THE HIGH COURT

JUDICIAL REVIEW

[2022] IEHC 546

[Record No. 2021/665 JR]

BETWEEN:

SEAMUS MALLON

APPLICANT

AND

THE MINISTER FOR JUSTICE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 5th day of October, 2022

INTRODUCTION

1. The Applicant is a sheriff appointed under the Court Officers Act, 1945 (hereinafter "the 1945 Act"). In these proceedings he seeks to challenge the mandatory retirement age of 70 fixed under s. 12(6)(b) of the 1945 Act as being incompatible with (Council Directive 2000/78/EC of the 27th of November, 2000 establishing a general framework for equal treatment in employment and occupation [hereinafter "the Framework Directive"].

2. The essence of the Applicant's case is that the mandatory retirement age of 70 infringes the age discrimination provisions of the Framework Directive, as transposed into Irish law by the Employment Equality Act, 1998 (as amended), because there is no objective of reasonable justification for such a mandatory retirement age.

BACKGROUND

3. The Applicant was appointed to the statutory office of sheriff on the 28th of January, 1987 for the Counties of Cavan and Monaghan pursuant to s. 12 of the 1945 Act. Appointments in more recent times are made following an open competition conducted by the Public Appointments Service and a Government appointment on foot of a memorandum to Government from the Minister for Justice. The office is non-pensionable but sheriffs are entitled to make contributions based on their earnings to provide for a State Contributory Pension upon reaching pensionable age (currently 66 years).

4. As per the terms of his letter of appointment, the Applicant was appointed with "*the single responsibility for the execution of certificates of tax liability under s. 485 of the Income Tax Act, 1967*".

5. The Applicant's appointment was stated to be on terms applicable to all Revenue Sheriffs which terms included an annual retainer fee (currently fixed at €25,630), an entitlement to retain fees payable in respect of the execution of Revenue Certificates under s. 485 of the Income Tax Act, 1967 pursuant to fee orders in force (currently the Sheriff's Fees and Expenses Order, 2005 (S.I. No. 644 of 2005) and the Fines (Payment and Recovery) Act, 2014 (Fees) Order 2016 (S.I. No. 549 of 2016), a requirement to provide at his own expense clerical and other staff as requisite for the execution of the Office of Sheriff, a requirement to enter into a bond in accordance with s. 12 of the 1945 Act, a requirement to report to the Revenue Commissioners on a monthly basis on the execution of certificates transmitted to him for execution.

6. On reaching his seventieth birthday in May, 2022, the Applicant was to be obliged to retire from office in accordance with the provisions of s. 12(6)(b) of the 1945 Act and the mandatory retirement age has applied without change from the date of the Applicant's appointment to office.

7. In practice, while the Sheriff is appointed by the Respondent who pays the annual retainer fee, operational responsibility for the work of Sheriff with regard to tax collection lies with the Revenue Commissioners but the Sheriff remains personally responsible for managing and organising the Sheriff's office, staffing levels, staff functions and staff remuneration.

8. In advancing his proceedings, the Applicant relied on an earlier process engaged in by the Sheriff's Association, of which he is a member, with the Respondent. On or about the 6th of July, 2020, the Sheriff's Association made a formal submission to the Respondent seeking a statutory amendment to the mandatory retirement age. In this submission the Sheriff's Association referred to the fact that there were only sixteen independent sheriffs in Ireland. The specific role of the Sheriff was outlined in some detail. A case was made for the extension of the retirement age for sheriffs by reference to considerations summarised in the submission as including:

i. People in the workforce are working for longer as a result of increased longevity;
ii. The law protects against discrimination on grounds of age interfering with the right to work;
iii. Sheriffs do not receive a pension on retirement and must make provision for their own pension from their earnings;
iv. Coroners, as State office holders, have obtained an increase in their age of retirement from 70 to 72 by statutory amendment;
v. Sheriffs incurred significant losses for the years 2020/2021 due to the COVID-19 Pandemic and an extension to the retirement age would allow them to recoup such losses;
vi. The caselaw of the European Court of Justice with regard to Council Directive 200/78/EC demonstrates that a national law providing for automatic retirement upon reaching the age of 70 will be regarded as infringing the age discrimination provisions of the Directive unless the relevant provision can be objectively and reasonably justified by a legitimate employment policy/labour market objective;
vii. An extension to the retirement age of only sixteen sheriffs would have no impact on the labour market in the legal sector and would be at no cost to the State. The restriction of sixteen Sheriff office holders to a retirement age of 70 in circumstances where it has been government policy to suspend enforcement, thereby depriving them of their livelihood, does not pass the test of objectively and reasonably justified by a legitimate employment policy/labour market objective;
viii. Coroners are treated more favourably than sheriffs, an act of discrimination in itself.

9. A reply dated the 20th of April, 2021 was issued by email on behalf of the Respondent. While the response referred to additional financial support approved by the Department of Public Expenditure and Reform for a one-off doubling of the annual retainer fee paid to Sheriffs for that year (2021), it further stated that approval to extend the mandatory retirement age beyond the age of 70 years "*is not forthcoming*". This was explained as follows:

> *"The Department of Public Expenditure and Reform has explained that the standard compulsory retirement age in the public service was consolidated following the enactment of the Public Service Superannuation (Age of Retirement) Act, 2018, to the greatest extent possible, at the age of 70. This position represents current Government policy, and is a position which that Department seeks to implement in a consistent manner in order to protect the integrity of the policy."*

10. This reply is challenged in these proceedings as a "decision" which requires the Applicant to retire from his position as sheriff on reaching the age of 70 in May, 2022 and as constituting a failure to properly consider the need for legislative amendment to s. 12 of the 1945 Act to ensure compliance with the provisions of the Framework Directive.

STATUTORY FRAMEWORK AND COMPARATOR PROVISIONS

11. The office of High Sheriff was abolished by the Court Officers Act, 1926. This Act provided for the transfer of functions Under-Sheriff's. The Court Officers Act, 1945 created the office of Sheriff and provided, subject to a Ministerial Order, for the transfer of functions from any remaining Under-Sheriffs to the Sheriff and for the transfer of functions from County Registrars to Sheriffs.

12. Section 12(6) of the 1945 Act provides with regard to the office of sheriff as follows:

> *"12.—*
>
> ....
>
> *(6) The following provisions shall have effect in relation to the office of sheriff:—*

(a) the office of sheriff shall be non-pensionable and shall be held at the will and pleasure of the Government;

(b) the age of retirement from the office of sheriff shall be seventy years;

(c) every person appointed to the office of sheriff shall give security to such amount and in such manner as the Minister shall direct (either generally or in any particular case) for the due performance of his duties;

(d) every sheriff shall furnish to the Minister such annual or other returns and such accounts as the Minister shall from time to time direct, either generally or in any particular case;

(e) any officer of the Minister authorised in that behalf by the Minister shall be entitled at all reasonable times to enter the offices of any sheriff and thereupon to inspect the offices, to inquire into the work done therein, to examine the accounts of the sheriff, and to be furnished by the sheriff with any information in regard to such offices, work, or accounts which he may require;

(f) the same person may be appointed to be sheriff for a county borough and one or more adjoining counties or for two or more adjoining counties;

(g) the conditions of employment of every sheriff shall, subject to the foregoing provisions of this section, be such as the Minister for Finance, after consultation with the Minister, shall from time to time determine."

13. The mandatory retirement age is fixed under s.12(6)(b) and remains unchanged since 1945, with one exception.

14. Whilst the Court Officers Act, 1945 specified the retirement age for Sheriffs to be 70, in 1951 the then holder of the office of Sheriff in Dublin was allowed to remain in office until the age of 72. Section 6(2) of the Courts Officer Act, 1951 provided for the once off retirement age of 72 in respect of the said sitting sheriff in Dublin as follows:

*"**6.**—*

...

(2) Notwithstanding paragraph (b) of subsection (6) of section 12 of the Act of 1945, the age of retirement from the office of sheriff of the person holding the office

of sheriff of the county borough of Dublin on the date of the passing of this Act shall be seventy-two years.

15. Specific explanation has been provided in evidence for this one-off exception which was effected by statutory amendment in 1951.

16. Different measures regulate retirement ages across the public service. With the exception of "*fast accrual grades*" for whom special provision is made as more fully summarised below, public servants have been subject to compulsory retirements as follows:

i. The Civil Service Regulation Act, 1956 provided that civil servants were to retire in the normal course, at age 65 (although they could be required to retire from age 60 and their retirement age could be extended to age 70 or in the case of a non-established civil servant, age 75). Other public servants recruited prior to 2004 were generally subject to a compulsory retirement age of 65, either by individual employment contract or by the relevant pension scheme, some of which were established by way of statutory instrument.

ii. Public servants (including civil servants) recruited after 2004 were not subject to any compulsory retirement age by virtue of the Public Service Superannuation (Miscellaneous Provisions) Act, 2004. This continued to be the case until the enactment of the Public Service Pensions (Single Scheme and Other Provisions) Act, 2012.

iii. The Public Service Pensions (Single Scheme and Other Provisions) Act, 2012 introduced a compulsory retirement age of 70 for public servants recruited after the commencement date of that Act (s. 13(2)) but further provided for an extension beyond 70 by providing "*or such later age as may be determined by the Minister by order*".

iv. The Public Service Superannuation (Age of Retirement) Act, 2018 increased the compulsory retirement age of the majority of pre-2004 public servants to 70 with effect from the 26th of December, 2018.

17. The Public Service Superannuation (Age of Retirement) Act, 2018 provides at s. 3A(1) as follows:

"3A. (1) A relevant public servant shall retire from being a public servant at the latest upon attaining the age of 70 years or, where a higher age is prescribed by order under subsection (2), upon attaining that higher age."

