discrimination to the WRC under the 1998 Act. The State objected to the WRC considering the complaints on the basis that the relevant age limit was fixed by law and that only the High Court – and not the WRC – was competent to review, and if appropriate to disapply, the relevant provisions of the regulations. This Court made a reference pursuant to Article 267 TFEU: *Minister for Justice v Workplace Relations Commission* [2017] IESC 43, [2020] 2 IR 244. The Grand Chamber held that it followed from the primacy of EU law that bodies called upon to apply EU law within the exercise of their respective powers are obliged to adopt all the measures necessary to ensure that EU law is fully effective, disapplying if need be any national provisions or any national case-law that are contrary to EU law (para 50). It followed that EU law precluded national legislation under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law (para 52).

58. In reaching that conclusion, the CJEU endorsed the distinction drawn by Advocate General Wahl between the power to disapply, in a specific case, a provision of national law that is contrary to EU law and the power to strike down such a provision, which has the broader effect that the provision is no longer valid for any purpose (para 33). While Member States are competent to designate the courts and/or institutions

empowered to review the validity of a national provision and to prescribe the legal remedies and procedure for contesting its validity and, where the action is well founded, for striking it down, a national court or tribunal called on to apply the provisions of EU law is under a duty to give full effect to such law and did not have to request or await the prior setting aside of a conflicting provision of national law (paras 34-35).

59. The decision in *Minister for Justice and Equality v Workplace Relations Commission* does not affect or restrict the jurisdiction of the High Court to determine these proceedings. Only the High Court has power to strike down Section 12(6)(b) *erga omnes*. The WRC does not have, and EU law does not require that it have, such a power: *Minister for Justice and Equality v Workplace Relations Commission*. Furthermore, in contrast to the position in *Doherty v South Dublin County Council* [2007] IEHC 4, [2007] 2 IR 696 or *O' Domhnaill v HSE* [2011] IEHC 421 Mr Mallon is not here pursuing a statutory claim for redress that the Oireachtas has exclusively assigned to a statutory tribunal such as the WRC, to the exclusion of the Article 34 courts. That would indeed be the case if Mr Mallon was seeking to pursue a statutory claim for discrimination under the 1998 Act in these proceedings, but he is not. He is instead looking for a remedy – a declaration that Section 12(6)(b) is incompatible with the Directive and is "*thus void and of no legal effect*" – that is not available from the WRC.

60. The Judge proceeded to consider whether, as a matter of discretion, she should decline to entertain the proceedings on the basis of Mr Mallon's failure to pursue his remedy before the WRC and concluded that she should not: Judgment, para 71. I agree. With no disrespect whatever to the WRC, the High Court (and, on appeal, this Court) is in a

better position than the WRC to determine the issue of whether Section 12(6)(b) is incompatible with the Directive. Article 34 of the Constitution does not envisage such issues being determined by lower courts, still less by statutory tribunals: see, by analogy, this Court's decision in *People (DPP) v MS* [2003] 1 IR 606, where this Court held that, while questions as to the constitutional validity of pre-1937 statutes were not expressly reserved to the High Court under Article 34, that Court had jurisdiction to determine such questions to the exclusion of the District or Circuit Courts. That the High Court is the appropriate forum for the determination of the validity of laws was, as I understand it, the fundamental rationale for the position advanced by the State in *Minister for Justice v Workplace Relations Commission* (where the validity of secondary, rather than primary legislation was at issue). For the State to contend that the High Court should relinquish its Article 34 jurisdiction in favour of the WRC involves a rather striking *volte face* on its part. The State's position was not in any sense dictated by, or a logical consequence of, the CJEU's finding that the WRC had power to disapply provisions of national law inconsistent with EU law (as section 12(6)(b) was said by Mr Mallon to be). In any event, I do not find its position in any way persuasive.

61. I would therefore uphold the Judge's holding that Mr Mallon was entitled to bring these proceedings and was not obliged, and should not now be required, to pursue a claim for redress before the WRC under the 1998 Act. However, the election made by Mr Mallon has consequences. Proceedings before the WRC under Part VII of the 1998 Act have a more inquisitorial/investigative character than proceedings in court, where generally the court proceeds on the basis of the arguments and (admissible) evidence presented

by the parties. The fact that the proceedings were brought by way of judicial review, rather than by way of plenary proceedings with oral evidence, further confined the evidential inquiry here. But the claims made by Mr Mallon must be determined as the evidence as it is, however limited that evidence may be. That may be particularly relevant to the question of whether and to what extent the positions of sheriff and coroner are comparable.

The CJEU Cases

62. The CJEU has considered the compatibility of mandatory retirement regimes with the Directive on a number of occasions. The principal cases are discussed in detail by Phelan J in her Judgment. Rather than repeating that exercise, I shall summarise what I consider to be the principal points emerging from the cases:

> (1) The imposition of a mandatory retirement age directly imposes less favourable treatment for workers who have reached that age as compared with other persons in the workforce and therefore establishes a difference in treatment directly based on age within Article 2(1) and (2)(a) of the Directive *(Palacios de la Villa*, para 51; Case C-286/12 *Commission v Hungary*, paras 51 & 54).

(2) Such a difference in treatment on grounds of age may nonetheless be justified under Article 6(1) *(Palacios de la Villa*, para 52; Case C-45/09 *Rosenbladt*, para 52; *Commission v Hungary*, para 55).

(3) A measure providing for mandatory retirement (whether a legislative measure or a provision of a collective agreement) may be justified even where it does not identify the aim being pursued: the "*general context of the measure concerned*" may be relied on to identify the underlying aim of the measure for the purpose of judicial review of its legitimacy and whether the means put in place to achieve that aim were appropriate and necessary (*Palacios de la Villa*, paras 54-57; *Age Concern England*, para 45; Case C-341/08 *Petersen*, para 40; *Rosenbladt*, para 58; C-268/09 *Georgiev*, para 40).

(4) The aims which can be considered to be a "*legitimate aim*" for the purposes of Article 6(1) are "*social policy objectives, such as those related to employment policy, the labour market or vocational training*" which are, by reason of their public interest nature, distinguishable "*from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness*", though national rules may recognise a certain degree of flexibility for employers (*Age Concern England,* para 46; C-160/10 *Fuchs & Köhler,* para 52).

