Neutral Citation Number: [2009] EWHC 2336 (Admin)

Case No: CO/4585/06

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/09/2009

Before :

MR JUSTICE BLAKE

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Between :

The Queen on the application of Age UK	**Claimant**
- and -	
Secretary Of State For Business, Innovation & Skills	**Defendant**
- and -	
The Equality and Human Rights Commission	**First Intervenor**
HM Attorney General	**Second Intervenor**

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Robin Allen QC & Declan O' Dempsey (instructed by **Irwin Mitchell Solicitors**) for the **Claimant**
Dinah Rose QC & Emma Dixon (instructed by **the Treasury Solicitors**) for the **Defendant**
Lord Lester of Herne Hill QC & Diya Sen Gupta for the **Intervenor**

Hearing dates: 16th, 17th, 20th July 2009

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Approved Judgment

The Hon Mr. Justice Blake :

Introduction

1. In these proceedings the claimant challenges the legality of the Employment Equality (Age) Regulations 2006 SI 1031/2006, hereafter the Regulations. The Regulations were promulgated on the 3rd April 2006 and were intended to give effect to European Council Directive 2000/78/EC of the 27th November 2000 (the Directive). They came into force on 1st October 2006.

2. By Article 18 of the Directive, Member States of the European Union were required to adopt the laws, regulations and administrative provisions necessary to comply with it by the 2nd December 2003, but were given a further 3 year period to December 2006 in order to take account "of particular conditions". Member States such as the United Kingdom, which chose to use this additional time period for transposition were required to report annually to the European Commission on the steps taken to tackle age discrimination and on progress towards implementation.

3. These proceedings for judicial review were started on the 3rd July 2006 following pre-action protocol letters written shortly after the Regulations were made. In July 2007 this court referred five questions relating to the interpretation of the Directive to the European Court of Justice (ECJ). Judgment was delivered by the Third Chamber of the ECJ on the 5th March 2009 in case C-388/07 *R (on the application of) Age Concern England v the Secretary of State for Business Enterprise and Regulatory Reform* (hereafter the *Age Concern* judgment).

4. In the intervening period since the commencement of these proceedings the parties have changed their names. The Incorporated Trustees of the National Council on Ageing (Age Concern England) have become part of a new organisation, Age UK, who act in substitution of the original claimants. The Secretary of State for Business, Innovation and Skills has taken on responsibility for the Regulations in place of the Secretary of State for Trade and Industry. Before the hearing of this application the court granted permission to intervene to the Commission for Equality and Human Rights that has re-named itself as the Equality and Human Rights Commission.

5. The Directive required the United Kingdom to legislate to give effect to its terms amongst other things in the field of age discrimination. The prohibition of discrimination on the grounds of age has now joined the prohibition against other grounds of discrimination as one of the fundamental principles of the European Union. Before the coming into force of the Regulations there were no legislative provisions within the United Kingdom which prevented discrimination on grounds of age in relation to employment and occupation. Employers were able to dismiss employees who had reached the employer's normal retiring age as identified in the contract of employment, or, in the absence of a normal retiring age, the age of 65. Such employees who were dismissed on the grounds of retirement could not claim unfair dismissal or redundancy payments. The implementation of the Directive by the Regulations substantially altered this position. The law now provides that employers must not discriminate on the grounds of age save to the extent that such discrimination is permitted by the Regulations that give effect to the Directive.

6. The claimant submits that the Regulations are over-broad in what they permit by way of derogation from the principle of non-discrimination. As such, they fail to give effect to the terms of the Directive and are liable to be struck down or declared invalid by this court in these proceedings. The claimant's submissions are directed first to Regulation 3 that permits employers to justify direct discrimination on the grounds of

age; second, to Regulation 30 that provides that it does not constitute unlawful discrimination for an employer to dismiss an employee on the grounds of retirement at age 65. The age of 65 has become a designated retirement age (DRA) in the United Kingdom as opposed to a default position in the absence of contractual term. Employers will be able to dismiss on retirement grounds at an earlier age but only if they can justify this measure as proportionate, necessary and for a legitimate purpose under Regulation 3. Employers are not obliged to dismiss workers at 65. They will be free to keep workers on in employment after 65, but if they do so they may subsequently dismiss them on retirement grounds without liability for unfair dismissal. Under new provisions established by the Regulations employers are required to give a minimum period of notice of an intended decision to retire employees and must listen to any representations made by the employee against such a course under a procedure spelt out in Schedule 6 to the Regulations. If the claimant's arguments as to Regulation 30 have validity, then there are consequential issues for Regulations 7 and 8 but these require no separate consideration because if the challenge to Regulation 30 fails so will the further challenges.

7. The intervenor makes no submissions as to Regulation 3 and its compatibility with the Directive, but supports the claimant's case against Regulation 30 on the grounds that: first, no DRA age was necessary when transposing the Directive and legitimate reasons for retiring an employee on the grounds of age could be established on a case by case basis in the light of the guidance given by Community law; second and alternatively, if a DRA was or is considered legitimate, 65 was too young an age for such a provision. The intervenor submits that 70 was the earliest appropriate age for a DRA on all the evidence available to the Secretary of State at the time when the Regulations were promoted in 2006, and even more so on the evidence now available.

8. The defendant, by contrast, submits first, that in substance the claimant's submissions as to Regulation 3 have already been dismissed by the ECJ in the *Age Concern* judgment, and, further, that both adopting a DRA at all and selecting age 65 as the DRA for the purposes of Regulation 30 was a matter well within the competence of the United Kingdom in giving effect to the Directive, particularly having regard to the margin of appreciation afforded to Member States by the Directive on judgments as to social and economic policy.

9. All three participants to this application cite and make extensive use of material arising in the legislative process undertaken between 2003 and 2006, whereby the United Kingdom Government published consultation papers, canvassed opinions, reflected on the results and engaged with recommendations from Parliamentary Committees and others, before finally promulgating the Regulations in question. Shortly before the hearing of this application, the Attorney General sought leave to intervene on behalf of the Speaker of the House of Commons and the Clerk to the Parliaments by written submissions only, questioning whether the court should receive this material at all and if so what use could legitimately be made of it without infringing Parliamentary privilege.

10. There are accordingly four broad issues that I have to consider:-

    i) What are the relevant principles that should apply when adjudicating on the legality of the transposition of a Directive, and in particular what margin of appreciation should the court afford to the executive?

ii) In the light of the applicable principles, are the parts of Regulation 3 complained of, unlawful and inconsistent with the Directive?

iii) In the light of all the available evidence, is the DRA established by Regulation 30 a lawful one?

iv) Can material relating to the evidence given to Parliamentary Committees and the recommendations of those Committees be received and relied on by this Court in determining this application?

The Terms of the Directive

11. The recitals to the Council Directive record the importance now given by Community law to protecting the elderly from discrimination in the field of employment (see Recitals (6), (8), (9), (11), (12)). The recitals also recognise that it is justified in national law to lay down retirement ages (see Recital 14 "The Directive shall be without prejudice to national provisions laying down retirement ages") and in other circumstances where use of age criteria may be justified. The two contrasting aspects of the social policy driving the Directive are reflected in Recital 25 that reads as follows:-

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

12. Article 1 of the Directive explains that its purpose is to lay down a general framework that combats 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 a Member State the principle of equal treatment.

13. Article 2 defines the concept of discrimination. Article 2(1) states that the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatever on any of the grounds referred to in Article 1. Article 2(2) further defines what the principle means. Article 2(2)(a) refers to direct discrimination which would be taken to occur where "one person is treated less favourably than another is, has been or would be treated in a comparable situation". Article 2(2)(b) refers to indirect discrimination which occurs:

> "where an apparently neutral provision criterion or practice would put persons having a particular …. age at a particular disadvantage compared with other persons unless:

i. that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

Article 4 deals with particular occupational requirements where age or any other prohibited basis of discrimination may be relevant.

14. Article 6 is titled "Justification of differences of treatment on the grounds of age". It is central to the present dispute and provides as follows:

> "1. Notwithstanding Article 2(2) Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.
>
> Such differences of treatment may include among others:
>
> a) The setting up of special conditions on access to employment and vocational training, employment and occupation…
>
> b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;
>
> c) the fixing of a maximum age for recruitment which is based upon the training requirements of the post in question or the need for a reasonable period of employment before retirement."

15. Article 6(2) is concerned with provisions relating to Social Security schemes and does not require consideration in this case. Article 10 under the heading "The Burden of Proof" provides that where persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove there has been no breach of the principle of equal treatment.

<u>The UK Regulations: Regulation 3</u>

16. Regulation 3(1) of the UK Regulations combines both direct and indirect discrimination on the grounds of age and provides by its concluding words that discrimination exists where the person alleged to be discriminating cannot "*show the treatment or as the case may be,* provision, criterion or practise to be a proportionate means of achieving a legitimate aim". The claimant complains of the words in italics and submits that by applying the test for justification of indirect discrimination to direct discrimination Regulation 3 fails to implement Article 6 properly understood, or did so in such a vague and general way as fails to comply with the duty of legal certainty. Further the failure to identify what the social aims were results in a situation

where the private interests of the employer can be permitted to usurp the policy-making role of the state.

Decisions of the ECJ on Age Discrimination

17. When the Administrative Court referred this challenge to the Court of Justice, there were few decisions on the proper meaning of the Directive. However, shortly afterwards the ECJ decided case C-411/05 *Palacios de la Villa* [2007] ECR I-8531 (the *Palacios case)* that answered one of the questions referred. It decided that the terms of Recital 14 to the Directive did not take the issue outside the scope of the Directive altogether or remove the need for justification of retirement ages.

18. The *Palacios* case further indicated that since the transposition of a Directive does not require specific means by which the result is achieved and there is a discretion afforded to the Member State as to how the principles of the Directive are to be transposed, national legislation derogating from the principle of non-discrimination on the grounds of age does not have to be precise or comprehensive as to the circumstances or the purposes when an employer can seek to justify treatment that would otherwise be discriminatory.

19. Further consideration was given to the prohibition of age discrimination as a general principle of Community Law in the case of C-144/04 *Mangold v Helm* [2005] ECR I-9981, where the ECJ found that a provision of German labour law excluding protection for short term contracts for those who were over 52 when they were entered into was an unjustified breach of the principle. The Court of Justice found:

> "64. As the national court has pointed out application of national legislation such as that at issue in the main proceedings leads to a situation in *which all workers who have reached the age of 52, without distinction*, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until the age at which they may claim their entitlement to a retirement pension, be offered fixed-term contracts of employment which may be renewed an indefinite number of times. The significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life of being excluded from the benefit of stable employment, which, however, as the Framework Agreement makes clear, constitutes a major element in protection of workers.
>
> 65. In so far as legislation takes *the age of the worker concerned as the only criteria for the application of a fixed term contract of employment, when it has not been shown that fixing an age threshold, as such, regardless of any other consideration linked to the structure of the labour market in question or the personal situation of the person concerned, is objectively necessary to the attainment to the objective which is the vocational integration of unemployed older workers,* it must be considered to go beyond what is appropriate and necessary

> in order to obtain the objective pursued. Observance of the principle of proportionality requires every derogation from an individual right to reconcile, so far as possible the requirements of the principle of equal treatment with those of the aim pursued… such national legislation cannot therefore, be justified under Article 6(1) of Directive 2000/78".