18. Therefore, 70 is now the compulsory retirement age of those public servants subject to the 2018 Act, with the principal exception being those recruited between 2004 and 2012, who are not subject to any compulsory retirement age.

19. Under the terms of the 2018 Act, the mandatory retirement age of 70 was further extended widely throughout the public service and applies by virtue of amendments introduced under that Act to the Ombudsman, permanent members of the Dental Council, the Director General of the Environmental Protection Agency, the Comptroller and Auditor General, the Director of the National Disability Authority, the Chairperson and members of An Bord Pleanála, managers of local authorities, the Ombudsman for Children, the Language Commissioner, Permanent Officers of the Medical Council, an employee of the Nursing and Midwives Board, the Information Commissioner and the Data Protection Commissioner.

20. The retirement age for these public servants are not set in stone, however, to the extent that power is given under s. 3A of the 2018 Act to make an order prescribing a higher age than 70 having regard to the statutory criteria prescribed under s. 3A(3) Before making an order under s. 3A(3) of the 2018 Act, the Minister is required to have regard to:

"*(3) Before making an order under subsection (2), the Minister shall have regard to—*

(a) the likely effect of the order on recruitment, promotion and retention of staff in the public service as a whole,

(b) the pensionable age applicable at the time of making the order,

(c) any evidence of an increase in normal life expectancy in the State made available by the Central Statistics Office from time to time,

(d) the likely cost (if any) to the Exchequer that would result from the order,

(e) any order made under section 13(2) of the Act of 2012, and

(f) such other matters as the Minister considers appropriate."

21. Certain specific grades of public servant, due to the nature to their work, are subject to an earlier retirement age (and fast-accrual pension) as follows:

i. Members of An Garda Síochána who were recruited before April, 2004 are subject to a compulsory retirement age of 60 (extendable by up to 5 years in '*exceptional circumstances'*.), which is fixed by a number of statutory instruments. Members who were recruited post-1st of April 2004 are subject to a compulsory retirement age of 55 (extendable by up to 5 years subject to the ability to continue carrying out duties), pursuant s. 4 of the Public Service Superannuation (Miscellaneous Provisions) Act 2004. After April 2004, members are subject to a compulsory retirement age of 65 (with the potential to be extended by up to 5 years, subject to one's ability to carrying out duties). The Commissioner (with consent of the Minister) can extend the retirement age of a member of An Garda Síochána by up to 5 years where this is in the interests of the efficiency of that member due to their possession of special qualifications or experience.
ii. Prison Officers are required to retire at the age of 60.
iii. Firefighters are required to retire at the age of 55 years of age. This originated in policy decision rather than legislation, however, both the Public Service Superannuation (Miscellaneous Provisions) Act 2004 and s. 26 of the Public Service Pensions (Single Scheme and Other Provisions) Act 2012 defines a '*specified fire brigade employee'* as one whose conditions of employment are as determined by a local authority.
iv. Member of the Permanent Defence Force are required to retire between the ages of 50 to 55, depending on the rank or in some cases after 21 years of service, despite the member not attaining the age of 50.

22. Judges of the Superior Courts holding office on the date of commencement of the Court and Court Officers Act, 1995 [hereinafter the "1995 Act"] were subject to a retirement age of 72. Judges of the Superior Courts appointed after the commencement of the 1995 Act are required to retire at the age of 70. Circuit Court judges are also subject to a retirement age of 70 pursuant to the Courts [Supplemental Provisions] Act 1961. District Court judges were subject to a retirement age of 65, extendable to 70 by way of annual discretionary extensions until the commencement of the Courts Act, 2019 which increased the retirement age to 70.

Other Court Officers, including the Master of the High Court, Legal Costs Adjudicators and County Registrars are required to retire at the age of 70.

23. Coroners were subject to a retirement age of 70 pursuant to the Coroners Act, 1962 until the commencement of the Coroners (Amendment) Act, 2019 where s. 6 amended the retirement age from 70 to 72. Section 11 of the Coroners Act, 1962 (as amended in 2019) provides for a retirement age for coroners of 72 as follows:

> *"11.—(1) Every coroner appointed after the commencement of this Act shall, unless he sooner dies, resigns or is removed from office, hold office [until he or she attains the age of 72 years].*
>
> *(2) Subsection (1) of this section shall not apply to a coroner appointed after the commencement of this Act where the qualifications for his appointment were prescribed before such commencement.*
>
> *"(3) Where a coroner intends to resign or will vacate the office on attaining the age of 72 years], he or she shall give not less than 3 months notice of such intention or attainment to the Minister."*

24. The special provision for coroners is explained in evidence as being a response to the impact of the COVID-19 pandemic on the coroner system and for the purpose of providing a pool of potential coroners to hear a large number of delayed inquests. Section 7 of the Civil Law and Criminal Law [Miscellaneous Provisions] Act, 2020 provided for the appointment of Temporary Coroners who may hold office until the age of 75.

25. As apparent from the above summary, a retirement age of 70 for the Sheriff is in line with the general retirement age fixed for most public servants. The principal difference between the office of Sheriff and most other public servants is that the general retirement age has been revised upwards through more recent statutory amendment whereas the retirement age of the Sheriff has long been fixed at 70 and has remained unchanged, with one exception only, since 1945.

26. Notwithstanding the general retirement age for public servants being in line with that prescribed for the Sheriff, the Applicant relies on the case of the one sheriff for whom exception was made in 1951 and on the Coroner, as comparators in these proceedings.

PROCEEDINGS

27. The Applicant commenced these proceedings in July, 2021 (leave to proceed by way of judicial review was granted by order made on the 19th of July, 2021) in an endeavour to secure a determination as to the lawfulness of the said retirement age before May, 2022. In addition to a challenge to the decision of the Respondent not to pursue amendment of s. 12(6)(b) which decision was communicated by email on the 20th of April, 2021 as more fully outlined above, the Applicant seeks declaratory relief as to the unlawfulness of the mandatory retirement age fixed under s. 12(6)(b) of the 1945 Act. The mandatory retirement age set under s.12(6)(b) is challenged as unjustifiably discriminatory when compared with:

a) The *ad hoc* retirement age of 72 fixed pursuant to s. 6(2) of the Courts Officers Act, 1951 in respect of the Sheriff for Dublin at the time of the passing of that Act and;
b) The increase in the retirement age for Coroners from 70 to 72 effected by s. 6 of the Coroners (Amendment) Act, 2019 (amending s. 11 of the Coroners Act, 1962).

28. In response, the Respondent contends that the email of the 20th of April, 2020 does not convey a decision which is amenable to challenge by way of judicial review. The requirement to retire arises by operation of law pursuant to s. 12(6)(b) and not by reason of a decision of the Respondent. It is further contended that the Framework Directive has been transposed into Irish law by the Employment Equality Act, 1998 (as amended) and that therefore the appropriate forum for a complaint of age discrimination arising from the application of s. 12(6)(b) is the Workplace Relations Commission [hereinafter the "WRC"] and not the High Court in judicial review proceedings. The Respondent identifies the legitimate aims of s. 12(6)(b) as:

a) To allow for planning at the level of the individual and at the level of the organisation;
b) Creation of age balance in the workforce;

c) Personal and professional integrity;
d) Intergenerational fairness and;
e) Standardising the retirement age in the public service.

29. The Respondent relies on the Public Service Superannuation (Age of Retirement) Act, 2018 which provides a mandatory retirement age for public servants of 70. It is contended that the mandatory retirement measure is appropriate and necessary to the attainment of these aims and was determined following consultation with public service employers and employee representative bodies. The age was selected to allow attainment of the age upon which the State Contributory Pension becomes payable (66 at present) together with some additional years of employment. It is contended that the measure is proportionate. It is not applied in respect of those public servants who were not subjected to any retirement age on recruitment on the grounds that it would infringe the accrued rights and expectations of such persons (in particular, public servants recruited between 2004 and 2012). It is contended that special factors were relevant justifying the increase in the case of coroners.

30. When it was not possible to accommodate the proceedings with a hearing date in advance of May, 2022, the Applicant did not pursue injunctive relief (despite the inclusion of such a plea in his proceedings) but instead successfully applied to amend his Statement of Grounds to include a claim for damages for breach of EU law.

31. It was agreed by the parties that the question of damages should await the outcome in the first instance of a determination on the primary question as to the lawfulness of the mandatory retirement age fixed under s. 12(6)(b) of the 1945 Act.

EVIDENCE AS TO REASONS FOR AGE OF SEVENTY

32. Mr. McDonagh, XX in the Department of Justice, swore a lengthy affidavit in which he described, *inter alia*, the office of Sheriff, retirement ages generally within the public service and the reasons for the retirement age of seventy. Referring to contemporaneous Dáil debates he explained that when the Courts Officers Act, 1945, was passed, the retirement age of 70 was deemed to be the appropriate age for retirement which would allow sheriffs to provide for themselves, given that they did not enjoy a pension. He specifically referred to a Dáil debate

on Finance, Court Officer's Bill, 1945, on the 20th of June, 1945 during which one Deputy O'Connor is on record as having asserted that the object of the amendment is to provide that a sheriff shall be allowed to remain in office until he reaches the age of 70. He further explained that this is only fair and reasonable having regard to the fact that the office of the sheriff is non-pensionable. Deputy O'Connor maintained that if a sheriff could continue carrying out his duties, he should not be forced to retire at 65 years of age or be placed in the position of asking for an extension each year.