(5) A variety of often overlapping aims have been recognised as legitimate in this context, including:

(i) promoting the employment of younger people and facilitating their entry to the labour market (*Palacios de la Villa*, para 62-66 (workers in the textile trade))

(ii) promoting the access of young people to the professions (*Petersen*, para 68 (public dentists))

(iii) establishing an age structure that balances younger and older workers (Joined Cases C-250/09 and C-268/09 *Georgiev*, para 45 (university lecturers); Joined Cases C-159/10 and C-160/10 *Fuchs & Köhler*, paras 49 and 50 (public prosecutors); Case C-286/12 *Commission v Hungary*, para 62 (judges, prosecutors and notaries))

(iv) sharing employment between the generations (Case C-45/09 *Rosenbladt*, paras 43-45 (commercial cleaners))

(v) improving personnel management by enabling efficient planning for departure and recruitment of staff (*Fuchs & Köhler*, paras 47 and 50)

(vi) preventing possible disputes concerning employees' fitness to work beyond a certain age (*Fuchs & Köhler*, para 50)

(vii) avoiding employers having to dismiss employees on the ground that they are no longer capable of working which may be humiliating for the employee (*Rosenbladt*, paras 43 & 45; Case C-141/11 *Hörnfeldt*, paras 26 & 30 (postal workers))

(viii) standardising retirement ages for professionals in the public service (*Commission v Hungary*, para 61).

(6) Member States enjoy "*broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it*" (*Palacios de la Villa*, para 68; *Age Concern England*, para 51; *Georgiev*, para 50*; Fuchs & Köhler*, paras 61 & 80; see also *Mangold*, at para 63).

(7) Members States have a choice "*on the basis of political, economic, social, demographic and/or budgetary considerations and having regard to the actual situation in the labour market in a particular Member State, to prolong people's working life or, conversely, to provide for early retirement*" and it is "*for the competent authorities of the Member States to find the right balance between the different interests involved*" subject to the measures not going beyond what was necessary and appropriate to achieve the aim being pursued (*Palacios de la Villa*, para 69 & 71; *Rosenbladt*, para 44; *Fuchs & Köhler*, paras 65 & 81).

(8) In reviewing the choices made by Member States, the test applied by the CJEU is whether those choices appear unreasonable (*Palacios de la Villa*, paras 71-72; *Rosenbladt*, para 69, *Fuchs & Köhler*, paras 82-83, and *Hörnfeldt*, para 32).[22]

(9) However, the CJEU has also emphasised the discretion enjoyed by Member States cannot have the effect of frustrating the prohibition on discrimination on grounds of age (*Age Concern England*, para 51; *Fuchs & Köhler*, para 62). That prohibition must now be read in the light of the right to work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union and particular attention must be paid to the participation of older workers in the labour force (*Fuchs & Köhler*, paras 62 & 63).

(10) A significant factor in assessing whether a mandatory retirement rule is "*appropriate and necessary*" will be the financial impact on the persons involved and whether it will result in undue hardship to them. In that context, whether they will, on retirement, be entitled to an adequate pension is an important consideration *(Palacios de la Villa*, para 73; *Rosenbladt*, paras 48 – 51; *Fuchs & Köhler*, paras 66 & 67; *Commission v Hungary*, 66-70) Whether persons subject to mandatory retirement may continue in their position on a short-term basis (for example on a fixed-term contract or series of contracts) or are free to pursue other employment or whether they are forced to withdraw

[22] See also the Opinion of AG Kokott in Commission v Hungary, at para 33: "the Court does not replace the assessment of the Member States but simply examines whether it seems unreasonable."

definitively from the labour market is also be relevant (*Rosenbladt*, para 75; *Hörnfeldt*, para 38-45)

(11) Legislation will be appropriate for achieving the objective pursued only if it genuinely reflects a concern to attain it in a "*consistent and systematic manner*" (*Petersen*, para 53; *Georgiev*, paras 55 & 56; *Fuchs & Köhler*, paras 85-98). Exceptions to a mandatory retirement regime may undermine the "*coherence*" of the regime, undermine the objective being pursued and give rise to such inconsistency that the regime will fall outside the scope of Article 6(1) of the Directive: *ibid*.

(12) However, the CJEU has also recognised the need for flexibility in this area. Member States must have the capacity to adapt to changing circumstances: *Palacios de la Villa*, para 70; *Fuchs & Köhler*, para 54. Thus, in *Palacios de la Villa*, the fact that a compulsory retirement regime has been reintroduced in Spain after being repealed for a number of years was not relevant to the complaint: para 70. A retirement regime introduced on the basis of a particular aim may later be justified on a different basis: *Fuchs & Köhler*, paras 41-43. Member States are also entitled to significant latitude in terms of implementing changes to the retirement age and transitioning from one regime to another: *Fuchs & Köhler*, paras 94-98.

(13) Providing for a limited extension to the standard retirement age, in the interests of the public service concerned, is not *per se* inconsistent with the Directive: *Fuchs & Köhler*, paras 87-91.

63. None of these cases involved a law or collective agreement imposing a retirement age of 70. *Palacios de la Villa* concerned a retirement age of 65. The age threshold at issue in *Age Concern England* (which was not strictly speaking a mandatory retirement age) was also 65. In *Fuchs & Köhler,* the mandatory retirement age was 65, though that could be extended to a maximum of 68 if that was in the interests of the prosecution service (not at the instance of the prosecutor). *Petersen* involved a maximum age for practice as a panel dentist of 68. The contested retirement age in *Rosenbladt* was 65. *Georgiev* involved a retirement of age of 65 which could be extended by one or more one-year contracts but not beyond age 68. *Hörnfeldt* concerned a mandatory retirement age of 67. In none of these cases were the national measures found to conflict with the Directive.

64. Such a finding was, however, made in *Commission v Hungary*. The facts were rather particular. Until 31 December 2011, Hungarian law allowed judges to remain in office until the age of 70. In the course of 2011 a new law was enacted which came into force on 1 January 2012 and which lowered the age-limit for compulsory retirement for judges (and for prosecutors and notaries) from 70 to 62 with near immediate effect for sitting judges, forcing some 274 judges into retirement.[23] The law was subsequently

[23] Gábor Halmai, 'The Early Retirement Age of the Hungarian Judges', in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (Fernanda and Davis, eds.), (Cambridge University Press, 2017).

declared unconstitutional by the Hungarian Constitutional Court.[24] Separately, the European Commission brought proceedings against Hungary for failing to fulfil its obligations under the Directive. The CJEU analysed the new law within the framework established by its earlier case-law. It accepted that the law had legitimate aims (creating a more balanced age structure facilitating access for younger lawyers to the professions of judge, prosecutor and notary, as well as standardising the retirement age for professionals across the public service). However, the new law went beyond what was necessary for achieving those objectives and unduly prejudiced the persons concerned. As regards the object of standardisation of retirement ages, the challenged provisions "*abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned*" (Judgment, para 68). As a result, the persons concerned had been "*obliged to leave the labour market automatically and definitively*" without having had the time to make proper financial provision for their retirement (para 70). Hungary had not been able to explain why it was necessary to lower the retirement age by 8 years without providing for a staggered introduction of the change while on the other hand it had enacted laws to raise the general retirement age to 65 which were to take effect over 8 years (para 73). As regards the objective of achieving a more balanced age structure, the CJEU observed that in the medium term the changes would lead to a slowing down of turnover in personnel, leading to a deterioration in access for young lawyers (para 78). The changes therefore did not comply with the principle of proportionality.