(emphasis supplied)

20. The *Mangold* judgment gave rise to some controversy as by reason of its date the Court was applying the principle of equal treatment found in the EU Treaty rather than the Directive itself. In case C227/04T *Lindorfer v The Council* the Court was dealing with a staff case where it upheld a complaint on sex discrimination and did not need to consider discrimination on the grounds of age. Advocate General Jacobs, did, however, make some general observations in his opinion about age discrimination and contrasting it with the more familiar and long-standing prohibition on sex discrimination. When the case was referred to the Grand Chamber Advocate General Sharpston adopted Advocate Jacob's comments. She said as follows:

> "67. Essentially, he expresses the view that it is not appropriate –or indeed possible– to apply the prohibition of age discrimination to the present case as rigorously as the prohibition of sex discrimination."

Advocate General Sharpston made similar observations in case C-427/06 *Bartsch v Bosch und Siemens Hausgerate GmbH.* That case was again not concerned with the Directive but with the principle of equal treatment on the grounds of age as a general principle of Community Law.

21. In its judgment in *Age Concern* the Court noted that Article 6(1) identified a number of purposes as illustrative of possible social aims rather than a comprehensive list of those aims (see Paragraphs 41-44 of the ECJ's judgment). It expressly rejected the claimant's case that the policy justification relied on by the state had to be set out in the legislation concerned.

22. Nevertheless the Court went on to set the criteria for application by the national court in making an evaluation as to whether there has been proper transposition. It said this:

> "45. In the absence of such precision it is important, however, that other elements taken from the general context of the measure concerned, *enable the underlying aim of that measure to be identified for the purpose of review by the courts* of its legitimacy and whether the means put in place to achieve that aim are appropriate and necessary (*Palacios* paragraph 57).
>
> 46. It is apparent from Article 6(1) a Directive 2000/78 that the aims which may be considered 'legitimate' within the meaning of that provision, and, consequently appropriate for the purposes of justifying derogation from the principles prohibiting discrimination on the grounds of age, are social policy objectives, such as those related to employment policy,

> the labour market or vocational training. *By their public interest nature those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers.*
>
> 47. It is ultimately for the national court which has sole jurisdiction to determine the facts of the dispute before it to interpret the applicable national legislation, to determine whether and to what extent a provision which allows employers to dismiss workers who have reached retirement age is justified by 'legitimate aims' within the meaning of Article 6(1) of the Directive 2000/78."
>
> (emphasis supplied)

23. The ECJ indicated that when the national court considers whether the aims contemplated in Regulation 3 of the Regulations are legitimate social policy ones, mere generalisations concerning the capacity of specific measures to contribute to employment policy are not enough. Such generalisations do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim and referred by analogy to its judgment in the sex discrimination case of C-167/97 *Seymour-Smith and Perez* [1999] ECR I-623. Stressing that it is only social policy objectives that are justified by Article 6(1) the Court indicated that it was for the national court to ascertain whether the legislation at issue is consistent with such a legitimate aim and

> "whether the national legislative or regulatory authority could legitimately consider, taking account of the Member State's discretion in matters of social policy, that the means chosen were appropriate and necessary to achieve that aim".

24. Finally, the Court answered the fifth question referred to it. Whilst it recognised a difference in language between the terms of Article 2(2) and Article 6(1) of the Directive, it concluded that the omission of the word "reasonable" from Article 2 did not indicate that Article 6(1) was applying a more intrusive test of scrutiny than hitherto since legitimate derogations must inherently be reasonable. It stressed that the social policy aims must be established to a high standard.

25. Since its decision in the *Age Concern* case there has been a further decision from the ECJ on age discrimination in the case C-88/08 *Hutter v Technische Universat Graz* delivered on 18th June 2009 and an opinion of the Advocate General in C-555/07 *Kucukdevici v Swedex GmbH* given on 9th July 2009 of which I have been supplied with an unofficial translation. I shall refer to these cases later in this judgment.

Issue 1: The Principles for Adjudication the Transposition of any Directive into National Law

26. Before considering the evidence and submissions as to the detailed challenges to Regulation 3 and 30 it is appropriate to consider first the issue that arose between the defendant and the intervenor as to both the intensity and relevant date of the review that the national court is required to undertake. Lord Lester QC for the intervenor in his skeleton argument and oral submissions commended the approach adopted by Lord Keith in the House of Lords in the case of *R v Employment Secretary (ex parte) EOC* [1995] 1 AC 1, where a strict assessment of the necessity of achieving the legitimate aim in the manner that the government intended was undertaken applying the approach identified in the Court of Justice in Case C-170/84 *Bilka Kaufhaus* [1986] ECR 1607.

27. He further submitted that the question is not whether the Secretary of State reasonably thought that the aim was legitimate and the means to advance it proportionate but whether the national court concluded that this was the case. As this was a challenge as to the legality of the transposition of a Directive, the court should apply the applicable legal test as at the date of the hearing and should also take account of all available evidence relevant to the determination of the question available as of the date of the hearing, even if this post-dated the transposition in question.

28. Ms Rose QC for the defendant, contested each of these propositions. She did so primarily by reference to the case of *Seymour-Smith* both in the ECJ and subsequently in the House of Lords. First, she noted that the ECJ in *Age Concern* at [51] expressly referred to *Seymour-Smith* in its application of the test of whether "it could reasonably be considered that the means chosen are suitable for achieving that aim".

29. Second, she submitted that it was clear from the ECJ's answer to the fifth question in the *Seymour- Smith* case itself that it afforded the Member State a wider margin of appreciation in advancing social policy aims than it afforded to the private employer in justifying indirect discrimination on the grounds of sex. It said this:

> "71. It cannot be disputed that the encouragement of recruitment constitutes a legitimate aim of social policy.
>
> 72. It must also be ascertained in the light of all the relevant factors and taking into account the possibility of achieving the social policy aim in question by other means, whether such an aim seems to be unrelated to the discrimination based on sex and whether the disputed rule, as a means to its achievement is capable of advancing that aim.
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> 73. In that connection, the United Kingdom government maintains that a Member State should merely have to show that it was reasonably entitled to consider that the measures would advance a social policy aim. It relies to that end on *Nolte* case C-317/93 [1995] ECR I-4625.
>
> 74. It is true that in the *Nolte* case at page 4660 paragraph [33] the Court observed that *in choosing the measures capable of*

> *achieving the aims of their social and employment policy, Member States have a broad margin of discretion*.
>
> 75. However, although social policy is essentially a matter for the Member States under Community Law as it stands, the fact remains that the broad margin of discretion available to the Member States in that connection cannot have the effect of frustrating the implementation of a fundamental principle of Community Law such as that of equal pay for men and women.
>
> 76. Mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex or to provide evidence on a basis at which it could reasonable be considered the means chosen were suitable for achieving that aim.
>
> 77. Accordingly, the answer to the fifth question must be that if a considerably smaller percentage of women then men is capable of fulfilling the requirement of two years employment imposed by the disputed rule, it is for the Member State, as the author of the allegedly discriminatory rule, to show that the said rule reflects the legitimate aim of its social policy, that that aim is unrelated to any discrimination based on sex and it could reasonably consider that the means chosen were suitable for retaining that aim."

(emphasis supplied)

30. Thirdly, Ms Rose points out that when the case returned to the House of Lords *R v Secretary of State for Employment ex parte Seymour-Smith and Another No.2* [2000] ICR 244 Lord Nicholls pointed out (at p. 260) that the test adopted by the Court of Appeal in that case applying *Bilka Kaufhaus* had been shown to be too stringent. He said this:

> "The burden placed on the government in this type of case is not as heavy as previously thought. Governments must be able to govern. They adopt general policies, and implement measures to carry out their policies. Governments must be able to take into account a wide range of social, economic and political factors. The Court of Justice has recognised these practical considerations. If their aim is legitimate, governments have a discretion when choosing the method to achieve their aim. National courts acting with hindsight are not to impose an impractical burden on governments which are proceeding in good faith. Generalised assumptions, lacking any factual foundation are not good enough. But governments are to be afforded a broad measure of discretion. The onus is on the Member State to show (1) that the allegedly discriminatory rule reflects the legitimate aim of its social policy, (2) this aim is unrelated to any discrimination based on sex and (3) that the

> Member State could reasonably consider that the means chosen were suitable for attaining that aim."

31. In the following paragraph of his judgment Lord Nicholls concluded:

> "The relevant question is whether the Secretary of State was reasonably entitled to consider the extension of the qualifying period should help reduce the reluctance of employers to take on more people".

32. Fourth, she submits that the ECJ in *Seymour-Smith* had expressly considered the question of the time at which the assessment is made. It said this:

> "47. Thus where the authority which adopted the Act is alleged to have acted *ultra vires*, the legality of that Act must, in principle, be assessed at the point in time at which it was adopted.
>
> 48. On the other hand in circumstances involving the application to an individual situation of a national measure which was lawfully adopted, it must be appropriate whether at the time of its application the measure is still in conformity with Community Law".

33. Lord Nicholls in the House of Lords in *Seymour-Smith No. 2* reflected this reasoning (at p.261H-262B) and noted that the government must review the situation periodically and that the greater the disparity of impact the greater the diligence which could reasonably be expected and depending upon the circumstances the government may become obliged to repeal or replace the unsuccessful measure. In the particular case six years had passed before the dismissal complained of:

> "Here again the matter is debatable. As time passed the consistently adverse impact on women became apparent. But, as with the broad measure of discretion afforded to governments when monitoring measures of this type, so with the duty of governments to monitor the implementation of such measures: the practicalities of government must be born in mind. The benefits of the Order could not be expected to materialise over-night or even in a matter of months. The government was entitled to allow a reasonable period to elapse before deciding whether an order had achieved its objective and, if not, whether the Order should be replaced with some other measure or simply repealed. Time would then be needed to implement any decision. I do not think the government could reasonably be expected to complete all these steps in six years, failing which it was in breach of Community law. The contrary view would impose an unrealistic burden on the government in the present case."

34. In the light of all these passages, I conclude that Lord Lester's reliance upon the strict test applied in the *EOC* case is misplaced. A wider margin is to be afforded to

Member States in formulating social policy. Further, in a challenge brought promptly to the legality and sufficiency of a transposition on the basis that the national measures were *ultra vires* the enabling power under the European Communities Act 1972, the question is principally determined by reference to the social policy aims identified by the government at the time of transposition. I accept that subsequent developments may show that the government is required to review those aims and their impact upon the class who suffer unequal treatment, but just as there is a broad measure of discretion as to the adoption of social policy aims, and the best means of giving effect to them, so there is a broad measure of discretion afforded to governments as to when those aims and the methods of giving effect to them need to be reviewed.