33. Mr. McDonagh further referred to a contribution in support of the amendment from one Deputy Cosgrave. Deputy Cosgrave in his contribution detailed a story in which he knew of a sheriff who was bound to retire at 65 and the Minister granted him a year's extension. Deputy Cosgrave maintained that this placed the sheriff in an "*unenviable position*" as his source of income was completely cut off and he was left in a "*poor financial position*" merely because he reached the age of 65. Deputy Cosgrave stated that officials in other capacities would get a pension and it was for this reason that he supported extending the age of retirement to 70.

34. As further set out on Affidavit on behalf of the Respondent, the record shows that one Deputy Boland also supported the amendment. He commented that "*I do not think it will make any difference*" were the Minister to extend the age of retirement to 70 in circumstances where the Minister already enjoyed a power to extend the retirement age to 70.

35. The position as regards the one Sheriff for whom an exception was made was also explained through reliance on the Dáil record and specifically an extract from the Dáil debates on the Court Officers Bill, 1950 (second stage) Dáil Eireann (13th Dáil) of the 15th of February, 1951, which reads as follows:

> *"Sub section (2) of Section 6 seeks to make provision of a purely ad hoc character in relation to the retiring age of the present Sheriff of the County Borough of Dublin, who is due to attain the age of seventy years in April next and who would then, as the law stands, have to vacate office. The present sheriff is the first holder of that new office which was created under the Act of 1945, having been appointed in that year to the office by the then Government. He has given very satisfactory service and, as he enjoys excellent health, both bodily and mentally, it is proposed that he should be retained in office until he reaches the age of seventy two, notwithstanding the provisions of Section*

12 of the 1945 Act. I do not think that this is a proposal to which the House is likely to raise any objection. I might mention, in order to anticipate a query as to be possible effect in other directions of the proposal, that there are only two other sheriffs and there are never likely to be more than four sheriffs in all, and the question of the retiring age in the case of these officers is not likely to arise again for another twenty five years. I suggest that what it is proposed to do now is, in these circumstances, not calculated to have any repercussions in other directions with which we, as all events, need to concern [ourselves]."

36. Mr. McDonagh further addressed on affidavit the developments in relation to pension ages since 1945. He referred to the fact that in 1995, the civil service superannuation scheme was integrated with the Pay Related Social Insurance (PRSI) system so that a simple servant commencing employment after 1995 would receive the Contributory State Pension (CSP). The CSP was introduced in 1961 with an age of eligibility of 70. During the 1970s, the age of eligibility was gradually reduced until it reached 66 years of age (where it currently stands.) In 1970, a retirement pension (subsequently renamed the State Pension (Transition)) was introduced for insured persons who were over the age of 65. This was then abolished with effect from January, 2014. In turn, the Social Welfare and Pensions Act 2011 provided for an increase in the state pension to 67 in January 2021 and to 68 in January 2028. However, the relevant provisions in the 2011 Act were repealed in December, 2020 which maintained the age of eligibility for the state pension at 66.

37. Mr. McDonagh explained that when the Public Service Pensions (Single Scheme and Other Provisions) Act, 2012 was passed, the reasons for a normal retirement age of 70 years of age was explained in a Dáil debate on the 21st of June 2012. Deputy Howlin explained that there are "*countervailing and strong argument that … there should be no age limit, people should work for as long as they like and are able to."* He examined the arguments for and against imposing a retirement age limit, stating that a retirement age to allow *"a horizon for people to plan a retirement and enter into a different pattern."* But in contrast to this, "*we should be making way for younger people at certain scales."* He also accepted that some categories of manual work cannot be done when people reach a certain age thus there needs to be a balance. He agreed that there should be an age limit and a retirement horizon and "*seventy years is about right*".

38. The record as relied upon by Mr. McDonagh on affidavit confirms that Deputy Howlin further considered the needs of people who reach a certain age reflecting on the fact that there is a requirement to obtain special medical certificates to drive a car and that eyesight dis-improves. At the same time, he acknowledged that healthcare has improved but there is a balance between being able to plan in a workforce for exits. He agreed that the retirement age should be set at 70.

39. Deputy Howlin continued, on the record, to state that there are 2 distinct lines of thought. On the one hand there is a view that there should be no age limit for people who are robust and wish to continue to work. On the other hand, legislation should be enacted on the *"ending of the period of work and entry into an easier lifestyle and the implications of this for workforce planning, movement within the workforce and accessibility for younger people so that we have a proper age profile in the workforce"*. He accepted that there is no right answer to this. He noted that there is validity in saying that there should be a horizon that people can work towards so that they know and plan for a different lifestyle. He identified that this is a real issue as many people fall into retirement rather than planning for it. While acknowledging that there are those who believe that specifying a compulsory retirement age may be ageist, his view was that 70 is a reasonable age for retirement and this matter should not be left "*open-ended*" as some level of planning is required. Indeed, planning purposes seemed to be the most pressing factor for Deputy Howlin. He stated that it is very difficult to plan where there is no finality. He concluded that "*the vast majority wanted to hang up their boots well before that age and we'd like to see the horizon".*

40. Mr. McDonagh further referred to consultation had with regard to the public service retirement age and specifically the fact that in 2016, the State carried out a process culminating in a report entitled '*Interdepartmental Group on Fuller Working Lives'*. On foot of that Report, the Department of Public Expenditure and Reform, with Public Service employers, was tasked to review the current statutory and operational considerations giving rise to barriers to extended participation in the public service workforce up to and including the current and planned age of entitlement to the Contributory State Pension. Mr. McDonagh confirmed that this report informed the enactment of the Public Service Superannuation (Age of Retirement) Act, 2018 which increased the compulsory retirement age of the majority of pre-2004 public servants to 70 with effect from December, 2018.

41. As more fully set out on affidavit on behalf of the Respondent, another Dáil debate took place on the 25th October 2018 leading to the enactment of the 2018 Act. During that debate Minister for State at the Department of Finance, Michael D'Arcy stated that selecting the age of 70 as the new compulsory retirement age followed "*extensive discussions*" with public service employers. He reasoned that the age of 70 aligns the potential working horizon for a public servant with the increasing age of eligibility for the state pension; it allows people to work beyond that age should they wish to do so; it helps to bring about a consistency in retirement age in the public service by matching the compulsory retirement age of the pre-2004 public servants with that of single scheme members. Speaking in the Dáil Minister Michael Darcy, stated:

> *"selecting the age of 70 not only aligns the potential working horizon for a public servant with the increasing age of eligibility for the state pension, it allows people to work beyond that age [i.e. the age of eligibility for the state pension] should they wish to do so."*

42. Mr. McDonagh draws the conclusion from this that it appears that when selecting 70 as the new mandatory retirement age across the public service more generally, regard was had to the increasing age of eligibility for the state age related pension by picking an age which was higher than the eligibility age for a state pension.

43. Referring to the response to correspondence from the Sheriff's Association, Mr. McDonagh averred that on the application by the association of sheriffs for an increase in the retirement age, it had been explained by e-mail dated the 20th of April, 2021, that the standard retirement age in the public service was consolidated following the enactment of the Public Service Superannuation (Age of Retirement) Act, 2018 *"to the greatest extent possible at the age of 70."* Mr. McDonagh confirmed that this position represented current government policy and is a position which the Department of Public Expenditure and Reform sought to implement in a consistent manner in order to protect the integrity of the policy.

44. Mr. McDonagh then proceeded to address the fact that while the general policy apparent from the foregoing is to implement a retirement age of 70, this is not universally applied. He explained that public servants recruited between 2004 and 2012 are not subject to any

retirement age as this would be in breach of their accrued rights and expectations. Similarly, he explained, the retirement age for coroners was extended from 70 to 72 in 2019 pursuant to s. 6 of the Coroners (Amendment) Act, 2019. He deposed on behalf of the Respondent that the reason advanced to justify the increase in age by two years was for the purposes of retaining experience and expertise within the coroner system. He also placed reliance was on the fact that a number of coroners also hold General Medical Scheme contracts (circa 50%) under which they are subject to a retirement age of 72. He maintained that the situation of Coroners was subject to further special provision by an amendment introduced under s. 7 of the Civil and Criminal Law (Miscellaneous Provisions) Act, 2020 in response to the COVID-19 pandemic and the backlog in cases which accrued by reason of the Pandemic.

REQUIREMENTS OF EU LAW - COUNCIL DIRECTIVE 2000/78/EC

45. The Applicant contends that a mandatory retirement age of 70 is in breach of EU law and specifically the Framework Directive. The Framework Directive became directly applicable in this jurisdiction on the 2nd of December, 2003 (although the time period for adoption was extended to 2nd of December, 2006 for the provisions dealing with age) and has been implemented in Irish law through the provisions of the Employment Equality Act, 1998 (as amended).

46. Recitals 4, 6, 8, 9, 11 to 14, 25 and 36 to the Framework Directive provide the general context of the Directive and, insofar as relevant for present purposes, state as follows:

> *"(4) The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.*
>
> ...

(6) The Community Charter of the Fundamental Social Rights of Workers recognises the importance of combating every form of discrimination, including the need to take appropriate action for the social and economic integration of elderly and disabled people.

...

(8) The Employment Guidelines for 2000 agreed by the European Council at Helsinki on 10 and 11 December 1999 stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with disability. They also emphasise the need to pay particular attention to supporting older workers, in order to increase their participation in the labour force.

(9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential.

...

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

(12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community. ...

(13) This Directive does not apply to social security and social protection schemes whose benefits are not treated as income within the meaning given to that term for the purpose of applying Article 141 of the EC Treaty, nor to any kind of payment by the State aimed at providing access to employment or maintaining employment.

(14) This Directive shall be without prejudice to national provisions laying down retirement ages.

...

(25) 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.

...