[24] Ibid

65. Here, of course, the retirement age for sheriffs has not been reduced. It remains at 70 (the pre-reduction retirement age for judges, prosecutors and notaries in Hungary) as per Section 12(6)(b) of the 1945 Act.

Donnellan and the issue of individual assessment

66. *Donnellan* is relied on by Mr Mallon as authority for a general principle that a blanket mandatory retirement age will not be justifiable where individual assessment is possible.

67. *Donnellan* concerned the retirement age of senior Garda officers. Under the Garda Síochána (Retirement) Regulations 1996 (SI 16/1996), a member of the Garda Síochána appointed to the rank of Assistant Commissioner or Deputy Commissioner was required to retire at age 60. The retirement age for those positions had previously been 65. However, the Commissioner of An Garda Síochána could, with the consent of the Minister for Justice, extend the retirement by up to 5 years, if satisfied that it was "*in the interests of the efficiency of the Garda Síochána*" to do so.[25] The plaintiff had been an Assistant Commissioner. He requested an extension but that was refused. He then

[25] By virtue of Regulation 6(b) of the Garda Síochána (Retirement) Regulations (No 2) 1951 (SI 335/1951), which provided that "if, but only if, the Commissioner is satisfied that it is in the interests of the efficiency of the Gárda Síochána that the age at which any such member would retire … should be extended because of the possession by that member of some special qualification or experience, the Commissioner may, with the consent of the Minister, extend that age in the case of that member by such period, not exceeding five years, as the Commissioner shall determine."

challenged the 1996 Regulations on the basis (*inter alia*) that they were incompatible with the Directive.

68. That challenge failed. In a wide-ranging and learned judgment, McKechnie J considered a number of US and Canadian authorities relating to age discrimination (including the US Supreme Court's decision in *Massachusetts' Board of Retirement v Murgia* to which reference was made above) but considered that these authorities were all distinguishable (paras 107-114). In his view, age discrimination could not be "*relegated to a form of doubtful importance within the overall family of discriminatory grounds*" (para 119). He accepted that a retirement age of 60 pursued rational and legitimate aims, namely that of ensuring motivation and dynamism through increased prospect of promotion and the creation of a pool of candidates suitable for appointment as Commissioner (para 121). As regards proportionality, an important consideration was, in his view, whether "*individual assessment would be possible in a given case, such that using an age-proxy would not be legitimate*" (para 122). In that context, McKechnie J viewed the Regulation 6(b) procedure as a form of individual assessment which served "*to temper the severity of what would otherwise be an absolute retirement age*" and which rendered it proportionate. The retirement age set out in the 1996 Regulations therefore could not "*be entirely equated with a blanket policy type position*" (para 122).

69. In concluding that the measure was proportionate, McKechnie J also attached significance to the fact that members of An Garda Síochána could retire on full pension at age 50 if they had 30 years' service done, that they could reach the highest offices

before retirement and hold such offices for a reasonable period and that the prospect of a second career was very much open (para 123).

70. McKechnie J had discussed the issue of individual assessment earlier in his judgment, expressing the view that *"[w]here there are a large number of people involved and it would be impractical to test every person then it may be proportional to use some form of age-proxy*." "*Conversely*", he went on, "*where there are few people to assess and such could be done relatively easily it would not be proportionate to use blanket proxies so as to determine personal characteristics*" (para 104). As support for that approach, McKechnie J referred to Ó Cinnéide, *Age Discrimination and European Law* (2005), at pages 37-38.

71. In her Judgment in these proceedings, Phelan J noted that, while some flexibility was provided for in the Regulations at issue in *Donnellan*, such flexibility was limited to an additional span of years and "*an absolute end retirement age was nonetheless mandated*." That, she considered, suggested that the absence of flexibility on a case by case or role by role basis did not, on its own, render a measure disproportionate (Judgment, para 107).

72. In considering what was said by McKechnie J in *Donnellan* on the issue of individual assessment, it is important, firstly, to appreciate that the retirement age challenged in *Donnellan* was considerably lower than the general retirement age and significantly lower than the retirement age at issue in these proceedings. Even if granted the maximum extension available under Regulation 6(b), Mr Donnellan would have been

required to retire at age 65. The Regulations made no provision for any further extension, whether on the basis of an individual assessment or otherwise. That is obviously relevant to any proportionality assessment.

73. Secondly, it is important to recall that Regulation 6(b) did not confer any *right* on a member of An Garda Síochána – however conditional – to an extension of his or her retirement age. The power to extend was clearly conferred in the interests of An Garda Síochána. That a member approaching retirement age was still capable of satisfactorily performing the duties of his or her rank was irrelevant unless the Commissioner was satisfied that an extension was "*in the interests of the efficiency of the Garda Síochána …because of the possession by that member of some special qualification or experience*." It is, therefore, questionable whether Regulation 6(b) can properly be regarded as providing for a form of individual assessment, in the sense used by McKechnie J in *Donnellan*.

74. Thirdly, and most significantly, the post-*Donnellan* CJEU jurisprudence does not support any general proposition in the terms articulated in paragraph 104 of *Donnellan*. On the contrary, as is evident from the discussion above, the *avoidance* of individual capacity assessment – both because of the scope for disputes such assessment necessarily involves and because of its potential impact on the dignity of employees – has been recognised as a legitimate aim capable of *justifying* a general retirement age. The recognition in the CJEU jurisprudence that standardisation of retirement ages across the public service and the emphasis on coherence and consistency are also at odds with any suggestion that it is only where it "*would be impractical to test every*

person then it may be proportional to use some form of age proxy." It may be that the law might have developed in that direction (as Ó Cinnéide appears to have considered in 2005) but it has not in fact done so.