35. On the other hand, I am not satisfied that the national court reviewing whether the aims are "reasonably justified" and the means of achieving them are "appropriate and necessary" is bound to address the question by a bare rationality challenge "was a reasonable Secretary of State entitled to consider the measures were necessary?" I reach this conclusion for the following four reasons.

36. First, the ECJ in *Age Concern* was applying its own judgment in *Seymour-Smith* by analogy and of course could not be commenting on the national court's subsequent application of that judgment. The Directive and the case law indicates what the national court is required to do and the ECJ leaves it to the national court how it achieves what is required. Part of the reason why the ECJ in a case concerned with social and economic policy affords a wide margin of appreciation to national authorities is that the national authority is closer to the vital forces and particular social issues in the relevant state than the international court is. The same principle is found in the jurisprudence of the European Court of Human Rights applying human rights criteria in such circumstances. In each case, the national authorities for this purpose include the national court that is ultimately charged with the task of analysing the justification for the discrimination. Lord Hoffman has recently noted this in the human rights context, in the case of *In Re G* [2008] UKHL 38 [2008] 3 WLR 76 at [31] to [32]. It will thus be national law that will determine the ultimate form of the judicial supervision.

37. Second, the issue and the test applied in *Seymour-Smith* concerned justification of indirect discrimination which was at best marginal. The ECJ in its own consideration of the case doubted whether any discrimination had been made out by the statistical evidence as to the proportions of men and women that were affected by the rule in question. Two of the five members of the Judicial Committee in *Seymour-Smith No. 2* concluded that it had not. In any event, a rule such as a qualifying period for unfair dismissal is classically a neutral rule unrelated to discrimination on any ground, and adopted for a legitimate purpose of encouraging the recruitment of workers. The intensity of the review of the justification relied on may turn on the transparency of the discriminatory treatment. By contrast, the essence of the present case is direct discrimination, where chronological age is identified by the legislator in Regulation 30 as being the determinative consideration permitting the employer to dismiss on the grounds of retirement because that person has reached a specific age without more.

38. Third, the European Court in *Age Concern* prefaced its remarks at [51] with the observations, that the ambit of discretion must not undermine the fundamental principles of the part of the Directive in question, and the government must prove

justification to a high standard. A mere rationality review by the national court could undermine the principle of equal treatment on the ground of age and fail to the address the high standard of proof.

39. Fourth, since 1999 the national court has become well-experienced in applying the concept of proportionality to disputed measures of economic and social policy. In the socially controversial area of immigration law, the case of *Huang v Secretary of State for the Home Department* [2007] UKHL 11 [2007] 2 AC 167 decided (after a period of judicial uncertainty) that the court must conclude for itself whether a measure is proportionate [13], [16], and [19]. The question of proportionality involves a consideration of the impact upon the affected applicant or class and whether a fair balance has been achieved between the competing considerations. Lord Nicholls himself recognised the court's role in adjudicating on proportionality challenges at [62] in his speech in *Wilson v First County Trust Ltd No. 2* [2003] UKHL 40; [2004] 1 AC 816 (see the extracts quoted hereafter in this judgment at [56]).

40. In my judgment the law is accurately spelt out in both leading text books on the topic. Lester Pannick and Herberg *Human Rights Law and Practice* (3rd Edition 2009) say at 3.10:

> "There must be 'a reasonable relationship of proportionality between the means employed and the legitimate objectives pursued by the contested limitation' a measure that will satisfy the proportionality test only if three criteria are satisfied:
>
> i) the legislative objective must be sufficiently important to justify limiting of fundamental rights.
>
> ii) the measure designed to meet the legislative objective must be rationally connected to that objective. They must not be arbitrary, unfair or based on irrational considerations.
>
> iii) the means used to impair the right or freedom must be no more than is necessary to accomplish the legitimate objective-the more severe the detrimental effects of a measure, the more important the objective must be if the measure is to be justified in a democratic society."

Clayton and Tomlinson, *The Law of Human Rights*, (2nd Edition 2009) say much the same at 6.92 and add "whether interference strikes a fair balance between the rights of the individual and the interests of the community, which requires carefully assessing the severity and consequences of the interference". The authors address proportionality in the context of Community law at 6.109 where they say:

> "The application of the principle of proportionality appears to involve consideration of three elements:
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> First, whether the measure in question was a useful, suitable or effective means of achieving a legitimate aim or objective; secondly, whether there were means of achieving the aim which were less restrictive of the applicants interest; and

> thirdly, even if there were a no less restrictive means of achieving the aim available, whether the measure has an excessive or disproportionate effect on the applicant's interest. In practice, however, the question of proportionality tends to be tested in two ways:
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> • by the balancing test (in other words balancing the object which the decision attempts to achieve against the means applied to achieve it) and
>
> • by the *necessity* test (in other words where a particular objective can be obtained by more than one available means, the least harmful of these means must be adopted)."

Of course, I am very conscious of the fact that in the performance of this function the court will give very considerable weight to the expertise of government in a field of economic and social policy-making where the court has no relevant experience or institutional competence, but as Lord Bingham pointed out in *Huang* at [16] judicial self-restraint is best described in terms of allocation of weight rather than deference, or any suggestion of withdrawal from engagement or adjudication.

41. I conclude that I must give full effect to Lord Nicholls' observation in *Seymour-Smith No. 2* (supra at [29]): governments must be free to govern, and businesses must be free to conduct business, but would add that judges must also judge, which they can do in this field by applying well-established principles of proportionality and in so doing apply an appropriate intensity of inquiry whilst ensuring that they do not stray beyond their proper constitutional competence and usurp the prerogatives of the executive on sensitive social issues for which it is ultimately accountable to the electorate.

Issue 4: Parliamentary Privilege

42. I now turn to the second broad issue of principle that requires resolution before reviewing the evidence and determining the particular challenges. The claimant, the defendant and the intervenor in this case have all made substantial use of material outlining the Parliamentary history of the Regulations in question. There has been examination by Parliamentary Committees of both the House of Lords and the House of Commons of the issues identified in the departmental consultations and expressions of opinion on the relevant considerations. The Committees have heard evidence from Ministers of the Crown and others on contentious issues and reached conclusions of their own as to where the balance between competing considerations should lie.

43. Although much of this material was deployed by the parties in 2006 and before the Administrative Court made its reference to the ECJ, it was only late in the day that Her Majesty's Attorney General applied to intervene in these proceedings in order to make submissions on the issue of Parliamentary privilege. The court granted the application and has had the benefit of written submissions by Mr Jason Coppel on behalf of the Attorney, to which Lord Lester replied in writing, and Mr Coppel lodged a written response.

44. The substance of the Attorney General's written submissions was that it is constitutionally improper for the court to receive in these proceedings the record of evidence given by a witness to a Parliamentary Committee, and the views of the Committee itself. The submission was supported by reference to two recent decisions of judges of this court.

45. In the case of *the Queen on the application of Bradley and Others v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin) 21st February 2007, the court was concerned with an application for judicial review of a decision of the Secretary of State to reject two of the findings and one of the recommendations of the Ombudsman's report into maladministration by the Department of Work and Pensions and its predecessor the Department of Social Security. The claimant relied on the evidence given by the Ombudsman to a Parliamentary Committee following the report in question. He also sought to adduce in evidence the conclusions of that Committee on the issue that the judge had to decide. The Attorney General intervened in those proceedings as interested party and drew the court's attention to the decision of the Judicial Committee of the Privy Council in the case of *Prebble v Television New Zealand Ltd* [1995] 1AC 321 at p. 332 that pre-figured the issues that were to arise in the United Kingdom in *Hamilton v Al Fayed* [1999] 1 WLR 1585. In *Prebble* it appeared that the law in Australia and New Zealand replicated the principle of Parliamentary inviolability contained in Article 9 of the UK Bill of Rights 1689. Lord Browne-Wilkinson noted:

> "in addition to Article 9 itself there is a long line of authority which supports wider principle, which Article 9 is merely one manifestation, is that the courts and Parliament are both astute to recognise their constitutional roles".

In *Bradley* it appears that submissions were advanced to the effect that the state of the law in the United Kingdom was reflected by the terms of an Australian statute, the Parliamentary Privileges Act 1987. That Act reads as follows:

> "In proceedings in any court or tribunal it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for purpose of :
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in parliament;
>
> (b) otherwise questioning or establishing credibility, motive, intention or good faith of any person; or
>
> (c) drawing or inviting the drawing of, inferences or conclusions, wholly or partly from anything forming part of those proceedings in Parliament".

46. It was undisputed that sub-sections (a) and (b) accurately reflected the principles and effect of Article 9 of the Bill of Rights 1689, but Mr Justice Bean (at [32] of his judgment) rejected the proposition that sub-paragraph (c) reflected a rule of English law. He nevertheless decided (at [34]) that he should not place reliance on the

Ombudsmen's evidence to the Public Administration Select Committee (PASC) as it would inhibit freedom of speech in Parliament and contravene Article 9 of the Bill of Rights. He concluded that it would have been open to the Ombudsman as an interested party to the particular proceedings to have lodged a witness statement putting in the substance of the observations she made to the Select Committee.

47. He did not consider there was any constitutional prohibition against receiving or giving weight to the report of the PASC but concluded he should not place reliance upon it for an entirely different principle, namely that it was for the courts and not for PASC to determine the legality of the action in question and the views of the Select Committee, which he noted and respected, were not of assistance on the question of law that he had to determine.

48. In *Office of Government Commerce v Information Commissioner* [2008] EWHC 774 (Admin) 11th April 2008, Mr Justice Stanley Burnton (as he then was) allowed an appeal from a decision of the Information Tribunal where it had placed reliance upon parliamentary evidence adduced before it when a Minister was giving a view as to whether certain information was exempt or not under the provisions of the Freedom of Information Act. His Lordship reviewed the decisions in *Prebble, Hamilton, Bradley* and his own decision in *R (Federation of Tour Operators) v HM Treasury* [2007] EWHC 2061 (Admin). He concluded (at [59] of his judgment) that it would be wrong for a party to rely upon an opinion of a Parliamentary Committee and equally it must be wrong for the Tribunal itself to seek to rely upon it :

> "If the Tribunal either rejects or approves the opinion of the Select Committee it thereby passes judgment on it. To put the point differently in raising the possibility of its reliance on the opinion of the Select Committee, the Tribunal potentially made it subject to submission as to its correctness and of inference which would be a breach of Parliamentary privilege".