(36) Member States may entrust the social partners, at their joint request, with the implementation of this Directive, as regards the provisions concerning collective agreements, provided they take any necessary steps to ensure that they are at all times able to guarantee the results required by this Directive."

47. Article 1 of the Framework Directive states the purpose of the Directive as follows:

"[t]he purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

48. Article 2 of the Framework Directive 2000/78, under the heading '*Concept of discrimination*' states, in paragraphs (1) and (2)(a):

"1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1".

49. There is no dispute that the Framework Directive applies to both public and private sectors in relation to conditions for access to employment, self-employment or to occupation and it is not suggested in these proceedings that the Directive has no application. The material scope of the Framework Directive is set out in Article 3(1) of the Directive. Article 3(1) provides:

"Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(c) employment and working conditions, including dismissals and pay…"

50. The Framework Directive permits different treatment on grounds of age in accordance with Article 6 of the Directive which provides, under the heading '*Justification of differences of treatment on grounds of age*', 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 of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

(b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment;

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.

2. Notwithstanding Article 2(2), Member States may provide that the fixing for occupational social security schemes of ages for admission or entitlement to retirement or invalidity benefits, including the fixing under those schemes of different ages for employees or groups or categories of employees, and the use, in the context of such schemes, of age criteria in actuarial calculations, does not constitute discrimination on the grounds of age, provided this does not result in discrimination on the grounds of sex."

51. Article 16 of the Framework Directive, under the heading 'Compliance', provides:

"Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended."

52. It is no part of the Applicant's case that the State has failed to transpose the Framework Directive. Section 34(4) of the Employment Equality Act, 1998 (as substituted by s. 10 of the Equality (Miscellaneous Provisions) Act, 2015 provides, in line with Article 6 of the Directive, as follows:

> *"(4) Without prejudice to subsection (3), it shall not constitute discrimination on the age ground to fix different ages for the retirement (whether voluntarily or compulsorily) of employees or any class or description of employees if—*
>
> *(a) it is objectively and reasonably justified by a legitimate aim, and*
>
> *(b) the means of achieving that aim are appropriate and necessary."*

53. It is therefore clear that as a matter of EU and Irish law different treatment on grounds will not constitute discrimination on age grounds where a test of objective and reasonable justification linked to a legitimate aim is identified and the means of achieving that aim are appropriate and necessary.

DISCUSSION AND DECISION

54. There is a body of caselaw from the CJEU in relation to the application of the Framework Directive which is relevant to the substantive issue raised in these proceedings and is instructive. I propose first, however, to address in turn whether the decision of the 20th of April, 2020 is amenable to challenge by way of judicial review, whether the challenge to s. 12(6)(b) of the 1945 Act should be pursued before the WRC rather than by way of judicial review before turning, on the basis of my conclusion that the challenge may be maintained by way of judicial review, to consider whether the mandatory retirement age fixed for sheriffs falls foul of the requirements of the Framework Directive as interpreted by the CJEU.

Is the Decision of 20th of April, 2020 Amenable to Challenge by way of judicial Review?

55. While the Applicant accepts that it would ultimately be a matter for the Oireachtas to enact legislation to amend the Act of 1945, it is contended that the failure by the Minister to properly interpret Government policy as regards the setting of higher mandatory retirement

ages for non-pensionable statutory office holders such as the Applicant and to pursue amending legislation, upon a request from the Sheriff's Association and on foot of submissions from them, constitutes a decision which may be made amenable to judicial review. In this regard reliance is place on the U.K case of *Regina v. Secretary of State for Employment ex Parte Equal Opportunities Commission and Another* [1995] 1 AC 1.

56. The "*decision*" to introduce or not introduce amending legislation is one which falls exclusively within the remit of the members of the Houses of the Oireachtas. Several authorities were identified on behalf of the Respondent to support a conclusion that decisions as to whether to amend legislation or not are not justiciable *qua* decision. I am satisfied that to the extent that the Respondent declined to pursue a legislative amendment as requested by the Sheriff's Association, this is not constitute a decision which might be made the subject of an order of *certiorari*. It is no more than an invocation of or reliance on the existing statutory position when the real object of attack is the provisions themselves. Whether the absence of amending legislation results in a failure to comply with EU law, justiciable as such and grounding a jurisdiction to grant injunctive or declaratory relief or damages, is a separate matter.

57. The High Court does not lose its jurisdiction to grant declaratory relief where the Court could not also make a "*prerogative*" order. Indeed, as recalled by Lord Keith of Kinkel in *Regina v. Secretary of State for Employment ex Parte Equal Opportunities Commission and Another* [1995] 1 AC 1, the seminal decisions in *Secretary of State for Transport, Ex Parte Factortame Ltd.* [1990] 2 AC 85; *Reg. v. Secretary of State for Transport, Ex Parte Factortame Ltd* (No. 2)(C-213/89)[1991] 1 AC 603 and *Reg. v. Secretary of State for Transport, Ex Parte Factortame Ltd.* (No. 3)(c-221/89)[1992] QB 680, provide clear precedent for declaratory relief as to the compatibility of legislation with European Union law being obtained in judicial review proceedings but without any prerogative order being available. It is clear to me that I have a jurisdiction to grant declaratory relief in judicial review proceedings in relation to the compatibility of primary legislation with the requirements of EU law, whether there also exists a decision which might be made amenable to judicial review or not.

Should the challenge to s. 12(6)(b) be pursued before the WRC rather than by way of judicial review proceedings?

58. It has been argued in reliance on the decision of the Court of Appeal in *Byrne v. Minister for Defence* [2019] IECA 338 and *O'Domhnaill v. HSE* [2011] IEHC 421 that I should not deal with the complaint of discrimination made and that the complaint should properly have been pursued before the WRC, it being the mechanism for enforcement provided by law pursuant to the provisions of the Employment Equality Act, 1998 (as amended). Section 77 of the Act provides:

> *"77.(1) A person who claims—*
>
> > *(a) to have been discriminated against or subjected to victimisation,*
> >
> > *(b) to have been dismissed in circumstances amounting to discrimination or victimisation,*
> >
> > *(c) not to be receiving remuneration in accordance with an equal remuneration term, or*
> >
> > *(d) not to be receiving a benefit under an equality clause,*
> >
> > *in contravention of this Act may, subject to subsections (3) to (9), seek redress by referring the case to the Director General of the Workplace Relations Commission.*
>
> *(2) ...*
>
> *(3) If the grounds for such a claim arise—*
>
> > *(a) under Part III, or*
> >
> > *(b) in any other circumstances (including circumstances amounting to victimisation) to which the Equal Pay Directive or Equal Treatment Directive is relevant,*

then, subject to subsections (4) to (9), the person making the claim may seek redress by referring the case to the Circuit Court instead of to the Director General of the Workplace Relations Commission.

(4) In this Part, in relation to a claim referred under any provision of this section—

(a) 'the complainant' means—

(i) the person by whom it is referred, or

(ii) where such a person is unable, by reason of an intellectual or a psychological disability, to pursue it effectively, his or her parent, guardian or other person acting in place of a parent, and]

(b) "the respondent" means the person who is alleged to have discriminated against the complainant or, as the case may be, who is responsible for providing the remuneration to which the equal remuneration term relates or who is responsible for providing the benefit under the equality clause or who is alleged to be responsible for the victimisation.

(5)

(a) Subject to paragraph (b), a claim for redress in respect of discrimination or victimisation may not be referred under this section after the end of the period of 6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence.

(b) On application by a complainant the Director General of the Workplace Relations Commission or Circuit Court, as the case may be, may, for reasonable cause, direct that in relation to the complainant paragraph (a) shall have effect as if for the reference to a period of 6 months there were substituted a reference to such period not exceeding 12 months as is specified in the direction; and, where such a direction is given, this Part shall have effect accordingly.

(c) This subsection does not apply in relation to a claim not to be receiving remuneration in accordance with an equal remuneration term.

(6) Where a delay by a complainant in referring a case under this section is due to any misrepresentation by the respondent, subsection (5)(a) shall be construed as if the references to the date of occurrence of the discrimination or victimisation were references to the date on which the misrepresentation came to the complainant's notice.

(6A) For the purposes of this section—

(a) discrimination or victimisation occurs—

(i) if the act constituting it extends over a period, at the end of the period,

(ii) if it arises by virtue of a term in a contract, throughout the duration of the contract, and

(iii) if it arises by virtue of a provision which operates over a period, throughout the period,

(b) a deliberate omission by a person to do something occurs when the person decides not to do it, and

(c) a respondent is presumed, unless the contrary is shown, to decide not to do something when the respondent either—

(i) does an act inconsistent with doing it, or

(ii) the period expires during which the respondent might reasonably have been expected to do it.

(7) Where the complainant's claim for redress is in respect of discrimination—

(a) by the holder of a recruitment licence under the Public Service Management (Recruitment and Appointments) Act 2004 in the course of such a recruitment or selection process as is referred to in section 76(5)(a),

(b) by the Minister for Defence in the course of a recruitment process for the Defence Forces, or

(c) by the Commissioner of the Garda Síochána in the course of a recruitment process for the Garda Síochána,

*the complainant shall in the first instance refer the claim for redress to the holder of the recruitment licence concerned or, as the case may be, to the Minister for Defence or the Commissioner of the Garda Síochána…***…**

(8) Where subsection (7) applies to a claim for redress in respect of discrimination, the complainant may not refer the case under subsection (1) or (3) unless—

(a) the holder of the recruitment licence concerned or, as the case may be, the Minister for Defence or the Commissioner of the Garda Síochána have failed to give a decision on the claim on or before the twenty-eighth day after it was referred, or

(b) the complainant is not satisfied with the decision given on the claim,

and in a case to which paragraph (a) or (b) relates, the end of the period of time which is applicable under subsection (5) (including, where appropriate, applicable under that subsection by reference to subsection (6)) shall be construed as—

(i) the end of that period, or

(ii) the end of the period of 28 days from the expiration of the period referred to in paragraph (a) or the date of the decision referred to in paragraph (b),

whichever last occurs.