75. *Fuchs & Köhler* is illustrative in this context. There, it will be recalled, the law provided for a general retirement age for prosecutors of 65. However, that general rule was subject to a number of exceptions, including a provision which permitted a prosecutor to be retained beyond age 65, to a maximum of age 68, if required by the interests of the service and if the prosecutor concerned consented. Significantly, the context in which that provision was analysed by the CJEU was not as a necessary qualification to the general rule but, rather, as an exception that potentially undermined its coherence (paras 87 – 91). The CJEU concluded that such an exception mitigated the rigidity of the general rule "*in the interests of the civil service concerned*" and contributed to the "*proper working of that service*" and did not render the law "*incoherent*" (para 90). It was, therefore, a *permissible* exception but in no sense did the court's analysis suggest that it was *required* in order to render the general rule proportionate.

76. I therefore agree with the Judge that the absence of flexibility on a case by case or role by role basis does not, on its own, render a measure disproportionate. But it seems to me that the CJEU jurisprudence goes further than that. There is no principle that case by case or role by role assessment is presumptively required or that it must be shown to be impractical if a "*blanket*" retirement age is to be justified. On the contrary, the CJEU has recognised that it is reasonable for Member States to adopt generally applicable mandatory retirement rules, without any requirement for individual capacity

assessment, and that the "*consistent and systematic*" and "*coherent*" application of such rules is not simply permissible but is in fact an important element of the proportionality analysis under Article 6(1) of the Directive. Nothing in the CJEU jurisprudence suggests that an employer is required to justify the application of a general retirement rule to an individual employee. Such a requirement would, of course, substantially negate the benefit of having such a rule in the first place.

77. Accordingly, I agree with the State Respondents' submission to the effect that, provided that the aims sought are legitimate, and that the measure in question is proportionate, a mandatory retirement rule does not offend the prohibition on age discrimination set out in the Directive notwithstanding that it does not entail an individual assessment of those subject to such rule.[26] That is certainly the position as a matter of general principle. It may be that different considerations apply in the context of lower than normal retirement ages specific to a particular occupation (such as airline pilots) which are sought to be justified by reference to Article 4 of the Directive. But this is not such a case.

Does Section 12(6)(b) have a legitimate aim?

78. The State Respondents say that the mandatory retirement age of 70 reflected in Section 12(6)(b) has the following legitimate aims:

[26] Written submissions of the State Respondents at para 59.

- to allow for planning at the level of the individual and at the level of the organisation
- creation of an age balance in the workforce
- personal and professional dignity
- intergenerational fairness
- standardising the retirement age in the public sector

(Statement of Opposition, para 9, as well as the Affidavit of Mr McDonagh, para 32).

79. In his Affidavit, Mr McDonagh refers to Ministerial statements made in the Dáil in debates on the Public Service Pensions (Single Scheme) and Remuneration Bill 2011 (enacted as the Public Service Pensions (Single Scheme and other Provisions) Act 2012) and the Public Service (Superannuation (Age of Retirement) Bill 2018 (enacted as the Public Service (Superannuation (Age of Retirement) Act 2018) and exhibits extracts from the relevant Dáil debates. No issue appears to have been raised in the High Court as to the appropriateness of relying on Ministerial statements in the Dáil in this way and it is therefore unsurprising that the Judge refers to this material in her Judgment.

80. At the hearing of the appeal, the Court itself raised the question of whether it was appropriate to have regard to Ministerial statements made in the course of debate in the Oireachtas, having regard to decisions such as *Crilly v T & J Farrington Ltd* [2001] 3 IR 251 and *Controller of Patents v Ireland* [2001] 4 IR 229. In *Crilly*, for the various reasons set out by Denham, Murray, McGuinness and Fennelly JJ in their respective judgments, this Court declined to depart from what Murray J characterised as the

"*classical exclusionary rule*" which excluded reliance on anything said in the Oireachtas as an aid to the interpretation of statutes. However, it appears that the scope of the rule extends beyond the interpretation of statutes. Recourse to Oireachtas debates for the purposes of establishing legislative intention or motive is generally impermissible: *Controller of Patents v Ireland*, per Keane CJ at 246, as well as the judgment of Fennelly J in *Crilly*, at 307 (citing this Court's decision in *In re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360). More recently, in *O' Doherty & Waters v Minister for Health* [2022] IESC 32, [2022] 1 ILRM 421, O' Donnell CJ (Irvine P, MacMenamin, O' Malley, Baker and Murray JJ agreeing) suggested that the exclusionary rule applies also where the proportionality of legislation is at issue: see paras 68 & 78-79. In any event, courts generally do not need to have recourse to parliamentary debates "*to ascertain the arguments used to justify the enactment of the measure – it will usually be possible for the court to make reasonable inferences from the provisions of the statute itself*…" per Costello P in *Molyneaux v. Ireland* [1997] 2 ILRM 241 at 244.

81. The precise status and scope of the "*exclusionary rule*" (and in particular whether it is to be seen as a rule of law or as a prudential rule founded on considerations of pragmatism and practicality) was not the subject of any significant debate in this appeal and it is not necessary to express any definitive view as to whether it operates to exclude recourse to Ministerial statements in the circumstances here, where reliance is sought to be placed on them as statements of general policy rather than as guides to the meaning or intended effect of a specific statutory provision. The statements to which Mr McDonagh refers are, in my view, of no real significance for the resolution of these

proceedings. That there is a generally applicable retirement age of 70 across the public service is apparent from the statute book, particularly the Public Service Pensions (Single Scheme and Other Provisions) Act 2012 and the Public Service Superannuation (Age of Retirement) Act 2018 (which applies a retirement age of 70 to many statutory offices in addition to public servants). It is in any event confirmed by Mr McDonagh in his Affidavit. Mr McDonagh also refers to, and exhibits, a number of reports which, he explains, informed Government policy leading to the enactment of the 2018 Act (Affidavit, para 39). This material, and Mr McDonagh's Affidavit itself, are more than sufficient to identify the general considerations involved in deciding to apply a mandatory retirement age of general application in the first place and then deciding what that retirement age should be. The Court does not need evidence of Ministerial statements to understand that such decisions involve the balancing of different socio-economic factors or that arguments may (and are) made against the adoption of any mandatory retirement age and for a retirement age higher than (or lower than) age 70.

82. In any event, the State Respondents have, through the Affidavit of Mr McDonagh, identified the aims being pursued by requiring sheriffs to retire at age 70. None of those aims find expression in Section 12(6)(b) itself but, as the Judge rightly observed, that is not required by the Directive (Judgment, para 82). Nor is it determinative that these aims might not have the aims identified at the time of the enactment of the 1945 Act; what is relevant is whether Section 12(6)(b) continues to serve an identifiable legitimate aim (*ibid*).