49. He was aware ([61] & [62] of his judgment) that the courts had referred to such opinions from time to time including in *Hamilton v Al Fayed* itself but accepted the submission advanced by the Attorney General that that was an exceptional case and generally inferences cannot be drawn from the fact of references made by the court on the reports of Parliamentary Committees in cases where no objection was taken to so doing. He observed that much will depend upon the purpose for which the reference is made. There could be no objection to a court making reference to the conclusions of a report that leads to legislation since in such a case the purpose of the reference is either historical or made with a view to ascertaining the mischief at which the legislation was aimed; the reference is not made with a view to questioning the views expressed as to the law as at the date of the report.

50. In my judgment, there is no constitutional impediment to the court receiving the material that the parties and the intervenor seeks to place before it for the purpose of informing itself as to the statutory history, the relevant considerations that led to the formation of policy, the aim of the policy in promoting the Regulations, and the existence of factors that might be relevant to the assessment of whether the Regulations were proportionate in their derogation from the principle of equal treatment of the grounds of age. The purpose of receiving this material is for the court to inform itself of any consideration that may be relevant or carry weight when it

reaches its own conclusions that it has a constitutional duty to reach. In receiving and informing itself from Parliamentary materials, the court is not adjudicating upon whether anyone else who has expressed a view, (whether a Parliamentary Committee, a Minister or a witness to a Committee) is right or wrong as a matter of law or fact. Nor, in my judgment, will receipt of such material have a chilling effect on the willingness of witnesses to give evidence to such Committees. What is said to Parliament is said in public, recorded and reported on in public for all interested to read.

51. In my judgment, what the constitutional principles identified in *Prebble, Al Fayed, Bentley* and the *OGC* case indicate are as follows:

    i) The court must be astute to ensure that it does not directly or indirectly impugn or question any proceedings in Parliament in the course of judicial proceedings.

    ii) 'Impugn or question' extends beyond civil or criminal sanction for any statement in Parliament but includes a judicial determination as to whether a statement in Parliament is right or wrong. The judge cannot receive evidence of what is said in Parliament for the purpose of agreeing or disagreeing with it.

    iii) The court must reach its own conclusions on questions of law and the legality of administrative action, subordinate legislation, and whether primary legislation is compatible with the European Convention on Human Rights or provisions on European Community Law. It cannot reach those conclusions by agreeing or disagreeing with the expressions of opinion that may have occurred inside Parliament, however eminent or well qualified may be the people expressing those opinions.

52. I do not understand that Mr Justice Bean or Mr Justice Stanley Burnton were adumbrating wider principles than these in the context of the particular issues they both had to decide. If they were, I do not consider that I am bound by any such conclusions. In so far as Stanley Burnton J at [61] and [62] of his judgment in *OGC* might be taken to have concluded that previous references by the courts to the conclusions of Parliamentary Committees were *per incuriam* where the Parliamentary privilege point had not specifically been taken by a party or intervenor, I would not agree for the following reasons.

53. First, Parliamentary privilege is a rule that the court should take of its own motion where it arises and is not dependent on argument from the parties. Second, the question of whether a court can indeed receive material of this kind in judicial review proceedings was fully considered by the House of Lords in *Pepper v Hart* [1993] AC 593.

54. I observe that in that case:

    i) The Attorney General in seeking to support the exclusionary rule as a principle of statutory construction by reference to Parliamentary privilege expressly exempted reference to *Hansard* to explain an exercise of ministerial discretion or to justify domestic legislation where it appears to be contrary to Community law or Treaty obligations (see 610 E-G).

ii) Lord Browne-Wilkinson (at 638H-639C) concluded that the Attorney's contentions on the scope of Parliamentary privilege were inconsistent with the practice which has now continued over a number of years in cases of judicial review where *Hansard* has frequently been referred to. There was no relevant distinction between that purpose and the construction purpose under consideration in that case. In neither case did his Lordship consider the use of such words by the courts might affect what was said in Parliament.

iii) An example was given by Lord Browne-Wilkinson by way of rejecting the breadth of meaning that the Attorney General sought to attach to the word "question". He noted (at 638 E) :

> "if the Attorney General's submission is correct any comment in the media or elsewhere on what he said in Parliament would constitute 'questioning' since all Members of Parliament must speak and act taking into account what political commentators and others will say. Plainly Article 9 cannot have effect so as to stifle the freedom of all to comment on what is said in Parliament, even though such comment might influence members in what they say".

He concluded (at 638 G) that:

> "The plain meaning of Article 9 viewed against the historical background in which it was enacted was to ensure that members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart Monarchy, to discuss what they, as opposed to the Monarch, chose to have discussed. Relaxation of the rule will not involve the courts criticising what is said in Parliament. The purpose of looking at *Hansard* will not be to construe the words used by the minister but to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts will be giving effect to what is said and done there."

iv) Lord Browne Wilkinson's judgment [at 623 F] also reveals the fact that on the 31st October 1980 the House of Commons resolved as follows:

> "That this House, while reaffirming the status of proceedings in Parliament confirmed by Article 9 of the Bill of Rights, gives leave for reference to be made in future court proceedings to the Official Report of debates and to the published reports and evidence of Committees in any case in which, under the practice of the House it is required that a petition for leave should be presented and that the practice presenting petitions for leave to refer to Parliamentary papers to be discontinued".

It appears that the practice was discontinued as permission under the former procedure was usually given. I observe that it was contemplated that reference would be made to *the evidence of the Committees*. Whilst that statement does not decide the question of what the proper constitutional limits for receiving such evidence are, it is inconsistent with the sweeping proposition that the

court ought never to receive such evidence because of some supposed chilling effect upon witness's willingness to give it or the ability of the relevant Committee to obtain it.

v) It is pertinent that it was Lord Browne-Wilkinson who was to give the leading judgment in *Prebble*, and in my judgment he cannot be taken to have acted in ignorance of or contrary to, what he had said in *Pepper v Hart.* Moreover, the only dissenting member of the Appellate Committee in *Pepper v Hart* on the question of relaxation of the exclusionary principle in relation to the statutory construction (Lord Mackay) did not base his conclusions on constitutional principle but practical considerations (See 615G to 616C).

55. I infer from all this that it was the relaxation of Parliamentary practice in 1980, that may have led to the frequent use by claimants and defendants in judicial review proceedings of all manner of Parliamentary materials (speeches, evidence and reports) that led to the practice approved by Lord Browne-Wilkinson in *Pepper v Hart* and that has developed apace since. No objection was taken to that practice by the authorities of the House because no objection could be taken for the reasons given in *Pepper v Hart.*

56. The matter was further considered in depth by Lord Nicholls in the case of *Wilson v First County Trust Ltd No. 2* [2003] UKHL 40; [2004] 1 AC 816. In a section of his judgment (from [51] to [67]) under the heading "Use of *Hansard* in compatibility cases" Lord Nicholls observed:

> "61. The courts were now under the Human Rights Act required to exercise a new role in respect of primary legislation that was fundamentally different from interpreting and applying it. The courts had to compare the effect of legislation with the Convention right and if the legislation impinges upon a Convention right the court must then compare the policy objective of the legislation with the policy objective under which the Convention may justify a prima facie infringement of the Convention right. In making these two comparisons the court will look primarily at the legislation, but not exclusively so. Convention rights are concerned with practicality. When identifying the practical effect and impugned statutory provision the court may need to look outside the statute in order to see the complete picture, as already instant in the present case regarding the possible availability of a restitutionary remedy… what is relevant is the underlying social development thought to be achieved by the statutory provision. Frequently that purpose will be self-evident. This will not always be so.
>
> 62. The legislation must not only have legitimate policy objectives. It must also satisfy a 'proportionality' test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate or disproportionate in its adverse effect. This involves a 'value judgment' by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current

> effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force…
>
> 63. When a court makes this value judgment the facts will often speak for themselves. But sometimes the court may need additional background information tending to show, for instance, the likely practical impact of a statutory measure as to why the course adopted by the legislator is or is not appropriate. Moreover, as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the 'proportionality' of a statutory provision the court may need enlightenment on the nature and extent of the social problem ('the mischief') at which the legislation is aimed. This may throw light on the rationale underlined in the legislation.
>
> 64. This additional background material may be found in published documents, such as the government white papers. Relevant information is provided by a Minister, or indeed, any other Member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with the Bill. The courts will be failing in the discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a Ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament. By having regard to such material the Court would not be 'questioning' proceedings in Parliament or intruding improperly in the legislative process or ascribing to Parliament the views expressed by a Minister. The court would merely be placing itself in a better position to understand the legislation.
>
> 65. To that limited extent there may be occasion for the courts when conducting the statutory 'compatibility' exercise to have regard to matters stated in Parliament. It is a consequence flowing from the Human Rights Act. The constitutionally unexceptional nature of this consequence received some confirmation from the view expressed in the unanimous report of the Parliamentary Joint Committee on Parliamentary privilege (1999) (HL paper 43-1HC 214-1) page 28, paragraph 86 that it is difficult to see how there could be any objection to the court taking account of something said in Parliament when there is no suggestion the statement was inspired by improper motives or was untrue or misleading and there is no question of legal liability ".

57. In my judgment, Lord Nicholls by quoting from the Joint Committee for some confirmation of his view was not at [65] undermining the principle that he had just

identified at [64] that courts should not question proceedings in Parliament. I accept that at other passages in his speech particularly at [66] to [67] he cautioned against excessive reliance on ministerial statements in Parliament as the basis for the justification of legislation. The court is reviewing the proportionality of the terms of the laws passed by Parliament and not the sufficiency of the contemporaneous justification give for it by the promoting Minister.

58. I note that Lord Nicholls' judgment was applied by Mr Justice Richards (as he then was), in the case of *R (Amicus) & Others v The Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) reported at [2007] ICR 1176. In that case, the court was concerned with the identical issue as confronts me in the present challenge, namely whether the United Kingdom has properly transposed the Equal Treatment Directive with respect to sexual orientation. His Lordship rejected a submission that Ministerial statements could not be taken into account and (at [65]) said this:

> "What was said in *Wilson*, a case about primary legislation, should apply at least as strongly to secondary legislation. Similar consideration should also apply when determining whether legislation enacted for the purpose of implementing a community obligation is compatible with that obligation. In my judgment, therefore, it is clear not only that the principles stated in *Pickstone* [1988] ICR 697 remain good law but that a wide range of relevant background material can properly be looked at in accordance with the approach approved in *Wilson* [2004] 1 AC 816, albeit subject to care in the use of such material as also emphasised in *Wilson*".

59. For these reasons, whilst I am grateful to the Attorney General for having drawn my attention to the decisions of this court in the cases noted above, I have received all the material relied on for the purpose of giving assistance as to the background to the legislation and to examine whether there is any information of relevance and utility to the function that the court faces arising from it.

Social policy aims derived from the legislative background to the 2006 Regulations

60. The history of how the Regulations came to be adopted is set out in the first witness statement of Ms. McCarthy-Ward, a senior civil servant at the Department of Trade of Industry from April 2002 to September 2006. It is undisputed that they were the product of very extensive consultation through to April 2006. In March 2001 the Age Advisory Group (AAG) were set up to advise Ministers on the implementation of the age strand of the Directive. Age Concern (England) and its equivalent organisation for Wales (constituent parts of the present claimant) were represented on this body. In 2004 the membership of the AAG was supplemented by others and became known as the Age Taskforce (AT).