(9) Where a claim for redress under this Act (other than on the age or disability ground)—

(a) relates to employment in the Defence Forces, and

(b) is made by a member thereof,

the claim shall, in the first instance, be referred for redress under the procedure set out in section 104.

(10) Where subsection (9) applies to a claim for redress, the complainant shall not refer a case under subsection (1) or (3) unless—

(a) a period of 12 months has elapsed after the referral under section 104 to which the claim relates and the procedures under section 104(2)(a) have not been requested or have not been completed, or

(b) the complainant is not satisfied with the recommendation given under section 104(2)(b) on the claim,

and in a case to which paragraph (a) or (b) relates, the end of the period of time which is applicable under subsection (5) (including, where appropriate, applicable under that subsection by reference to subsection (6)) shall be construed as—

(i) the end of that period, or

(ii) the end of the period of 28 days from the expiration of the period referred to in paragraph (a) or the date of the recommendation referred to in paragraph (b),

whichever last occurs.

(11) A party to any proceedings under this Act before the Director General of the Workplace Relations Commission or Labour Court may be represented by any individual or body authorised by the party in that behalf.

(12)

(a) Not later than 42 days from the date of a decision of the Director General of the Workplace Relations Commission on an application by a complainant for an extension of time under subsection (5), the complainant or respondent may appeal against the decision to the Labour Court on notice to the Director

General of the Workplace Relations Commission specifying the grounds of the appeal.

(b) On the appeal the Labour Court may affirm, quash or vary the decision.

(c) Unless otherwise agreed by the complainant and respondent, effect shall not be given to a decision of the Director General of the Workplace Relations Commission on such an application until—

(i) the period of 42 days mentioned in paragraph (a) has expired, or

(ii) any appeal against it has been determined,

whichever first occurs.

(13) This section is subject to section 104."

59. It is clear from the foregoing that the 1998 Act (as amended) established a specific statutory scheme for the adjudication of complaints of discrimination which includes an appeal from the WRC to the Labour Court. Section 82 lays down the various forms of redress that may be ordered by the WRC. The WRC may make orders, *inter alia*, for compensation for discrimination, for equal treatment in whatever respect is relevant to the case or directing that the person specified in the order take a course of action which is specified or for reinstatement or reengagement. It would seem therefore that the WRC has wide-ranging powers but it has no power to declare s. 12(6) to be incompatible with the Framework Directive. Section 90 of the 1998 Act provides further for an appeal from a decision of the Labour Court on a point of law. While it was contended on behalf of the Applicant that he could not have brought a complaint under the 1998 Act at the time proceedings were instituted because he had not yet been discriminated against, I do not accept that this is correct. It seems to me that a complaint of discrimination could have been maintained under s. 77(6A)(b)((ii) at any time throughout the duration of the contract where the alleged discrimination arises by virtue of a provision of the contract. Accordingly, it seems to me that there was indeed a statutory remedy available to the Applicant which he failed to exhaust before pursuing these proceedings.

60. In *O'Domhnaill*, Laffoy J. held that as there was a specific statutory scheme provided for in the Protection of Employees (Fixed Term Work) Act, 2003 (the Act of 2003) for adjudication of complaints of infringement of an employee's statutory rights conferred by that Act and the statutory scheme makes provision for the involvement of the High Court only on questions or points of law, and which provides a mechanism for obtaining a court order which can be executed to enforce a determination of the Labour Court, then the High Court should not entertain separate applications to enforce rights. However, in so holding she emphasised that it was the complaint of infringement of a statutory right conferred by that Act which must be initiated in accordance with the procedure provided for under the statutory scheme. Laffoy J. ruled that the Court did not have jurisdiction to determine the statutory element of the plaintiff's claim. Of note, however, the High Court was not asked in *O'Domhnaill* to determine the lawfulness of different treatment based on alleged breach of rights occasioned by a statutory provision. Similarly, in *Byrne v. Minister for Defence*, the plaintiff pursued a remedy in reliance on her rights pursuant to contract as opposed to the disputed lawfulness of a statutory provision.

61. It seems to me that this case can be distinguished from *Byrne v. Minister for Defence O'Domhnaill v. HSE* [2011] IEHC 421 because of the nature of the impugned provision (statutory as opposed to merely contractual) and because of the nature of the relief claimed. In particular, insofar as a declaration is sought in this case that s. 12(6)(b) is null and void as incompatible with the Framework Directive, it is clear that this type of relief could not be obtained from the WRC or the Labour Court on appeal nor indeed on an appeal on a point of law. The extent of the powers of the WRC in adjudicating on a complaint of age discrimination and any appellate jurisdiction exercisable in respect of the WRC adjudication would be to disapply the provision in the individual case, but the provision would continue to exist.

62. If authority is needed for this conclusion, then it seems to me that there is a parallel between the case of *Donnellan v. Minister for Justice, Equality and Law Reform & Ors.* [2008] IEHC 467 and the relief claimed therein with the within proceedings. The Framework Directive was considered by the High Court in that case which concerned a challenge to the compulsory retirement age of 60 prescribed for Assistant Commissioners of An Garda Síochána. In that case it was noted in the judgment that the Plaintiff had lodged a claim with

the Equality Tribunal under the Employment Equality Act, 1998 (as amended) but that this had no bearing on the case before the High Court which turned on two questions, namely, the *vires* of regulations which introduced a mandatory retirement age and the compatibility of the regulations with the Directive.

63. Despite the existence of a complaint before the Equality Tribunal in *Donnellan*, the High Court saw no jurisdictional impediment to deciding the question of compatibility with the Framework Directive. It is true, however, that the jurisdiction of the WRC to disapply incompatible provisions of domestic law has been more clearly established since the decision in *Donnellan* with the result that it may not be safe to rely on the fact that the Court accepted that it had jurisdiction at that time. It is possible that a different view might be reached in light of the more expansive jurisdiction of the WRC as found in *Case C – 378/17 Minister for Justice and Commissioner of An Garda Siochana v. Workplace Relations Commission*.

64. In that case, the Supreme Court referred a question to the CJEU on the premise that the WRC lacked jurisdiction to disapply provisions of national law that it considers to be contrary to EU law. The Supreme Court had found that as a matter of national law the jurisdiction to hear cases relating to equality in employment was shared between the WRC, which had jurisdiction in most cases, and the High Court which has jurisdiction when upholding an application would require, *inter alia*, disapplying rules of national law that conflict with EU law. In its decision the CJEU stated (para. 33):

> *"In that regard, it should, first of all, be pointed out, as the Advocate General has noted in point 45 of his Opinion, that a distinction must be drawn between the power to disapply, in a specific case, a provision of national law that is contrary to EU law and the power to strike down such a provision, which has the broader effect that the provision is no longer valid for any purpose."*

65. The Court concluded (at para. 50):

"It follows from the principle of primacy of EU law, as interpreted by the Court in the case-law referred to in paras 35 to 38 of the present judgment, that bodies called upon, within he exercise of their respective powers, to apply EU law are obliged to adopt all the measures nece3ssary to ensure that EU law is fully effective, disapplying if need be any national provisions or national case-law that are contrary to EU law. This means that those bodies, in order to ensure that EU law is fully effective, must neither request nor await the prior setting aside of such a provision or such case-law by legislative or other constitutional means."

66. The Court added (para. 51):

"Consequently, the fact, highlighted by the referring court, that in the present instance national law permits individuals to bring an action before the High Court founded on the alleged incompatibility of a national provision with Directive 2000/78 and allows the High Court, if it upholds the action, to disapply the national provision at issue is not capable of calling the above conclusion into question".

67. Two points emerge from the foregoing:

1. The WRC has jurisdiction to disapply a provision of national law where necessary to uphold a complaint of employment discrimination; and

2. The High Court retains its jurisdiction to determine applications before it founded on the alleged incompatibility of a national provision with the Framework Directive and the High Court, if it upholds the action, has jurisdiction to disapply the national provision at issue generally.

68. There has been no consideration, subsequent to the decision of the CJEU in *Case C – 378/17 Minister for Justice and Commissioner of An Garda Siochana v. Workplace Relations Commission,* as to whether the expanded jurisdiction of the WRC as clarified in that decision requires that an application be made under the statutory scheme rather than in reliance on the

wider jurisdiction of the High Court. I note that in *Regina v. Secretary of State for Employment Ex Parte Equal Opportunities Commission and Anor* [1995] 1 AC 1 which was cited in argument for other purposes, that the claim of the individual who had been joined in the application to Court brought by the Equal Opportunities Commission was dismissed on the basis that her claim against her employers was a private law claim which could be enforced in the appropriate industrial tribunal. In understanding the *ratio* of that decision, however, it is relevant that the individual claimant (one Ms. Day) had a claim pending before the relevant tribunal independently of the action commenced by the Equal Opportunities Commission challenging primary legislation as incompatible with EU law. In finding that the individual "*purely private claim*" had been improperly joined to the proceedings brought by the Equal Opportunities Commission, the House of Lords determined that her private claim fell to be determined by the appropriate industrial tribunal but did not decline to determine the proceedings brought by the Equal Opportunities Commission. In proceeding to determine the question of the compatibility of primary legislation with EU law raised by the Equal Opportunities Commission in the proceedings, the House of Lords also rejected a locus standi point which had been taken against the Equal Opportunities Commission. It appears that the joinder of the individual claim, which had already been commenced before the industrial tribunal, occurred in circumstances where the locus standi of the Equal Opportunities Commission to maintain proceedings challenging the legislation as discriminatory was in question.