83. The Judge clearly accepted the evidence of Mr McDonagh as to the identification of the aims sought to be achieved (Judgment, paras 84 & 85). That was, at least in part, a finding of fact, made on the basis of the affidavit evidence. To that extent, Mr Mallon bears the burden of demonstrating that there is some error in the Judge's finding (*Ryanair Ltd v Billigfluege.de GmbH* [2015] IESC 11, per Charleton J, Hardiman, McKechnie, Clarke and MacMenamin JJ agreeing, at para 11) and this Court begins its analysis "*from the firm assumption that the trial judge was correct in the findings or inferences he or she has drawn, and [interferes] with those conclusions only where it is satisfied that the judge has clearly erred in the findings made or inferences drawn in a material respect*" (*AK v US* [2022] IECA 65, per Murray J, Haughton and Barniville JJ agreeing, at para 53).

84. In reality, that the aims of Section 12(6)(b) are as identified by the State Respondents does not appear to be in dispute. Mr McDonagh's Affidavit has not been contradicted. Neither does Mr Mallon appear to contest that, at the level of principle, those aims may be legitimate. They may, he accepts, be valid considerations for a larger integrated workforce but, he says, they have no application to the office of sheriff. Intergenerational fairness has no application (so it is said) because promotion within the office does not arise. There is, it is said, no evidence of what planning is involved or what considerations of age balance have been considered. As regards personal and professional dignity, it is said that Mr Mallon's dignity has been impugned. Finally, the relevance of standardisation/consolidation is questioned by Mr Mallon on the basis that a retirement age of 70 has not been applied consistently and, in particular, is not applied to coroners.

85. Member States have a "*broad discretion*" in choosing which aims to pursue in this area and those aims may be broad "*social policy objectives, such as those related to employment policy, the labour market or vocational training*". Those objectives do not need to be specific to particular areas of public service, such as the office of sheriff. The objectives identified by the State Respondents apply generally across the public service. That does not call into question the legitimacy of those objectives in their application to sheriffs. Having a fixed retirement age enables the State to plan for the recruitment of a replacement sheriff. It also enables the retiring sheriff to plan for their retirement, including making appropriate arrangements for the staff engaged by them for the purpose of carrying out the functions of sheriff (Mr Mallon had a number of staff which had to be made redundant on his retirement). Intergenerational fairness and the creation of an age balance are also legitimate aims in this context. That is so even in the absence of an integrated workforce within which there are promotion pathways. The application of a mandatory retirement age to sheriffs results in positions becoming vacant when otherwise they would not and provides an opportunity for the appointment of younger persons to the office. It also provides an opportunity to move toward greater gender parity.[27] That there is only a limited number of sheriffs in the State, and that each is effectively a separate office with its own area of responsibility, does not undermine the legitimacy of those objectives. The avoidance of disputes concerning the

[27] According to the State's submissions, of the 14 sheriffs in place as of the hearing of this appeal, half were over the age of 60, with 4 over the age of 65. Only 6 sheriffs were under the age of 50. Only 2 of the 14 sheriffs were women, both of whom were younger than 50. While this information should properly have been put on affidavit, no objection was taken to it on Mr Mallon's behalf.

capacity of serving sheriffs to perform their functions is also a legitimate aim in this context and that is not altered by the fact that the pool of sheriffs may be small (or by the fact that Mr Mallon was evidently affronted by being required to retire at age 70, despite having applied for and accepted appointment expressly on that basis). Finally, standardisation of retirement ages across the public service is, in principle, unquestionably a legitimate aim, one capable of justifying the application of a mandatory retirement age of 70 to sheriffs, even in the absence of any other considerations (and, it will be recalled, standardisation was the factor emphasised in the Minister's response to the Sheriffs' Association request to increase the retirement age). Whether that aim has been applied consistently is a separate issue, relevant to the second stage of the analysis required by Article 6(1) of the Directive which is addressed below.

86. The Judge was satisfied that the State Respondents had discharged the burden on them of identifying from the general context legitimate aims for the mandatory retirement policy *vis-à-vis* the office of sheriff (Judgment, para 97). No error in that conclusion has been demonstrated. In truth, I cannot see how any other conclusion would have been open to the Judge on the basis of the material before her.

Is Section 12(6)(b) "necessary and appropriate"?

87. In response to a question raised by the Court prior to the hearing of the appeal, Mr Mallon helpfully articulated his "*primary complaint*" as being "*that the mandatory retirement age of 70 for Sheriffs is objectively discriminatory and too low, in particular*

when compared to that of Coroners, which is fixed at 72." He went on to observe that any statutory retirement age for the office of sheriff must be objectively justifiable and, if no relevant justification is forthcoming, "*it may well be that no mandatory retirement age would be lawful, and an individual assessment would be necessitated*." That, he says would not be particularly burdensome given the limited number of sheriffs.

88. Leaving aside for a moment the differential treatment of coroners – which, in reality, appears to be the *fons et origo* of Mr Mallon's complaint here – the issue of whether the State may reasonably take the view that the adoption of a mandatory retirement age of 70 for sheriffs is "*necessary and appropriate*" to achieve the aims identified above would appear to admit of only one answer. It is difficult to identify any circumstances in which a retirement age of 70 might currently be said to be disproportionate. Such a retirement age is higher, and in many cases significantly higher, than the thresholds for mandatory retirement considered without criticism or condemnation by the CJEU. Indeed, even in *Commission v Hungary*, the problem identified by the CJEU was not the retirement age of 62 *per se*, but the fact that it was applied to serving judges, prosecutors and notaries without any "*transitional measures of such a kind as to protect the legitimate expectations of the persons concerned*."

89. No doubt, the State could have elected to fix the mandatory retirement age at a level higher or lower than age 70 (or elected not to have any general retirement age). There is no "*right*" age and Member States may reasonably differ as to the retirement age (if any) that should apply (and may change that age in response to changing circumstances). Provided that the prescribed age appears reasonably designed to

achieve the objectives being pursued, the requirements of Article 6(1) will be satisfied. It is clear from the CJEU jurisprudence that the State enjoys a "*broad discretion*" in this context and its judgment as to how best to balance broad and competing socio-economic considerations – including but by no means limited to the rights and interests of persons required to retire, potentially against their will – must accordingly be given very significant weight.

90. In the course of her careful analysis – with which I am otherwise in complete agreement – the Judge expressed a concern as to the "*blunt application*" of the mandatory retirement age to sheriffs and the absence of any "*flexibility*" to vary that retirement age as it applies to sheriffs. That part of the Judge's analysis appears to derive from the observations made by McKechnie J in *Donnellan*. As I have explained, the suggestion in *Donnellan* that case by case or role by role assessment is presumptively required or that it must be shown to be impractical if a "*blanket*" retirement age is to be justified is not supported by the CJEU jurisprudence as it has developed post-*Donnellan*. Individual assessment is not required by the Directive.