61. There was a marked conflict of views between the organisations represented on the AT as to the way forward with respect to age discrimination and the particular topic of retirement ages. Broadly the position taken by Age Concern and another organisation the Age and Employment Network (TAEN) was that there should be no

mandatory retirement age, no designated age for retirement, and any decision taken by an employer to dismiss on grounds of retirement would have to be justified in the light of the particular circumstances of the business and the employee and by reference to a non-discriminatory legitimate social policy aim.

62. Employer organisations were concerned by the potential cost, uncertainty and difficulty of applying such an approach. They supported the idea of a DRA to be selected by government that would not render employers vulnerable to many difficult and uncertain claims in the Employment Tribunal. The DTI carried out four national consultation exercises relevant to the development of the legislation. The first of these was a paper called "Towards Equality and Diversity" that covered all discrimination strands of the Directive and sought views on the question of retirement. The second was generic and immaterial to present concerns. The third consultation was age specific. "Equality and Diversity: Age Matters" was a report dealing with the responses to the age questions in the first consultation. It stated:

> "Retirement ages that employers set for employees will be unlawful under the Directive unless they can be objectively justified. We are seeking views on whether the legislation should provide for employers, exceptionally, to be able to justify mandatory retirement ages according to their own circumstances and by reference to specific aims.
>
> We are also asking for comments on a default age of 70 at or after which employers could require employees to retire."

63. Nearly 62% of the 269 responses welcomed the abolition of mandatory retirement age. However, 68% thought it would be difficult for employers and employees to agree on the retirement age in the absence of legislation and 69% thought it would be difficult to only allow employers exceptionally to justify retiring employees on age grounds. Of the 280 people who responded to the question 'should the government specify a default retirement age?' 51.8% said 'yes' while 42.9% said 'no' and 64.9% (of 271 responses) were opposed to this age being 70. If opinion was divided amongst consultees it remained equally divided amongst the members of the Age Task Force. The Pensions Commission was represented on the task force and it concluded that there should be no default retirement age but recognised that this could cause difficulties for employers. If a default age were to be decided upon, however, the Commission advocated it should be set higher than the state pension age.

64. In parallel with these processes of consultation the DTI commissioned two separate studies. The first was a report by Pamela Meadows, an independent labour market and social policy economist who was commissioned to write "*Retirement ages in the UK: a review of the literature*" DTI Employment Relations Research Series 13. Her findings were published in June 2003. It is not possible to do justice to this report of some 76 pages in a few lines in this judgment. However, the Executive Summary addressing issues that were to become controversial in this judicial review indicates as follows:

> - "Generally the evidence that is currently available does not support the argument that it is essential to continue to allow mandatory retirement. However, that does not

necessarily mean the case does not exist at all, rather that any evidence that might support the case is not currently in the public domain and is not therefore available to contribute to the wider debate.

- Receipt of a pension is not synonymous with retirement from paid work. In practice neither the state pension age nor the normal retirement age in occupational pension schemes determines the age at which people actually retire. Some people draw a state or occupational pension and continue working. Others effectively retire before they receive either an occupational or state pension……

- There is no evidence to support the view that older workers are inherently less productive than younger workers except in a limited range of jobs requiring rapid reaction or physical strength and people tend to move out of these as they become harder for them……

- Employers who have introduced flexible retirement schemes have generally done so in the context of performance monitoring systems which either apply to all workers… or only to those beyond normal retirement age. It is likely if mandatory retirement were to be abolished employers generally might have to introduce or strengthen performance monitoring systems. In some cases this would be likely to add to business costs although there is no evidence about the scale of these costs…….

- The macro economic evidence suggests that the impact of restricting mandatory retirement is likely to be very small but positive. Increasing the employment rate of older workers is likely to increase output and living standards and improve the government's fiscal position. However reducing the extent of early retirement is likely to be more important in increasing the employment rate than restricting mandatory retirement".

65. Summarising Chapter 3 "The effect of age on productivity and capacity" the Report concluded (p.27):

- "The evidence suggests that, except in a very limited range of jobs, work performance does not deteriorate with age at least up to the age of 70 since few people are employed beyond that age, there is virtually no evidence about work performance after the age of 70.

- The positive effects on performance of experience, interpersonal skills and motivation generally offset the adverse effects of loss of speed, strength and memory.

- Where performance does decline with age the falling average score for older people seemed to be driven by the marked deterioration of a small number of individuals rather than by decline across the whole cohort.

- Older workers have the same ability as younger workers to master the skills but they learn more slowly and can be helped by different training methods.

- Employers may need to introduce new performance monitoring and management systems which will add to business costs."

66. The second research document commissioned by the DTI was a report published in March 2006 by Mr Bruce Warman, a human resources specialist who interviewed a number of companies at senior management level to ascertain their response to the issues of retirement age. He recorded from his interviews that the most significant and consistent finding was the over-whelming desire from the companies for there to be a national retirement age. 21 of his 30 respondents wanted that age to be at 65 and only two respondents preferred age 70. Mr Warman reported that virtually every company recognised that in the long term (and he assessed this could be 15-30 years) there would in effect be no retirement age but that there was a general concern that organisations needed to be given time to prepare and adapt. There were dangers in moving too quickly and too inflexibly. His interviewees identified eight reasons to have a designated retirement age. He listed these as follows:

i) A strong feeling that retirement acts as a natural break and allows people to leave with dignity. Most people do a reasonable job but there is generally deterioration in performances as people get older and retirement is a satisfactory way of ending the employment relationship with dignity. Although performance management schemes are in widespread use performance management was not seen as the right way to get people to leave when it is time for them to go on performance or competence grounds particularly after a long and successful career. It absorbed significant amounts of management time, results in large legal and tribunal costs and the whole approach alters the way in which the performance and management system should be used from a constructive development tool to a punitive one. All the companies interviewed were concerned at the impact on morale and would not wish to take this approach.

ii) With no retirement age the whole process of career management becomes much more difficult. Having a defined age allows for advanced planning, training, employee development and recruitment against a known attrition profile. It allows individuals to see and plan a way upward.

iii) There were health and safety concerns about particular employments.

iv) A retirement age provides focus for individuals to plan for their life when they finish work.

v) The extra cost and uncertainty associated with less predictable retirement attrition may perversely lead companies to move away from the open-ended cost of defined benefit pension provision and result in this benefit being removed for the future service of existing employees.

vi) Declining productivity and associated cost increase was a concern of several employers operating in performance measured environments.

vii) The burden would be greater on smaller employers as they do not have the employment flexibility from having a relatively large work force.

viii) Comparisons with other jurisdictions may be misleading as other employment protection is much less in for example the US.

Mr Warman summarised the response of his consultees as:

> "There was a general concern that removal of the retirement age will lead to a loss in competitiveness as costs rise (for all the reasons listed earlier) and management time is absorbed and diverted from growing the business. Taken across the UK as a whole this would damage the country's collective competitive standing"

67. At the conclusion of his short Report Mr Warman listed suggestions for action which would not seriously damage competitiveness and would pave the way for the long-term vision. These included:

- The introduction of a national retirement age of 65.
- If considered necessary, the creation of a right for employees to be considered for post 65 working to be mutually agreed.
- The announcement of a review of the impact of the legislation within 5-10 years of enactment.

It appears that these three recommendations proved influential in the ultimate decisions taken by government and all featured in the final package.

68. Mr Harrop, a senior officer with Age UK and the principal witness for the claimant has made three very extensive witness statements in this case. Mr Wadham, group legal director of the Equality and Human Rights Commission has made a substantial witness statement for the intervenor. The tenor of both these witness statements is that in the conclusions reached at the end of the process the government was unduly influenced by the Warman Report which in material respects was not consistent with the literature review by Ms Meadows, and in any event contained stereo-typical views about age and ability to continue working that were contrary to the principles of the Directive.

69. In December 2004 the Secretaries of State for the Departments of Trade and Industry and Work and Pensions made a joint announcement to Parliament about their decision to provide a default retirement age at 65 and to introduce a statutory right for employees to request working beyond their normal retirement date. Mr Wadham's statement points out that these proposals did not appear to sit comfortably with the evidence given to the House of Lords Select Committee on Economic Affairs by civil servants at the Department for Work and Pensions and by the Secretary of State for Work and Pensions, the Right Hon. Andrew Smith MP on the 15th July 2003. For reasons already given, I have received this evidence. I have considered whether it assists me in reaching a judgment on these issues. I have concluded that it does not.

70. It is apparent that these were difficult and controversial matters and views within different Departments and within the government as a whole may crystallise and change as the process of consultation continued. I have no reason to doubt that the final decision taken by the responsible Ministers took fully into account all the evidence that had previously been given and decision makers were well aware of the recommendations of the House of Lords Select Committee. Ms McCarthy-Ward's evidence refers to parts of their conclusions, although the claimant points out other parts of assistance to their case.

71. Following the joint Ministerial statements of December 2004 there were then regulatory reviews by the DTI in July 2005 and March 2006 and draft Regulations were drawn up based upon the decision that had been made on retirement age. On the 14th July 2005 the government launched its final formal consultation 'Equality and Diversity: Coming of Age' which sought views on the draft Regulations. This was no longer a consultation on the policy options of a default retirement age but whether the proposed Regulations correctly reflected the policy intentions and whether they would cause practical problems. Under the draft Regulations it had been envisaged that employees had a right to be consulted on retirement decisions made by the employer and would have a right to challenge refusals to agree to a request to work after aged 65 where they considered the employer had not acted in good faith. Consultation responses from employers and the legal profession demonstrated a concern this would expose employers to Employment Tribunal complaints and uncertainty in every case and would undermine the objectives of the default retirement age. The Regulations were therefore changed in the final version to remove the references to good faith and increase the certainty of the effect of the provisions. At the same time other parts of the procedure were tightened up to increase employee's protection such as the requirement of notice of retirement to be given.

72. The witness statement of Ms McCarthy-Ward then moves from the history to explain the policy aims underlying the decision. At [46]-[52] she says:

> "Policy aims underlying the decision on the default retirement age - Introduction:"
>
> The Government's labour market objectives include encouraging the recruitment, training, retention and proper remuneration of workers, and ensuring proper pension provision for them when they retire. There are a number of factors which are required to support those objectives and to ensure that employers are most likely to behave in a way which

is consistent, rather than inconsistent with them.