69. I am satisfied that the constitutional order under which the High Court is vested with full original jurisdiction in and power to determine all matters whether of law or fact, civil or criminal and extending to the question of the validity of any law having regard to the provisions of the Constitution under Article 34 of the Constitution, as relied upon by the Supreme Court in *Case C 378/17 Minister for Justice and Commissioner of An Garda Síochána v. Workplace Relations Commission* [2018], means that the effect of the decision of the CJEU is that the High Court retains the jurisdiction, acknowledged by the Supreme Court in referring the question, which is a wide power to declare a provision unlawful with consequential suspensive effect, while the WRC has a parallel but more limited jurisdiction to disapply the offending provision in upholding a complaint before it. The jurisdiction of the High Court to grant relief arising from its' jurisdiction to grant an order of *certiorari* or declaratory relief, as sought in these proceedings, has not been removed by the existence of a separate statutory remedy.

70. If I am correct in this view, the Applicant could have made a complaint to the WRC and the WRC has power to disapply a statutory provision such as s. 12(6) in order to uphold a complaint before it but the provision would remain on the statute books and would not be voided or nullified generally. It seems to me that the remedies are neither mutually exclusive nor mirror remedies. Given a dual jurisdiction to deal with the Applicant's complaint recognised by the CJEU in *Case C – 378/17 Minister for Justice and Commissioner of An Garda Siochana v. Workplace Relations Commission*, I am satisfied that in a case of this nature the Applicant could properly elect to pursue the wider relief claimed in the judicial review proceedings notwithstanding that a remedy was also available to him before the WRC and I have jurisdiction to determine the application.

71. Of course, where an alternative remedy exists, the question of a discretion to refuse to consider the application arises and involves consideration of the effectiveness of the alternative remedy. Insofar as the Court enjoys a discretion in judicial review proceedings such as these because of the existence of an alternative remedy, it seems to me that an important factor in this case is that the Applicant sought to expedite proceedings to secure a determination in advance of May, 2022 in circumstances where an appeal to the Labour Court and from there to the High Court on a point of law lies in any event from a decision of the WRC. Had the Applicant instead elected to proceed before the WRC in the event of an appeal from a decision of the WRC, there was likely to be attendant delay. It is also relevant to the exercise of a discretion to permit a claim to proceed by way of judicial review that it is clear that the Sheriff's Association supports the Applicant's position in maintaining these proceedings and that declaratory relief of the type sought could obviate the necessity for other sheriffs to pursue individual actions. Further, the Applicant in commencing proceedings prior to his retirement age proceeded on the basis that a complaint before the WRC was vulnerable to an argument, which I do not consider to be correct for the reasons set out above, that proceedings were pre-mature insofar as he had not yet been required to retire by reason of a mandatory retirement age. In all of the circumstances, I would not refuse to determine the substantive issue of the compatibility of the mandatory retirement age prescribed under s. 12(6) of the 1945 Act raised in these proceedings on discretionary grounds.

72. Accordingly, I am satisfied that the Applicant is entitled to pursue declaratory relief regarding the lawfulness of the provision, this being a more far-reaching remedy than that which could be afforded by the WRC through a disapplication of the provision in the particular case but with the result that the provision would remain in force.

Is the measure compatible with EU law?

73. The CJEU has ruled that it is clear from the title, preamble, content and purpose, that the Framework Directive is designed to lay down a general framework in order to guarantee equal treatment '*in employment and occupation'* to all persons, by offering them effective protection against discrimination on one of the grounds covered by Article 1, which includes age. It has been found to follow from Article 3(1)(c) of the Framework Directive that it applies, within the framework of the competence conferred on the Community, '*to all persons … in relation to employment and working conditions, including dismissals and pay'* (See Case C-411/05 *Felix Palacios de la Villa v. Cortefiel Servicios SA).* While the Framework Directive prohibits discrimination on age grounds, as set out above, Article 6 of the Directive provides for circumstances where a difference of treatment on age grounds shall not constitute discrimination. Article 6 provides that different 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.

74. So, although Recital 14 in the preamble to the Framework Directive states that the Directive is without prejudice to national provisions laying down retirement ages, the CJEU has found that recital merely states that the Directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that Directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached (see *Felix Palacios de la Villa case).* Any doubts in this regard are laid to rest by the decision in *Donnellan v. Minister for Justice & Ors*. [2008] IEHC 467 where McKechnie J. stated (paras. 67-68):

"I would hold, relying upon first principles, that such a construction would be inherently incompatible with the whole purpose, thrust and tenor of the Directive. Given the significance of furthering the principle of equality and noting the steps taken at community level to implement this, it would seem almost self-defeating, to allow member states to disregard the Directive, by such simple means as fixing compulsory retiring ages. It would matter not at what particular age the threshold was set, or whether there was any or any legitimate justification therefor. Once on the statute books the effect would be to bypass the Directive. I could not hold that this was either the intention of the Directive or indeed its effect.

68. In addition, I entirely disagree that the Palacios decision can be distinguished in such a manner so as to neutralise the effect of para. 44 of the Court's judgment. In my view the real challenge in the case was to a compulsory retiring age which was both recognised and enforceable in the domestic laws of that state. The fact that its foundation lay directly within the collective agreement does not in any way take from the primacy of the point. I therefore believe that Palacios is a direct authority on Recital 14 and, since it accords with my own interpretation as to the placement of that Recital, I would respectfully follow it. Therefore, having regard also to the next succeeding paragraph, I am satisfied that the Directive applies to the Regulations under review in this action."

75. McKechnie J. expressed in no uncertain terms (para. 79) that the imposition of a mandatory retirement age is discriminatory, *per se*, under the Framework Directive in that it places one person at a disadvantage to another, who would otherwise be in the same situation, on the grounds of age alone. It is crystal clear from his judgment that to be lawful any such different treatment on grounds of age must serve a legitimate aim or purpose and the means taken to achieve that purpose must be appropriate and should go no further than is necessary.

76. McKechnie J. summarised the effect of the Framework Directive at para. 71 of his judgment in *Donnellan* as follows:

"71. The effect of the Directive, in these circumstances, can thus be summarised:-

i) In pursuit of its purpose to implement the principle of equal treatment in employment and occupation, it prohibits direct and indirect discrimination on any of the discriminatory grounds which include age.

ii) "Direct discrimination" for this purpose occurs where by reason of age one person is treated less favourably than another in a comparable situation (Article 2).

iii) If a national law provides for differences in treatment between comparable persons on the grounds of age, such inequality will not necessarily be prohibited if the differences are objectively and reasonably justified, by reference to a legitimate aim such as legitimate employment policy, labour markets and vocational training objectives, and if the means used are appropriate and necessary (article 6).

iv) Member States have a broad discretion in their choice of identifying the aim(s) to be pursued and the means or measures to implement such (Recital 25). These can be identified by reference to political, economic, social, demographic and budgetary considerations, provided overall the effect of the Directive is not put in peril:Mangold [2005] ECR I-9981.

v) Member States shall, without prejudice to the Directive, have the power to fix retiring ages (Recital 14).

vi) Member States are not obliged under the provisions of the Directive to recruit, or maintain in employment, persons in the police, prison or emergency services who lack the capacity to perform the required service: this derogation supports the legitimate objective which a Member State may have in preserving the operational capacity of these services (Recital 18)."

77. As in the *Felix Palacios de la Villa* and *Donnellan* cases, the legislation at issue in these proceedings, which permits the automatic termination of an employment relationship concluded between an employer and a worker once the latter has reached the age of 70, affects the duration of the employment relationship between the parties and, more generally, the engagement of the worker concerned in an occupation, by preventing his future participation in the labour force as sheriff. Consequently, legislation of this kind must be regarded as

establishing rules relating to *'employment and working conditions, including dismissals and pay'* within the meaning of Article 3(1)(c) of Directive 2000/78 and therefore comes within the scope of the Directive.

78. Accordingly, there is no doubt that the mandatory retirement age is discriminatory on age grounds as per McKechnie J. in *Donnellan* unless it can be brought within Article 6 of the Framework Directive as transposed by s. 34(4) of the 1998 Act (as amended). The core question for me is whether it is demonstrated that the mandatory retirement measure contained in s. 12(6)(b) of the 1945 Act is objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and whether the means of achieving that aim are appropriate and necessary.

79. It is established that the burden of proof in justifying an otherwise discriminatory measure is on the Respondents. The CJEU, in the case of *Regina, on the Application of the Incorporated Trustees of the National Council for Aging (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform* held that:-

> *"Article 6(1) of Directive 200/78 ...imposes on Member States the burden of establishing to a high standard of proof the legitimacy of the aim relied on as a justification."*

80. Accordingly, I must be satisfied in these proceedings that the Respondents have adduced evidence which clearly establishes the legitimacy of the aims identified as justification.