91. As regards the absence from the 1945 Act of any mechanism for varying the retirement age for sheriffs generally, such as by means of a Ministerial order in the manner provided for in the 2004 and 2012 Acts, that does not appear to me to be a matter of any significance in this context. Section 12(6)(b) fixes a retirement age of 70 for sheriffs. That retirement age is either currently lawful or not. If it is currently lawful – as the Judge found it was – then the question of whether and/or how that threshold might be varied in the future does not arise. That the retirement age for sheriffs must be

amended by primary legislation, rather than varied by Ministerial order, does not mean that it is set in stone. Section 12(6)(b) can be amended by the Oireachtas at any time. Changing circumstances – such as increased longevity or changes to the pensionable age – may require it to be revisited. In the event that orders were made under the 2004 and/or 2012 Acts raising the mandatory retirement age above 70, then, as the Judge observed, the case for raising the retirement age for sheriffs would be made more compelling (Judgment, para 114) and the Minister would then have to consider whether to ask the Oireachtas to make a corresponding adjustment to the Section 12(6)(b) age limit. But no such orders have been made and that scenario is – for the moment at least - entirely hypothetical.

92. 70 is considerably higher than the current "*pensionable age*" of 66 for the purposes of entitlement to a pension under the Social Welfare Consolidation Act 2005. That is a significant factor having regard to the CJEU jurisprudence. While sheriffs have no entitlement to an occupational pension arising from their office (a point understandably emphasised by Mr Mallon), they may make the necessary contributions to earn a State Contributory Pension and Mr Mallon is in fact in receipt of such a pension. He does not seek to make the case that retirement as sheriff has caused him financial hardship.[28] That may be unsurprising in circumstances where Mr Mallon was in practice as a solicitor throughout the entire period through which he held the office of sheriff and

[28] Mr Mallon did explain (in his Affidavit sworn on 10 May 2022, para 9) that on retirement he would have to make three staff redundant and would have to bear the costs of those redundancies. But those costs – which are not quantified – would have had to be borne by Mr Mallon whenever he reached retirement, regardless of whether that was at age 70, age 72 or some other age and he was presumably in a position to make provision for those costs during his period of service as Revenue sheriff.

where he remains in practice now. Mr Mallon has not chosen to disclose any information about his financial affairs but, in the absence of any suggestion to the contrary, it seems reasonable to infer that, between his remuneration as sheriff and his income as a solicitor over many decades, he has been in a position to make adequate provision for his retirement (including by way of contributions to a private pension).

93. That persons appointed as sheriff are free to combine that office with continuing practice as a solicitor (or as a barrister) is a highly significant factor in assessing the proportionality of the mandatory retirement age of 70 applicable to them. For many, including Mr Mallon, the office will not be their sole source of income. Furthermore, should they elect to remain in private practice as a solicitor or barrister while serving as sheriff – as Mr Mallon did – they may continue in practice after retirement as sheriff. Retired sheriffs are not, by any means, "*shut out from the workforce*" on reaching the age of 70.

94. It remains to be considered whether the State's policy of mandatory retirement at age 70 has been applied in a "*consistent and systematic manner*" and whether, in that context, any exceptions to the mandatory retirement regime give rise to such inconsistency as to bring that regime outside the scope of Article 6(1) of the Directive.

95. In my view, it cannot plausibly be suggested that the *ad hoc* and one-off exception to Section 12(6)(b) made by section 6(2) of the Court Officers Act 1951 (which provided that the age of retirement of the then serving sheriff in Dublin City should be 72 rather

than 70) affects the coherence of the current mandatory regime, either generally or in its specific application to sheriffs.

96. As for the cohorts of public servants recruited between 2004 and 2012 who were not subject to any mandatory retirement age, I agree with the Judge that there was a proper basis for treating them differently. In the first place, the State was entitled to change its policy in 2012 (when the Oireachtas enacted the 2012 Act, reimposing a mandatory retirement age, fixed at 70 rather than 65, for new entrants into the public service): *Palacios de la Villa* at para 70. Secondly, the State was entitled to take the view that it would not be appropriate to apply that new regime retrospectively to public servants recruited between 2004 and 2012. To have done so would have raised potential issues both under Irish law and by reference to the Directive.

97. There are a number of areas where a mandatory retirement age *lower* than 70 applies, including An Garda Síochána, the Permanent Defence Forces and the fire services. Particular considerations apply in these areas and for that reason they do not, in my view, call into question the consistency or coherence of the general retirement regime. I did not understand Mr Mallon to contend otherwise.

The retirement age of coroners

98. The position of coroners must now be considered. Mr Mallon relies on the fact that the retirement age for coroners is now 72 to suggest that a retirement age of 70 for sheriffs is "*too low*". In other words, he contends that fixing the retirement age for coroners at

age 72 undermines the general rule of retirement at age 70. But he also appears to claim that requiring him to retire at age 70 in circumstances where coroners are permitted to remain in office until age 72 constituted direct discrimination against him. Significant issues arise as to whether that latter claim properly comes within Mr Mallon's pleaded case, and whether, in any event, such a claim can be pursued by means other than a claim for redress made to the WRC pursuant to the 1998 Act. However, in light of the view I have reached on the substance of Mr Mallon's complaints, it does not appear necessary to consider those questions further.

99. The Directive does not require that Member States that elect to adopt a mandatory retirement regime must apply precisely the same retirement age uniformly across the public service. Member States may legislate having regard to the particular characteristics of different sectors and may respond to particular circumstances that arise in a particular sector without necessarily undermining the general objective of standardising retirement ages across the public service as a whole. Member States may also provide for exceptions, provided that such exceptions do not call into question the coherence of the retirement regime or undermine its objectives. Thus, it is permissible to provide for the retention of public prosecutors beyond their normal retirement age where that is in the interests of the prosecution service (and thus in the public interest): *Fuchs & Köhler.* Similarly, in areas where there is a shortage of professional staff, it is permissible (and perhaps obligatory) to disapply the generally applicable retirement age: *Petersen.*

100. Accordingly, it is clear that, as a matter of principle, the State may provide for the application of a different retirement age to a specific category of public servants where there is a rational and objective basis for doing so and that one of the considerations that the State may take into account in that context is the need to maintain the effective delivery of public services in that area.