One of those factors is that employers have confidence in the labour market. This means, for example, that they are optimistic about future prospects and trust that the labour market will not be unduly affected by external factors over which they have no control and which will have a detrimental impact on them. In general, business prefers to operate in a climate of certainty and any factors, including labour market factors, that increase uncertainty may have a detrimental effect on confidence. Significant new legislation which affects all employees inevitably will reduce the confidence of some employers because of fears about the impact, which will be uncertain at least until the case law has clarified its effect. If the Government failed to consider the impact of new legislation on business, employers would fear that the impact could be significant. The Government's policy in regulating, therefore, is to ensure that the impact of new measures on business is always taken into account. Levels of employer confidence affect their investment and business decisions, which encompasses their decisions about employees. Without confidence then they are less likely to take the risks which are necessary to ensure increasing recruitment, training, remuneration and proper pension provision.

Employees aged 50 and over constitute a significant and increasing part of the labour market. They presently (2006 2nd quarter) account for 26% of total employment Total U.K. employment grew by 13% between 1992 and 2006 and employees aged 50 and over accounted for 65% of overall net employment growth in that period. Employer confidence is difficult to measure accurately, or to predict, although surveys of employers concerns and expressed confidence are of assistance.

In the context of the labour market objectives mentioned above, and mindful of the need not to jeopardise employer confidence in the labour market (particularly the market for older employees) the Government formulated the social policy aims which informed the Government's decision on the default retirement age. The Secretary of State took the decision to provide for a default retirement age in pursuit of the following two aims:

-workforce planning,

-avoiding an adverse impact on the provision of occupational pensions and other work-related benefits.

> The Secretary of State also considered that other benefits would flow from the default retirement age and that these supported the aim of workforce planning. These benefits included:
>
> - the protection of the dignity of workers at the end of their working lives
>
> - improving the participation of workers in the 50-64 age group; and
>
> - encouraging culture change.
>
> It should be noted that the default retirement age only applies to employees (within the meaning of s.230(1) of Employment Rights Act 1996), civil servants, and certain members of the House of Lords and House of Commons staff. We considered whether we should extend the default retirement age to partnerships and to office holders (including company directors). We concluded that although we had evidence to support the default retirement age for employees and civil servants we did not have sufficient evidence to justify extending the exemption to these other groups.
>
> *Policy aim underlying the default retirement age –*
>
> *(i) workforce planning*:
>
> Workforce planning has three aspects in this context:
>
> - that a retirement age provides a target age against which employers and employees can plan work and retirement;
>
> - prevention of "job blocking"; and
>
> - encouraging employees to save for retirement.
>
> The Secretary of State relied on all three aspects of workforce planning in making his decision to provide for a default retirement age. Each aspect is explained in more detail below."

73. The next 26 paragraphs of the witness statement address each of these four issues in considerably greater detail and with cross-reference to some of the other reports already cited in this judgment. Reference to the Warman Report is made on a number of occasions, including in a section of the witness statement headed "Other benefits flowing from a default retirement age supporting the aim of workforce planning".

74. At paragraph 77 she states:

> "The Government took the view that the default retirement age was needed to protect the dignity of workers by avoiding a situation in which employers were obliged to dismiss elderly employees on grounds of declining competence at the end of an

> otherwise unblemished career. It considered that this would be an undignified end to a valuable working life, which would be painful to both sides and likely to damage industrial relations."

75. Paragraph 82 is as follows:

> "The Government considered that the default retirement age was a useful tool in achieving the wider aim of government policy i.e. improving the participation of the 50-64 age group in the labour market. This is also an aim of wider European social policy, as set out in the 2003 Employment Guidelines[1]. Those employers who would otherwise be concerned about recruiting older workers because of the possible need to deal with their declining competence at a later stage, can recruit such workers in the knowledge that they can retire them without the uncertainty of when and how their working lives will end. "

76. Paragraph 84 concludes:

> "Having identified all the above aims, we could not find a less discriminatory way of addressing the totality of our aims in implementing legislation. For example, to some extent the final Regulations addressed the concerns about the levelling down of pensions by exemptions targeted directly at the pensions provisions, on the lines suggested by Mr Harrop. However, such provisions do nothing to address the concerns relating to workforce planning. We have also taken steps to limit the discriminatory impact of the default retirement age. Evidence supporting our legitimate aims suggested the default retirement age was necessary in relation to employees, but evidence was not persuasive in relation to some other groups of workers. Hence the default retirement age does not apply to people such as partners working within partnerships or office holders, for whom the Government was not satisfied it had sufficient evidence of objective justification. Discriminatory impact is also reduced by the new rights in relation to retirement (six months' notice and the duty for employers to consider requests to continue working) which are designed to help to encourage a culture change. "

<u>The response of the claimant and intervenor</u>

77. The cogency and sufficiency of these reasons have been challenged in the detailed witness statements of Mr Harrop for the claimant, Mr Grattan for TAEN; Mr Wadham and Mr Ashcroft on behalf of the Intervenor. Their statements and the material they deploy present a cogent case for the proposition that either there should be no default retirement age or that the default retirement age should not be 65 but 70. There have been responses to this material from a second witness statement of Ms McCarthy-

Ward and one from Ms McLynchy, a senior civil servant in the Department for Business Skills and Industry. There has been a continuing debate as to the relevance to be given to practice in other countries, the strength of the reasoning in recommendations from the Select Committees of the House of Lords and the House of Commons, the views of other employee bodies such as the Institute of Directors and so on.

78. This court is concerned with assessing the sufficiency of the government's reasons for acting as it did it in promoting the Regulations. I consider that to perform this task it is not necessary to set out the substance of the policy debates and the strength or weakness of the material supporting the relevant arguments. As far as is relevant to the legal challenge which are made to the Regulations in question, the claimant suggests that taken as a whole there is no clear and consistent social policy aim being pursued by government in the decisions that it came to that formed the Regulations. Rather, it has succumbed to lobbying pressure by the CBI and business organisations at a time when government was anxious to be business friendly and not increase the regulatory burden on business and industry.

79. The claimant submits in particular that the history of policy-making in this case suggests a drift away from the interests of the individual employee and towards those of the CBI and industry generally. It points out:

i) There has been a move away from the proposition that all retirement age decisions could be justified by employers in the event of a challenge by the employee on the objective and proportionate principles required by Community law, to the position where a default retirement age has been identified as appropriate. The consequence of the default retirement age is that an employer will not have to justify dismissal on the grounds of retirement made in reliance upon that retirement age but only dismissals on the grounds of retirement at an earlier period.

ii) The period selected for the default retirement age of 65 rather than the age of 70 which had been suggested in earlier part of government thinking. 65 is the present age for receipt of state retirement pensions though different provisions for women are being phased in over a transitional period. More recently government policy has identified an onward aim of raising the eligibility for a state retirement pension to 68, being phased in over a number of years in transition provisions. However, not only is the age of 65 too low, it does nothing to create a new culture of severing the connection between the date of actual retirement and the date of eligibility for receipt of either the state pension or occupational pension.

iii) Insofar as the government relied upon the Warman Report in identifying 65 it necessarily relied upon some stereotypical reasoning expressed by consultees to that report that there was a decline in competency after age 65 but it was too embarrassing to address that competence assessments and a default retirement age was a more dignified way of terminating the employment relationship.

iv) The government placed much emphasis upon a new right to be given notice of intention to dismiss on the grounds of retirement age and the right of the employee to make representations against being required to retire, have the

opportunity to have a meeting to discuss such representations and thereby to make representations on that issue and to be consulted about it. However, the claimant points out that Schedule 6 to the 2006 Regulations that implement this element in the policy balance do not impose a duty on the employer to give reasons for a decision rejecting the employees' request and it is no longer possible to complain to the Employment Tribunal about the good faith of the employer's decision even though this was contemplated in the original draft of the representations. Thus on this issue as well there has been a shift to the employer's side away from the rights of the employee.

80. The claimant further submits that the fact that the government has excluded statutory office holders and partners in businesses from the default retirement age and the Regulations leave it up to the business or employing authority to decide on retirement age and justify it in the case of challenge before the Employment Tribunal demonstrates that there is no need to apply a different approach to employees generally. The government has not chosen the route of identifying particular employments or levels of employment where the phenomenon of "job blocking" might have a detrimental effect upon the employment profiles of younger workers. Moreover the general aims of 2006 Regulations are inconsistent with the good practice that is being developed in the civil service below the level of the senior civil service where unions and government departments are moving beyond default retirement ages into more flexible arrangements.

81. The developments in the UK need to be seen in an international perspective. Both Australia and United States have provisions prohibiting mandatory retirement ages for older workers, though all sides were agreed that the legislative and social background to those two countries was sufficiently distinct from that in the United Kingdom not to require the court to review those arrangements. The defendant did rely on its own survey of retirement ages in the European Union and indeed the employment practices in the European Commission itself. With two exceptions from Scandinavia (Finland and Sweden) it seems that there were either mandatory or default retirement ages up to 65. That was the position with respect to employment within the European Commission though an employee could request an extra two years of employment.

82. With this attempt to summarise the history, the supporting material and the rival positions of the participants in the process that led to the making of the Regulations it is finally time to turn to the specific challenges to the Regulations and to reach my conclusions about them.

Issue 2: Is Regulation 3 compatible with the Directive ?

83. The claimant submits :-

i) This Regulation fatally mixes the capacity to justify discrimination by the private employer and the public authority. Albeit that the ECJ in its judgment in the *Age Concern* case has made plain that the legislation itself does not need to identify the social aims of the legislator in permitting derogation, it also went on to stress that the only aims that are permissible in derogating from the principle of equal treatment with respect to age under Article 6 of the Directive are the social policy aims of government and not the private interest of employers.

ii) A Regulation that combines direct and indirect discrimination and justification of both in the same abstract terminology is vulnerable to employers seeking to justify direct discrimination on the grounds of age by reference to their own individual business needs and in particular the considerations of cost.

iii) Although the Directive permits government to choose its social aims and how and where to express them, a choice must be made, and government cannot choose to delegate the identification of social aims by others.

iv) The inclusion of broad social policy reasons that are undefined in the Regulations themselves or the explanatory notes presented to Parliament violates the fundamental principle of legal certainty. Private parties must know what the social aims are if they are to litigate before the courts the proportionality and necessity of the employers' methods of giving effect to these aims.

84. Ms Rose QC pointed out in her skeleton argument first that Regulation 3 merely replicates the language of Article 2 of the Directive and as such does not have to identify a particular social policy aim to justify its inclusion. Alternatively, if it needed a social policy aim, it was to give employers sufficient flexibility age based practices in the field of employment where they were necessary and proportionate.

85. Shortly before the hearing of this case, the opinion of Advocate General Bot submitted on the 7th July 2009 in case C-555/07 *Kucukdevici v Swedex GmbH* became available. He observed at [47] although the Court in *Age Concern* recognised that some flexibility could be given to employers in pursuit of the social aims set by the executive, such flexibility cannot constitute a social aim in itself.

86. Although the decision of the Court of Justice is outstanding and opinions of Advocate Generals are not a source of binding law, Ms Rose was not minded to quarrel with this statement. In her oral submissions, by reference to the evidence of Ms McCarthy-Ward cited above, she refined the social policy behind both the capacity of private employers to justify under Regulation 3 and the state's justification for the DRA in Regulation 30 as preserving the confidence and integrity of the labour market and providing sufficient clarity to the workforce and employers to prevent that confidence being damaged with detrimental consequences to employment and the terms on which employment is offered in the UK.