81. Turning then to the measure in question here. There is no direct assistance to be derived from the terms of the 1945 Act which introduced the impugned measure. The lack of precision in the national legislation at issue as to the aim pursued does not automatically exclude the

possibility that it may be justified under that provision. In *Joined Cases C-159/10 and C-160/10 Fuchs and Kohler v. Land Hessesn* [2011] ECR 1-06919 the CJEU stated (at para. 39):

> *"the Court has repeatedly held that it cannot be inferred from Article 6(1) of Directive 2000/78 that the lack of precision in the legislation at issue as regards the aim pursued automatically excludes the possibility that it may be justified under that provision. In the absence of such precision, it is important that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary".*

82. Thus, while the burden of establishing that the measure is objectively and reasonably justified by a legitimate aim is on the Respondents, it is established (in cases such as *Felix Palacios de la Villa and Fuchs and Kohler*) that it is not necessary for the measure itself to expressly refer to an objective of that kind. Furthermore, where the measure is one which is of some antiquity, it is significant that the fact that the context in which the law was adopted may have changed leading to an alteration of the aim of that law has also been found not, by itself, to preclude that law from pursuing a legitimate aim within the meaning of Article 6(1) of the Directive (*Fuchs and Kohler,* para. 41). It is therefore not determinative, for example, that the impugned measure was introduced at a time when life expectancy and health considerations were such that the fixing of the retirement age at 70 was more readily objectively justifiable than in the modern day. What is relevant is whether the measure continues to serve an identifiable legitimate aim.

83. Furthermore, while regard may be had to the general context the fact that justifications are identified for a mandatory retirement age is not enough on its own. In its decision in *Fuchs and Kohler,* the CJEU emphasised that*:*

> *"mere generalisations are not enough to show that the aim of that measure is capable of derogating from the principle of non-discrimination on grounds of age and do not*

constitute evidence on the basis of which it could reasonable be consider that the means chosen are likely to achieve that aim."

84. In this case the Respondents rely on the affidavit evidence of Mr. McDonagh to identify the legitimate aims relied upon to provide objective and reasonable justification for the impugned measure. I accept that the general context of the 70 year old rule at issue in these proceedings, to which I am permitted to have regard, includes the history of compulsory retirement in the public service more generally as set out in some detail on affidavit by Mr. McDonagh (and summarised above). I accept the evidence of Mr. McDonagh as to the identification of the aims sought to be achieved. It is established on Mr. McDonagh's affidavit evidence as to the general context that the following aims are pursued in the adoption of a standard retirement age of 70:

i. To allow for planning at the level of the individual and the level of the organisation;
ii. Creation of an age balance in the workforce;
iii. Personal and professional dignity;
iv. Intergenerational fairness and;
v. Standardising the retirement age in the public service.

85. From the evidence, the justification relied upon for the mandatory retirement age is that it enables planning (for retirement, for recruitment and for promotion), it makes way for younger people, personal and professional dignity, allows an age balance and intergenerational fairness and consistency. In particular, I accept that the aims sought to be achieved by the adoption of a standard retirement age of 70 were to allow for planning at the level of the individual and at the level of the organisation, the creation of an age balance in the workforce, personal and professional dignity, intergenerational fairness and standardising retirement age in the public service.

86. Of course, it is not enough for me to be satisfied from the evidence adduced that it possible to identify the underlying aims of the measure. It is now necessary to conduct a review as to whether the identified underlying aims are legitimate such as to be capable of objectively and reasonably justifying the measure and whether the means, namely the application of the

mandatory retirement age of 70 to the office of the Sheriff, are appropriate and necessary to achieving those aims. Here again, the jurisprudence of the CJEU is of assistance in the application of the legal requirements to a particular fact scenario.

87. In the case of *Case C-411/05 Felix Palacios de la Villa v. Cortefiel Servicios SA*, the provision challenged allowed the inclusion of compulsory retirement clauses in collective agreements. The measure was adopted at the instigation of the social partners, as part of a national policy seeking to promote better access to employment, by means of better distribution of work between the generations. The compulsory retirement of workers who had reached a certain age was first introduced into Spanish legislation in the course of 1980, against an economic background characterised by high unemployment, in order to create, in the context of national employment policy, opportunities on the labour market for persons seeking employment. The aim of the compulsory retirement mechanism was to create opportunities in the labour market for persons seeking employment and permitted clauses requiring compulsory retirement where the measure was linked to objectives consistent with employment policy such as the conversion of temporary contracts into permanent contracts or the recruitment of new workers.

88. The CJEU stated that where the measure was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment, the legitimacy of such an aim of public interest could not reasonably be called into question, since employment policy and labour market trends are among the objectives expressly laid down in the first subparagraph of Article 6(1) of the Framework Directive and, in accordance with the first indent of the first paragraph of Article 2 EU and Article 2 EC, the promotion of a high level of employment is one of the ends pursued both by the European Union and the European Community. Accordingly, it was concluded that an objective such as that referred to by the legislation at issue must, in principle, be regarded as '*objectively and reasonably*' justifying '*within the context of national law'*, as provided for by the first subparagraph of Article 6(1) of the Framework Directive, a difference in treatment on grounds of age laid down by the Member States.

89. Likewise, in a series of subsequent cases including C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe [2010] ECR I-47;* (C-45/09 *Gisela Rosenbladt v Oellerking Gebäudereinigungsges. MbH [2010] ECR I-9391;* C-159/10 *Gerhard Fuchs* (C-159/10) *and Peter Köhler* (C-160/10) *v Land Hessen* [2011] ECR I-6919 and; C-141/11 *Torsten Hörnfeldt v. Posten Meddelande AB*, the aims identified, which included the creation of "*a favourable age structure*" or a balance between the generations which is achieved by the simultaneous presence within the profession of young employees at the start of their career and older employees at a more advanced stage of theirs, was found by the CJEU to constitute aims of public interest.

90. Specifically, in *Fuchs and Kohler*, the CJEU found that a German State law which compelled prosecutors to retire at 65 years of age was compatible with Article 6. The CJEU ruled (at para. 81):

> *"That choice may, therefore, be based on economic, social, demographic and/or budgetary considerations, which include existing and verifiable data but also forecasts which, by their nature, may prove to be inaccurate and are thus to some extent inherently uncertain. The measure in question may, moreover, be based on political considerations, which will often involve a compromise between a number of possible solutions and, again, cannot with certainty lead to the expected result".*

91. The Court confirmed that the encouragement of recruitment is a legitimate aim of Member States' social policies whilst noting that keeping older workers in the labour force promotes diversity and contributes to their quality of law. The Court also noted, however, that financial hardship caused by retirement also required to be considered. The Court held that these divergent interests must be taken into account and a balance struck.

On the basis of the CJEU authorities I am satisfied that the aims of the mandatory retirement measure identified by the Respondent in evidence as including forward planning (for retirement, for recruitment and for promotion), making way for younger people, personal and professional dignity, achieving an age balance, intergenerational fairness and consistency are policy aims which fall within the broad discretion of the State and are legitimate aims within the meaning of Article 6(1) of the Framework Directive. These aims have already been endorsed by the CJEU in a series of cases.

92. I accept, and it is well established, that the implementation of a compulsory retirement measure assists in achieving the aims identified and the aims identified are capable in principle of providing objective and reasonable justification for a mandatory retirement measure. In *Felix Palacios* and subsequent cases the Court did not consider it unreasonable for the authorities of a Member State to take the view that a mandatory retirement measure may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy. As observed by the CJEU in *Hornfeldt*, (para. 28):

> *"the Court has held that automatic termination of the employment contracts of employees who meet the conditions as regards age and contributions paid for the liquidation of their pension rights has, for a long time, been a feature of employment law in many Member States and is widely used in employment relationships. It is a mechanism which is based on the balance to be struck between political, economic, social, demographic and/or budgetary considerations and the choice to be made between prolonging people's working lives or, conversely, providing for early retirement."*

93. I further accept that the policy objectives identified by the Respondent do not apply with equal force to all persons working in different sectors of the public service and that considerations in respect of the office of the Sheriff are not identical to considerations arising in respect of other positions within different sectors of the public service.

94. In argument great emphasis is placed on the fact that sheriffs were between 14 and 16 in number and a person working under the Sheriff in his office would not necessarily consider "*promotion*" to the office of the Sheriff as part of their career path. However, I am satisfied that the fact that there is a small number of sheriffs employed in the State does not negate the public interest in maintaining a proper age balance amongst sheriffs as a means, *inter alia*, of maintaining intergenerational fairness and promoting access to the profession by younger people, even if not typically or necessarily drawn from the previous sheriff's office.

95. It is also contended that because the number of sheriffs is so small, cost is not a weighty consideration. I agree that cost considerations are less compelling, and indeed have not been pressed, in the case of a small pool of public servants but this does not appear to me to be determinative not least because it is but one consideration and is also a consideration which is required to be assessed in the wider context of a policy interest in achieving consistency and limiting exceptions.

96. It seems to me that once there is a sound basis for the policy, the policy is not rendered other than legitimate because factors which inform the policy are more present in some sectors of the public service than others for so long as and provided that those policy considerations remain valid in respect of the sector in question to a sufficient extent that the measure passes a proportionality assessment. In my view, the need for forward planning, the need to make way for younger people, the interest in safeguarding personal and professional dignity, the objective of achieving an age balance, intergenerational fairness and consistency remain sound policy objectives insofar as the office of the Sheriff is concerned even if some of those interests are more acutely present in other classes of public sector worker. As noted by McKechnie J. in *Donnellan* (para. 96) where multiple reasons are given by way of justification, it will be enough that one or more amount to a legitimate aim.

97. While considerations are clearly different depending on the particular characteristics of the workforce in question, I am quite satisfied that the Respondents have discharged the burden on them of identifying from the general context legitimate aims for the mandatory retirement policy *vis-a-vis* the office of the Sheriff.

98. It remains for consideration whether the 70 year measure is appropriate and necessary. In this regard, it is recalled that Member States enjoy broad discretion in their choice, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (see further to that effect, *Case C-144/04 Mangold* [2005] ECR I-9981, para. 63). It is clearly established, however, that even where a measure is shown to have been enacted with a legitimate aim it must still show itself to be appropriate and necessary and a balance requires to be struck taking divergent interests into account.