101. That, the State says, is precisely the position here as regards the increased retirement age for coroners. According to Mr McDonagh, the retirement age for coroners was increased by 2 years "*for the purpose of retaining experience and expertise within the coroner system*." Mr McDonagh explains that the position of coroner is a "*highly specialised role*" and that the holders of the position have built up valuable experience in conducting inquests, which experience can by definition only be built up over time. It was appropriate, he says, that steps were taken "*to allow this experience to be retained*" (Affidavit, para 35). In answer to Mr Mallon's complaint that sheriffs are being treated in a discriminatory manner, Mr McDonagh avers that the concerns that led to the decision to seek an amendment of the retirement age for coroners "*do not arise with regard to the position of sheriff*" (para 36). He also refers to the fact that many coroners hold General Medical Scheme (GMS) contracts which are subject to a retirement age of 72 (para 35).

102. Mr McDonagh might well have addressed this issue in greater detail. No doubt, if Mr Mallon had elected to seek redress under the 1998 Act, the issue could have been explored in greater detail. But, whatever its brevity, Mr McDonagh's evidence explains the basis for the different treatment of coroners and that evidence has not been

contradicted by Mr Mallon. He neither took issue on affidavit with anything said by Mr McDonagh nor did he seek to cross-examine on that affidavit. In those circumstances, it is not open to Mr Mallon to invite the Court to reject Mr McDonagh's evidence: *RAS Medical Ltd v Royal College of Surgeons in Ireland* [2019] IESC 4, [2019] 1 IR 63.

103. In any event, a consideration of the role and functions of the coroner clearly indicates that the office of coroner is ever more challenging and suggests that the judgment to provide for the retention of coroners to age 72, in order to retain experience and expertise within the system for longer, has a rational basis. The Coroners (Amendment) Act 2019 – the same Act that extended the retirement age to 72 – significantly expands the functions and powers of the coroner.[29] It expands the circumstances in which an inquest must be held by the inclusion of maternal and late maternal deaths (section 10(c), amending section 17 of the Coroners Act 1962). The 2019 Act also applies the 1962 Act to stillbirths. The 2019 Act also reflects Article 2 ECHR by expressly providing that deaths in State custody or detention must be the subject of an inquest (*ibid*). The enactment of the European Convention on Human Rights Act 2003 has had a significant impact on the work of coroners, the full implications of which are still to be worked out in this jurisdiction.[30] In addition – and significantly – the 2019 Act makes it clear that, to the extent that the coroner holding an inquest considers it necessary, the inquest shall seek to establish "*the circumstances in which the death occurred*" and to

[29] See generally the discussion in Murray et al, *Medical Inquests* (2022), chapter 2, "The Changing Landscape."

[30] See Murray et al, *op cit*, chapter 8. There is a significant body of case-law in the UK addressing the implications of Article 2 ECHR for coroners' inquests: see the recent decision of the (UK) Supreme Court in *R (Maguire) v Senior Coroner* [2023] UKSC 20, [2023] 4 All ER 1 and the authorities referred to there.

make "*findings*" in that regard (section 12, inserting a new section 18A into the 1962 Act) and also expands the scope of recommendations that may be appended to the verdict of an inquest (section 19, amending section 31 of the 1962 Act). Those provisions reflect the increasing emphasis in recent jurisprudence on the significance of the role of coroners and the importance of coroners carrying out full and proper investigations into deaths.[31] Many other provisions of the 2019 Act reflect an enhanced role for coroners, including provisions conferring powers of entry (with a warrant) (section 30, inserting new section 49A into the 1962 Act) and a power to retain an expert to provide advice and assistance (section 31, inserting new section 53A into the 1962 Act).

104. The decision to adopt a higher retirement age for coroners was, at least in the first instance, one for the Government to propose and for the Oireachtas to make. Those organs were better placed than the courts to assess what was necessary or appropriate for the effective operation of the coronial system established by the 1962 Act (which is, on any view, a matter of compelling public interest). Courts have a limited role in reviewing such a judgment: they do not carry out a *de novo* assessment but are concerned only with whether the judgment made by the competent authorities appears to be unreasonable. That has not been demonstrated here. Insofar as there is a burden on the State Respondents to establish a basis for the different treatment of sheriffs and coroners, they have discharged that burden in my view.

[31] See *Eastern Health Board v Farrell* [2000] 1 ILRM 446; *Ramseyer v Mahon* [2005] IESC 82, [2006] 1 IR 216; *Lawlor v Geraghty* [2010] IEHC 168, [2011] 4 IR 486 and *Loughlin v Coroner for Counties of Sligo and Leitrim* [2019] IEHC 273, [2020] 2 IR 385

105. The fact that the prescribed eligibility conditions for appointment as a coroner (being a practising barrister or solicitor or registered medical practitioner of at least 5 years' standing) and/or the conditions attaching to service in that office if and when appointed (and in particular the fact that coroners may continue to pursue a legal or medical practice while serving as coroner, just as sheriffs may continue in practice as a solicitor or barrister) have obvious parallels with the conditions attaching to the office of sheriff under the 1945 Act says little or nothing as to the comparability of the two offices, which involve very different functions. That is not to say that expertise and experience are not important in carrying out the functions of a sheriff. No doubt they are. But it was open to the State to decide that the particular requirements of the office of coroner were such that it was in the public interest to retain the experience and expertise of serving coroners for longer.

106. In the circumstances, and having regard to the uncontradicted evidence of Mr McDonagh, the Judge was entitled to conclude that it was not unlawful for the Oireachtas to make special provision for the office of coroner (Judgment, para 112). That conclusion is sufficient to dispose of Mr Mallon's complaint that the retirement age for coroners demonstrates that the retirement age for sheriffs is "*too low*" and should be 72 rather than 70. It also disposes of his complaint that the requirement to retire at 70 constituted direct discrimination against him, having regard to the higher retirement age applicable to coroners.

107. While section 7 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 (which inserted a new section 11B into the 1962 Act providing for the appointment as temporary coroners of persons otherwise qualified for appointment who has not attained the age of 75 at the time of his or her appointment) was mentioned in argument, Mr Mallon understandably did not place any significant emphasis on it. It clearly was a direct legislative response to the Covid-19 pandemic. But the provision helps to illustrate the flexibility that Member States retain under the Directive to respond to changing circumstances.