87. She submitted that that aim was sufficiently clear and precise as to comply with the requirements of the Directive and enabled employers to justify particular treatments and practices as necessary and proportionate to their business needs without infringing the distinction between public policy and private needs.

88. In my judgment, this refined submission has considerably more force than the approach indicated earlier by the defendant in its skeleton argument. Whilst the Directive permits the Member State to make derogations from the equal treatment principle in pursuit of legitimate social aims, I conclude that the Regulations must spell out what derogations have been made. The legislative context needs to identify the social policy aims that have led to the derogation. The court needs to ensure that the aims are legitimate and the means for giving effect to them are reasonable, necessary and appropriate.

89. Having considered with care the detailed submissions of Mr Allen QC for the claimant and Ms Rose on this issue, I prefer the submissions of Ms Rose. I do not consider that the matters upon which the claimant relies prevented the Minister from the making Regulation 3 in the manner that he did.

90. I am satisfied from the evidence of Ms McCarthy-Ward, as well as the explanatory notes to the Regulations and the elaborate publicly available consultation process that has been identified above, that the government have proved to the requisite high standard that it did have social policy concerns in protecting the integrity of the labour market. I conclude that such concerns were legitimate concerns within the principles of the Directive and the case law of the ECJ. Moreover, such concerns are discernable from the legislative background to the case, including the process of consultation and public debate.

91. None of this infringes the principle of legal certainty. Once it is recognised that social policy justifications need not be precisely listed in the Regulation, but may be found in the legislative background, the fact that the aims are broad ones does not infringe legal certainty. The courts can contribute to the process by case law in the light of the principles and purposes of the Directive. Ms Rose points out that the European Court of Human Rights has found that there is sufficient legal certainty in the law on civil contempt of court and she might have added breach of the peace, even though testing cases in both areas have to apply general principles to the facts of the specific case.

92. I consider that examining the legislative context as a whole, there is a distinction between the social aim of confidence in the labour market and the application of that aim in the particular Regulations that permit employers to discriminate where they can show it is necessary and proportionate to do so in the interests of their business. The private employer is not afforded the wider margin of discretion in the application of the regulation that the state is. The flexibility shown to the employer in permitting it to endeavour to justify discriminatory treatment is not an aim in itself, but a means of advancing the social policy aim of confidence in the labour market. There is no reason to believe that in the special context of age discrimination, the kind of business practice reasons that can justify indirect discrimination are fundamentally different from those that can justify direct discrimination. If they were the ECJ would have made this clear in its answer to question five in the reference

93. There is, however, a clear distinction between the government as a public body being concerned about the social cost to competitiveness of UK employment in the early phase of implementing the new principles and policies of the Directive, and individual business saying it is cheaper to discriminate than to address the issues that the Directive requires to be addressed.

94. In my judgment, the government was entitled to take the view that there is little point in developing the principle of age discrimination in the field of employment if it resulted in fewer UK jobs altogether for young and old alike, or jobs being generally offered on worse terms to accommodate the increased costs created by uncertainty. That does not mean that the priorities and the policy may not change, or that what is considered necessary in 2006 or 2009 cannot yield to some different perception of where the public interest lies at a later date.

95. There is an acute policy tension in this area. On the one hand there is the government's interest in promoting employment, continuity of employment, self-sufficiency in employment, tax revenues from people who remain in employment after 65, reducing the burden on the state pension, and ensuring that as people live longer they work longer and are able to lead both socially and economically productive lives. On the other, there is the need for reassurance, clarity and flexibility to reduce the social cost of regulation, maintain competitiveness, address issues as to career planning, and ensure availability of jobs in industry and public service to workers of different ages.

96. I further consider that any defect in Regulation 3 when drafted can to a certain extent be remedied by the national court reading down and reading in what the emerging ECJ jurisprudence requires to be read in to achieve compatibility. Accordingly, the concept of *ultra vires* in this area would only apply to radical cases where it is not possible or not permitted for the national court to adjust the regulation by the vigorous interpretative technique required by the case of C-106/89 *Marleasing v La Comercial* [1990] ECR I-4135.

97. I accept that there is a limit to what a national court can do by way of reading down Directives that are inconsistent to Community law on the grounds of vagueness or uncertainty and where policy choices need to be made by the legislator to cure the defect. But having concluded that sufficient policy aims have been identified in this context, the future application of the Regulations can be determined in accordance with the purposes and principle of the Directive and the criteria in the *Age Concern* judgment. The social aims that the government relies on are ones in which the states enjoy a wide margin of appreciation. Whereas the individual employer justifying particular practices or treatment in reliance upon that social aim has a much more rigorous task and where discrimination remains unjustified it will be unlawful. In short, I see no illegality in the form of transposition of Article 6 of the Directive in Regulation 3 of the 2006 Regulations.

Question 3 Is Regulation 30 compatible with the Directive?

98. The general tenor of the complainant's case with respect to Regulation 3 was that it was over-broad, vague and imprecise. A very different complaint is directed at Regulation 30 that it is arbitrarily precise. Indeed the defendant pointed out that there was an inconsistency between the submissions of the claimant as to the need for all decisions on retirement age to be justified on a case by case basis, and its complaints as to Regulation 3 that requires just that for persons who fall outside of Regulation 30. That inconsistency was striking with respect to the comparison of the different treatment afforded employees and partners in business. The DRA for employees was deprecated while the need to justify retirement decisions for business partners in the absence of a DRA was in this context preferred.

99. Under this limb of the challenge, the claimant is concerned with people who are within the Regulation as employees within the meaning of section 231 of the Employment Rights Act 1996, that is to say including a person in Crown employment and relevant members of staff of both Houses of Parliament. They may be dismissed without breach of Part 2 or 3 of the Regulations where they are over the age of 65 and the reason for their dismissal is retirement.

100. I have distilled the submissions that were developed by Mr Allen on this part of the case and supported by Lord Lester to five. These are:

i) In the light of the longer term aim of removing a designated retirement age and the intention of reviewing the Regulation in 2011, the designated retirement age under Regulation 30 is effectively a decision to defer implementation of the Directive until after December 2006.

ii) The defendant has not proved to a high standard the existence of a legitimate social policy aim for such a provision.

iii) Any such social policy aim as the defendant has proved to exist was based substantially upon generalisations rather than evidence.

iv) Use of a DRA was not a proportionate way of advancing the aim.

v) If there was to be a designated retirement age at all, the choice of 65 was disproportionate in its effect upon elder workers.

Non implementation

101. I reject the first submission as without any substance. In my judgment, it is quite plain from a combination of Regulation 3 and Regulation 7 that the government has brought about measures outlawing age discrimination in the field of employment which is what it was required to do. It was entitled to define discrimination by reference to the Directive and to make derogations from the principle of non-discrimination as long as they were in accordance with the Directive. Provisions for a generalised retirement age appear to be the kind of arrangements that may be contemplated as being justified in accordance with the Directive according to Recital 14 of its Preamble. The fact that the government announced that it intended to review the Regulations within five years of it being brought into effect is a perfectly legitimate approach commended by both the ECJ and the House of Lords in the *Seymour-Smith* case (see [32] and [33] above). Further there is no inconsistency in having a long-term aim of moving away from DRA when culture change has been effected, but to rely upon it in the short term for a different aim.

102. The *Palacios* case itself concerned legislation where there were significant changes to the social aims. Yet at [17] in its judgment the Court recognised that governments were entitled to reach different conclusions at different times as to what their predominant social policy aim should be. In my judgment the fact that the government varied its policy during the process of consultation is not a matter for criticism, rather it demonstrates a genuinely open mind in reaching conclusions on difficult and sensitive issues where there was a considerable divergence of views.

Social policy aim

103. I am further satisfied that the government has proved to a high standard that the promotion of Regulation 30 and the concept of a designated retirement age was based upon a social policy aim that may generally be described as maintaining confidence in the labour market but is more particularly set out in the witness statement of Ms

McCarthy-Ward. Those aims cumulatively are a labour market objective within the meaning of Recital 25 to the Directive.

104. The government could reasonably conclude on the information it had before it that the implementation of these new important obligations required, at least in the short term, some bright line guidance on the contentious issue of retirement and discrimination.

105. Although in its judgment in *Age Concern* the court confirmed that it was for the national court to make the adjudication on justification and proportionality, there is no indication in its judgment at [46], [51] or [52] that the kind of aims relied upon by the defendant were not legitimate ones within the meaning of the Directive. Concerns as to the integrity of the labour market and its short-term competitiveness are social policy aims of a general public interest that can be distinguished from purely individual reasons particular to the employer's situation.

106. Nor is the government prevented from having such an aim despite the representations and cogent submission made to it by the claimant, and the differing judgments of others such as the House of Lords Select Committee and the more recent views of the House of Commons Select Committee. Despite the voluminous evidence presented to the court in the course of this application, it is not the function of this court to make social policy choices itself and to prefer one way of implementing the Directive over another.

Stereotyping

107. The claimant's second submission is that any aim that the government has established is substantially based upon generalisation rather than evidence. In my judgment giving a purposive interpretation to the court's judgment in the *Age Concern, Palacios* and *Seymour-Smith* cases, the Court by referring to the need for evidence over generalisations is deprecating stereo-typical reasoning, rather than a particular form of proof of the social policy justification. The social policy aims can be broad ones including maintenance of economic competitiveness, and in times of high unemployment, fair distribution of employment opportunities amongst the population as a whole, ensuring that workers have an adequate opportunity to provide for their retirement and suchlike.

108. On a fair reading of the process by which Regulation 30 came to be adopted, and the considerations that the government gave to the differing views in the consultation process I do not conclude that the government adopted the idea of a DRA on the basis of any generalised assumption that people over 65 are not reasonably capable of competent performance of their duties, or as a class are more likely to be incompetent then people below that age. A concern of employers, noted in the Warman Report was the difficulty of addressing fading competence grounds generally with dignity, and a reluctance to be required to employ competence testing as a sanction for older workers because of the detrimental effect upon morale, but that was not the government's aim in adopting this provision. In any event social perceptions are a factor that the government may take into account in implementing the directive as long as its core principles are not undermined.

Proportionately of having a DRA at all

109. Equally I do not consider that the decision to adopt a DRA was a disproportionate way of giving effect to the social aim of labour market confidence. The use of a designated retirement age is to be contrasted with a mandatory retirement age. The latter, such as the kind of provision in contemplation in the *Palacios* case affords no discretion to either employee or employer. A DRA does not require the employer to dismiss on grounds of age or retirement, but merely enables it to do so when that age is reached without risk of violating the law and being vulnerable to damages claims. The idea of a DRA is not inherently arbitrary and illegitimately discriminatory but is the making of a social choice in the light of a number of social and economic factors which point either way as to the desirability of such a measure or its actual effect upon future employment prospects.