108. Finally, at the hearing of the appeal, reference was made to the statement made in the Seanad by the Minister for Justice and Equality in respect of the proposal to raise the retirement age for coroners from 70 to 72. The Minister stated that the change accorded with Government policy on extending mandatory retirement ages in line with increases in healthy and productive life expectancy and also responded to a long-standing request by the coroners' representative body for such an extension. That explanation was, it was suggested in argument, inconsistent with the explanation given by Mr McDonagh in his evidence. For my own part, I see no necessary conflict between the two. A general policy to increase mandatory retirement ages is not inconsistent with recognising the specific needs of one area and legislating for it on that basis. More fundamentally, however, if Mr Mallon wished to challenge Mr McDonagh's evidence, there was a procedure for him to do so under the Rules. As already noted, Mr Mallon neither swore any affidavit taking issue with what was said by Mr McDonagh nor did he seek to have Mr McDonagh cross-examined. Even if a Ministerial statement in the Dáil is admissible in principle in this particular context – and that is certainly questionable in light of the

authorities to which I have already referred, as well the decision of the Divisional Court in *Ahern v Mahon* [2008] IEHC 119, [2008] 4 IR 704 - it simply cannot be produced on appeal (without even being verified on affidavit) and relied on to impugn sworn evidence that Mr Mallon allowed to go unchallenged in the High Court.

Conclusions on whether Section 12(6)(b) is "necessary and appropriate"

109. The Judge concluded that, in deciding to fix a mandatory retirement age of 70 (which, as she noted, had been the subject of consultation and engagement in the lead-up to the enactment of the 2018 Act) the Oireachtas was seeking to strike a balance and she was satisfied that, in doing so, it was acting within the boundaries of the discretion allowed by the Directive (Judgment, para 116). In view of the discretion afforded to the State in pursuing social and employment policies, she was satisfied that the mandatory retirement rule adopted in respect of sheriffs is appropriate and necessary for the achievement of the aims identified to justify that rule (Judgment, para 117). Again, these are findings of fact and it follows from the authorities I have cited earlier that it is for Mr Mallon to establish some clear error on the part of the Judge if those findings are to be interfered with by this Court on appeal. No such error has been demonstrated. As with the Judge's findings on the first element of Article 6(1) (legitimate aims), it is indeed difficult to see how any other finding was open to the Judge on the material before her.

CONCLUSIONS

110. I will summarise my principal conclusions briefly:

(1) The email of 20 April 2021 did not constitute a reviewable decision and Mr Mallon was not entitled to seek certiorari of that "*decision*". However, Mr Mallon was entitled to seek declaratory relief directed to the issue of whether Section 12(6)(b) is compatible with the Directive (paras 52-55 above).

(2) While Mr Mallon could have pursued a claim for redress before the WRC under the 1998 Act, the High Court Judge was entitled to conclude that it would not be appropriate to decline to adjudicate on Mr Mallon's claim on the basis of his failure to pursue a remedy before the WRC. The High Court was the more appropriate forum for determining the issue of whether Section 12(6)(b) is compatible with the Directive and, having regard to the provisions of Article 34 of the Constitution, the contention that the High Court should have relinquished its Article 34 jurisdiction in favour of the WRC is unpersuasive (paras 56-61).

(3) Section 12(6)(b) establishes a difference in treatment directly based on age within Article 2(1) and (2)(a) of the Directive. However, such a difference in treatment may be justified under Article 6(1) of the Directive (para 62(1)& (2))

(4) It is not the case that the Directive presumptively requires case by case or role by role assessment or that such individual assessment must be shown to be

impractical if a generally applicable retirement age is to be justified. Provided that the aim sought is legitimate and the means of achieving that aim are *"appropriate and necessary*" (proportionate), a mandatory retirement rule does not offend the prohibition on age discrimination in the Directive, notwithstanding that it does not entail an individual assessment of those subject to that rule (paras 66-77).

(5) In light of the CJEU jurisprudence (para 62(5) – (7) above), the aims identified by the State Respondents as justifying the application of a mandatory retirement age of 70 in the public service, and the application of that retirement age to sheriffs, clearly constitute legitimate aims for the purposes of Article 6(1) of the Directive. Standardising the retirement age at 70 across the public service and public agencies and offices, including the office of sheriff, is one such legitimate objective (paras 78 – 86).

(6) The imposition of a retirement age of 70 is not disproportionate, generally or with particular reference to the position of sheriffs. Member States enjoy "*broad discretion*" in this area and it is for the competent authorities to "*find the right balance between the interests involved*." A retirement age of 70 is higher, and in many cases considerably higher, than the thresholds for mandatory retirement considered without criticism or condemnation by the CJEU. It is significantly higher than the pensionable age for the purposes of the State pension. The appropriate retirement age in the public service generally has been the subject of recent public engagement and consideration by the Oireachtas,

resulting in the enactment of the 2018 Act which provides for a mandatory retirement of 70. While the State could have elected to fix the mandatory retirement age at a level higher or lower than 70 (or could have decided not to have any general retirement age), provided that the prescribed retirement age appears reasonably designed to achieve the objectives being pursued, the requirements of Article 6(1) will be satisfied (paras 87-97).

(7) As regards the position of sheriffs specifically, the fact that persons appointed to that office are free to combine it with continuing practice as a solicitor (or barrister) is a highly significant factor in assessing the proportionality of requiring their retirement at age 70. For many – including Mr Mallon – the office will not be their sole source of income while holding the office of sheriff and they may also continue in practice after retirement from that office. If they have made the necessary contributions, they will be eligible to receive the State Pension (Contributory) from age 66 (as Mr Mallon does). No case is made here that the requirement for sheriffs to retire at age 70 is likely to give rise to any financial hardship (*ibid*).

(8) As a matter of principle, the State may provide for the application of a different retirement age to a specific category of public servants where there is a rational and objective basis for doing so and one of the considerations that the State may take into account in that context is the need to maintain the effective delivery of public services in that area. The evidence demonstrates that there was a rational and objective basis for the decision to increase the retirement age

for coroners from 70 to 72. That decision was one for the Government and the Oireachtas to make. Courts have a limited role in reviewing such a judgment: they do not carry out a *de novo* assessment but are concerned only with whether the judgment made by the competent authorities appears to be unreasonable. That has not been demonstrated here. Insofar as there was a burden on the State Respondents to establish a basis for the different treatment of sheriffs and coroners, that burden has been discharged. It follows that Mr Mallon's complaint that the retirement age for coroners demonstrates that the retirement age for sheriffs is "*too low*" and should be 72 rather than 70 is not well-founded. It follows also that his complaint that the requirement to retire at 70 constituted direct discrimination against him, having regard to the higher retirement age applicable to coroners, fails (paras 98 – 108).

(9) In the circumstances, the Judge was entitled to conclude that Section 12(6)(b) was justified under Article 6(1) of the Directive.

111. It follows from these conclusions that I would dismiss the appeal and affirm the Order of the High Court refusing all of the reliefs sought by Mr Mallon, including the claim for *Francovich* damages.