110. The claimant's evidence contains a number of statements by people over 65 who wanted to continue working over that age but were not permitted to do so. There is equally some material in the papers before the court suggesting that the view of the CBI at least was that 81% of employers have accepted the requests made by employees under the Schedule 6 procedure following the duty to serve notice of intended retirement by the employer on the employee. If that evidence proves to be accurate it is a pointer that a DRA of 65 has contributed to keeping people in employment after that age. The employer is not called upon to made a once and for all decision, and will be free to terminate the employment relationship later on retirement grounds without penalties.

111. I accept the submission made on behalf of the defendant that use of a specific age as the basis for social policy decisions reflected in the Regulations is somewhat different from use of other criteria such as race, sex, religion or sexual orientation which have either been, or have become now regarded as particularly suspect grounds. Advocate General Jacobs, Advocate General Sharpston and Advocate General Mazak have all made similar points in their opinions in the emerging case law dealing with age. This is not to assign age to some diminished worth in a supposed hierarchy of rights. Unlike the immutable characteristics of racial and gender identity all of us grow older each year, and all of us face decisions about retirement. The different nature of discrimination on the grounds of age compared with other grounds is reflected directly in the Directive by the fact that Article 6 permits justification of direct discrimination on the grounds of age.

112. A DRA is not a generalised statement of social worthlessness, but is a measure designed to give certainty and corresponding focus for planning purposes for employers and employees alike. It is a statement that a person is liable to be retired because they have reached the kind of age where it is generally considered appropriate for retirement issues to be addressed.

113. The social aims relied upon by the defendant and the use of the DRA in giving effect to them are wholly distinct from the kind of arbitrary rules affecting people in the midst of their working careers that were considered unacceptable by the Court of Justice in the case of *Mangold* and the inconsistent aims with respect to age rules connected with vocational training deprecated in the most recent case of C-88/08 *Hutter v Technische Univercat Graz* 18th June 2009 (ECJ). Although I accept there are differences in the pension arrangements available in Member States throughout the European Union, it is of some significance that many Member States use mandatory or designated retirement ages as aspects of their social policy. Further, it is

significant that in the *Palacios* case the ECJ accepted as justified Spanish laws that enabled the social partners i.e. the parties to collective bargaining in sector wide industries throughout the nation, to agree mandatory retirement terms in the interests of the labour market and making jobs available fairly to all.

114. For these reasons and according government an appropriate discretionary area of judgment broad enough to permit it to make relevant social policy choices but not so broad as to undermine the principles of the Directive, I conclude that the decision to adopt a DRA was both legitimate and proportionate and therefore reject the second ground of challenge.

The adoption of 65 as the DRA for employees

115. That leaves the final submission whether the choice of 65 as the age for the DRA was itself proportionate in all the circumstances. I confess to finding this question much more difficult than all the other issues in the case. It will be observed that, unlike the case of *Palacios*, age alone is the criteria as opposed to age combined with length of service or the acquisition of sufficient pension entitlement. I recognise very substantial weight in the propositions advanced by the claimant and the intervenor. It does appear that the overall package of rights to the employee diminished during the consultation process. Not merely was a DRA adopted at all but an earlier age than 70 was selected and with diminished procedural rights in terms of ability to go to an employment tribunal to complain about the lack of bona fides in use of the retirement age.

116. Given, that one element in the overall social balance was that people should not retire until they were able to afford to do so and that the present state retirement age for both men and women is (or is intended to be) 65 and that before the Regulations were adopted 65 was the age beyond which generally there would be no right to unfair dismissal or redundancy claims, I cannot see how any age less than 65 could conceivably have been adopted as the DRA for the purposes of Regulation 30.

117. There were powerful reasons why an age over 65 should have been adopted by government. First, insofar as creating a change of culture with respect to retirement and age discrimination was a consideration of weight for the legislator, a measure that advanced in some modest way beyond eligibility for state pension the age at which employers were not called upon to justify individual decisions to enforce retirement would appear to have contributed to that aim. Any advance of the DRA beyond 65 would benefit those who wanted to continue to work for financial or social or any other reasons, but would not have penalised those who did not. They could have withdrawn their state and any occupational pension to which they would have been entitled by then. I recognise that in the consultation age 70 was not a popular choice of age by the majority of those who responded including some trade unions who feared a later DRA would reduce choice rather than expand it. However, it was in the interests of government to make the case to break the connection between retirement age and pension age and to give assurances that pushing back the age for a DRA would not automatically require workers to work that long in order to be eligible for a state pension.

118. Second, even assuming that at some point in later working life questions of dignified exit from employment arise, the literature review prepared by Ms Meadows suggested

there was no evidence that was a problem between the ages of 65 and 70. Nothing in the responses to the Warman Report undermines these conclusions of the literature review, and it is likely that if employers had adverse perceptions those were precisely the results of stereo-typical thinking. The choice of 65 seems particularly odd in the light of subsequent thinking about pensionable age which is intended by the middle of the century to rise to 68. It would undermine government policy for the DRA to not at least keep pace with those developments and for reasons already indicated should logically keep ahead of it.

119. Thirdly, I cannot see how use of 68, for example, as the DRA in the Regulations would have undermined or diminished any other of the government's objectives in adopting a DRA at all. Legal certainty, workforce and retirement planning and the general balance between job blocking and fair access to posts by younger members of the workforce and the ability to continue employment by older members of the workforce would not be detrimentally affected by such an adjustment. Where particular employments either had genuine occupational requirements for retirement at the younger age, or where there were compelling social policy reasons for requiring very senior staff to retire earlier to provide an incentive for younger staff to remain in the post and compete for such top jobs, those would be capable of being justifications under the Regulation 3 arrangements.

120. The government's own initiatives with respect to removing a DRA in the civil service point to the kind of good practice many have been recommending, and the government's own case accepts it is desirable. It should be pointed out that these exclude the senior civil service, to which particular job-blocking considerations apply.

121. I have rejected the submission that the decision to apply a DRA at all was lacking in proportionality. Once a case for a DRA at all is made out in the interest of certainty, clarity and enhanced confidence in the labour market then nothing less than implementing a DRA will do to address those concerns. This is an issue of proportionality of means. However, the choice of which age the DRA should apply to involves different and broader considerations that may be described as a proportionality of ends. Applying the approach summarised at [40] above, the court is here concerned with the overall fair balance of the Regulations, and whether use of age 65 is more intrusive of the rights of the employee than is necessary to give effect to the social policy aim of having a DRA at all.

122. Given that Regulation 30 is direct discrimination that will result in considerable numbers of older members of the workforce who want to continue in employment not being able to challenge an employer's decision to the contrary, I accept that its adoption has an adverse impact on the dignity on autonomy of members of this class. The question is therefore whether a fair balance has been achieved in pursuit of the legitimate aim, whilst recognising the particular competence of government to make these choices.

123. I recognise that any bright line based upon age will leave classes of persons aggrieved, and in the context of human rights litigation the courts have recognised that that is of itself not something that makes the claims disproportionate. I have not drawn particular assistance from the cases where the Strasbourg court have considered these matters because circumstances in each case were different from the present issue and more significantly age discrimination as an aspect of Article 14 of

the European Convention on Human Rights has never been identified as a particularly weighty consideration.

124. On the other side of the balance, the government points to the lack of enthusiasm across the board by its consultees for age 70. Popular perceptions as to the effect of a policy may be a factor to which some weight can be attached by government, although there must be limits to that consideration in the light of the purposes of the policy of the Directive. In any event, that does not address why an age such as 68 could not have been adopted as a significant step in the right direction.

125. I note that from the evidence of comparative EU practice that whilst Austria, Denmark, Ireland, Italy, Luxembourg, Netherlands, Poland and the European Commission appear to retirement ages of 65 (at least for men). The age in Sweden is 67, in Finland 68, in Portugal where the employee has not requested retirement before 70 the contract is automatically changed to a short term one on achievement of this age. Six countries had no retirement age, and in the case of the European Commission employment could be extended for a further two years on application in the absence of countervailing factors.

126. There may be no European consensus but in the light of changed economic circumstances and the generally recognised problems that a longer living population creates for the social security system the case for advancing the DRA beyond minimum age of 65 at least would seem to be compelling. I am conscious that very shortly before the hearing of this application, on the 13th July 2009 the government announced its intention to move forward the review of the Regulations from 2011, its original planned date, to 2010. The Prime Minister is quoted as saying:

> "Evidence suggests that allowing older people to continue working, unfettered by negative views about ageing could be a big factor in the success of Britain's businesses and our future economic growth".

127. That decision has been broadly welcomed by the claimants and the intervenor as enabling the legislator to reconsider the balance of competing considerations in the light of contemporary conditions. Whether or not it will be decided that a DRA is still a valuable means of promoting the government's social policy aims is a matter entirely for the future, for the reasons I have sought to indicate. However, if a DRA is retained at all, the review must give particular consideration to whether the retention of 65 can conceivably now be justified.

128. If Regulation 30 had been adopted for the first time in 2009, or there had been no indication of an imminent review, I would have concluded for all the above reasons that the selection of age 65 would not have been proportionate. It creates greater discriminatory effect than is necessary on a class of people who both are able to and want to continue in their employment. A higher age would not have any general detrimental labour market consequences or block access to high level jobs by future generations. If the selection of age 65 is not necessary it cannot therefore be justified. I would, accordingly, have granted relief requiring it to be reconsidered as a disproportionate measure and not capable of objective and reasonable justification in the light of all the information available to government.

129. I have accepted Ms Rose's submission that this is a historic challenge to Regulations adopted in 2006 and the starting point must be the state of affairs then. I further recognise that:

a) it is not for this court to identify when a particular age for a DRA is justified;

b) age 65 had some support from past practice in the United Kingdom and the preponderance of consultees and continuing practice elsewhere in the European Union;

c) no one was making a case for age 68 or so and age 70 commanded little popular support in the consultations;

d) An appropriate margin of discretion must be afforded to government in the selection of the age for a DRA and in monitoring the impact of a DRA of 65.

I do not consider that Regulation 30 as adopted in 2006 was beyond the competence of the government in applying the Directive or outside the discretionary area of judgment available in such matters. It was not a bold decision at the time but that is not the test. It was not a decision for the long term but that fact alone does not make it unlawful. Accordingly, despite the concerns I have identified in this part of the judgment, I conclude that it is not *ultra vires* the Directive and I do not declare it to be void.

130. The claim fails and I do not grant the claimant the relief sought. It will, however, be apparent from my observations at [128] above that the position might have been different if the government had not announced its timely review. I cannot presently see how 65 could remain as a DRA after the review. Both the claimant and the intervenor have played a useful role in the consultation period and after, marshalling a wide range of material, bringing the Regulations under prompt and detailed judicial scrutiny. I am grateful to all counsel for their helpful submissions in writing and orally in a difficult case with a number of challenging aspects.