McKechnie J. described this as the "*test of proportionality*" in *Donnellan* stating as follows (at para. 98):

> *"the measure must go no further than is required to reach the legitimate aim and must do so in the least restrictive way possible".*

99. The CJEU has reiterated that while Member States enjoy a broad discretion in the definition of measures capable of achieving its aims, Member States may not frustrate the prohibition on discrimination on grounds of age set out in the Framework Directive. This prohibition must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union but against this may be balanced competing interests which may include political, social, demographic or budgetary considerations. It is for the authorities of the Member State to find the right balance between the different interests involved while ensuring that they do not go beyond what is appropriate and necessary to achieve the legitimate aim pursued.

100. In view of the State's broad discretion, it is relevant in understanding the effective to be given to the Framework Directive that mandatory retirement ages are not unusual and the CJEU has found similar mandatory retirement ages to be compatible with the Directive in a series of cases. The fact that a mandatory retirement age is not unusual does not excuse the application of a proportionality assessment. In *Felix Palacios*, the Court carried out such an assessment. The Court noted that the measure in question could not be regarded as unduly prejudicing the legitimate claims of workers subject to compulsory retirement because they have reached the age-limit provided for as the relevant legislation was not based only on a specific age, but also takes account of the fact that the persons concerned are entitled to financial compensation by way of a retirement pension at the end of their working life, the level of which could not be regarded as unreasonable. The CJEU concluded that it could not reasonably be maintained that national legislation, pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age, set at 65 by Spanish national law, and must have fulfilled the conditions set out in the social security legislation for entitlement

to a retirement pension under their contribution regime was unlawful, where the measure, although based on age, was objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and it was not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose.

101. While a mandatory retirement age was therefore upheld in *Felix Palacios* it is significant that in that case the Court had regard to the fact that the relevant national legislation allowed the social partners to opt, by way of collective agreements – and therefore with considerable flexibility – for application of the compulsory retirement mechanism so that due account may be taken not only of the overall situation in the labour market concerned, but also of the specific features of the jobs in question.

102. In *Donnellan* McKechnie J. in proceeding to consider whether the means employed to achieve the identified legitimate aim in that case were '*appropriate and necessary'* stated that an important consideration in deciding whether a measure is proportionate is (para. 122):

> *"whether individual assessment would be possible in a given case, such that using an age proxy would not be legitimate."*

103. He found that:

> *"although a continuation was refused in this case, the procedure under Regulation 6(b) of the 1951 regulation serves to temper the severity of what would otherwise be an absolute retirement age; thereby rendering it, in my opinion, proportionate."*

104. In conducting his proportionality assessment McKechnie J. also had regard to the fact that a member of An Garda Síochána can retire after 30 years of service with a full pension at

age 50. He noted that in addition to the significant financial package, a member's age of retirement is such that the prospect of a second career was very much open (para. 123). In the circumstances, he concluded that the regulations were proportionate.

105. Conducting a proportionality assessment in this case, I accept that there are a finite number of sheriffs in the State. I accept that they are appointed as office holders outside a hierarchical, promotional structure which typifies public sector employment, that cost implications are similarly contained. It is noted that an exception was made in the 1950s where the retirement age was increased in an isolated case. I further accept, as has been urged, that the role shares some characteristics (but not all) with that of coroner where an older retirement age has been fixed. The treatment of the office of the Sheriff contrasts not only with the treatment of the position of the coroner where consideration has been given to the specific features of the office of coroner in prescribing an increased retirement age but even more fundamentally, it contrasts with the position of public servants who have accrued rights in respect of whom no mandatory age has been fixed. Separately, it requires to be considered that the mandatory retirement age applied in the case of sheriffs has remained unchanged since 1945 and no provision for an extension having regard to particular circumstances has been made. This is in contrast with the general position where the age has risen and where a power to raise the age in accordance with statutorily prescribed considerations has been prescribed.

106. In view of the particular factors pertaining to the office of the Sheriff, I consider that it is legitimate to question whether the blunt application of a mandatory retirement age justified by reference to general considerations following a public service review delivers a proportionate means of pursuing the legitimate aims identified. Further, given the reliance on a general public service age limit in pursuit of identified aims by the Respondent, a relevant consideration in this case, in my view, is whether the absence of any flexibility or discretion having regard to specific features of the office of sheriff offends against the requirements of proportionality.

107. Insofar as the question of flexibility is concerned, I note that some flexibility provided for in the regulations considered in *Donnellan* (up to 65 years in case of persons above the rank

of Chief Superintendent and 57 years in respect of a member below the rank of Superintendent), this flexibility was limited to an additional span of years and an absolute end retirement age was nonetheless mandated. This suggests that the absence of flexibility on a case by case or role by role basis does not on its own render a measure disproportionate. When regard is had to the example of the coroner's position, it seems it could on the one hand be relied upon to demonstrate that the absence of a measure which provides for an extension or variation of the mandatory retirement age in respect of this class of public servant akin to that provided for in s. 3A of the 2018 Act, does not render the measure unlawful because in the absence of a statutory measure, it is open to the State to legislate through the introduction of primary legislation in the same way it did for coroners. The coroner's position demonstrates the capacity of the Legislature to respond to the exigencies of a particular sector of the workforce though specific legislative measures.

108. There is nonetheless a difference in practice between a ministerial power to raise the mandatory retirement age across the public service (albeit generally rather than specific to any particular class of worker) and the power of the Legislature to introduce primary legislation for the purpose of enabling a variation on the prescribed mandatory retirement age for a class of worker or occupation. I accept that a ministerial power to vary a mandatory retirement age having regard to prescribed criteria might be considered more flexible than a power to introduce variations by primary legislation.

109. I have concluded that an important distinction between the sheriff as office holder appointed pursuant to the 1945 Act and workers within the public service generally insofar as the absence of a specific regulatory power to raise the mandatory retirement age for sheriffs is concerned is the fact that the office of the Sheriff is already the subject of specific provision or consideration in that the office is the subject of a separate legislative regime. Given that specific and separate statutory provision is made for sheriffs as a class of public servant, I am satisfied that a concern that the application of a mandatory retirement age in respect of sheriffs, without a ministerial power to vary, is too blunt to satisfy the requirements of proportionality is not substantiated. What the evidence of different treatment of different classes of public servant demonstrates is that a "*one size fits all*" approach has not been adopted and while 70 has now been identified generally as a mandatory retirement age throughout the public service,

exceptions are made as apparent in the case of coroners (because of an identified need to retain expertise and other factors including improvement in health) and public servants with accrued rights.

110. Furthermore, while the lack of an occupational pension and the impact of forced retirement on the sheriff's financial interests have been strongly urged in argument on behalf of the Applicant, it is the case that although the person who holds the office of the Sheriff is not entitled to an occupational pension, the proportionality of the mandatory retirement measure *vis-a-vis* the Sheriff is nonetheless supported by the entitlement of all workers to access the State Pension (Contributory) based on contributions made throughout one's working life or, in the absence of contributions and upon satisfying a means test, access to the State Pension (Non-Contributory). It is also the case that a sheriff is not precluded from exercising another professional activity, such as that of solicitor in the Applicant's case, with no age limit. As in *Hornfeldt*, where a mandatory retirement age of 67 years was found to be objectively justified, the Applicant is not shut out from the labour force and has reached pensionable age.

111. As for the different treatment of coroners, the evidence in this case establishes that the Oireachtas introduced a specific increase on the retirement age of coroners with a view to retaining experience and expertise within the coroner system also having regard to the fact that a significant number of coroners were also doctors providing services under the General Medical Scheme where the retirement age is 72. While it is true that sheriffs like the Applicant also have valuable experience and expertise, this does not negate the fact that from a policy perspective a particular need to retain expertise was identified in the case of coroners which has not been identified in respect of sheriffs. In the circumstances, it seems to me that it is not unlawful as discriminatory against sheriffs for the Legislature to make special provision in the case of coroners where specific considerations arise. Similarly, the fact that the Legislature made an exception historically in respect of a sheriff in the 1950s cannot be relied upon to establish that the maintenance of a mandatory retirement age for sheriffs since then is unlawfully discriminatory.

112. I am quite satisfied that there is a proper basis also for treating those public sector workers who were recruited during a period when no mandatory retirement age was fixed differently. Those workers have accrued rights pursuant to contract. There has been no change to the Sheriff's terms and conditions of employment and he has no accrued or vested right to continue in employment beyond the age of 70. There are different factors to be weighed in a proportionality assessment which include the terms and conditions upon which a person takes up office or enters employment. The fact that some public servants, by reason of historical treatment as to their terms and conditions of employment, are not subject to a mandatory retirement age when the Sheriff is, does not render the application of a mandatory retirement age discriminatory as a disproportionate interference with the Sheriff's rights as the Sheriff has no similarly accrued or vested rights.

113. As demonstrated in evidence, the State carried out a process of consultation in 2016 which informed the wider general application of a mandatory retirement age. Having pursued a process of engagement involving interest groups including the Department of Public Expenditure and Reform and Public Service employers, a review of the then current statutory and operational considerations took place. In this process regard was had to extended participation in the public service workforce up to and including the current and planned age of entitlement to the Contributory State Pension culminating in the mandatory retirement age of 70 for public servants provided for in the 2018 Act being fixed.

114. The mandatory retirement age most recently prescribed in 2018 was determined following consultation with public service employers and employee representative bodies. I am satisfied on the evidence that the age of 70 was selected to allow attainment of the age upon which the State Contributory Pension becomes payable together with some additional years of service. In prescribing for circumstances where that age may be changed by ministerial order in respect of a large number of public servants (albeit not sheriffs) the State has identified as relevant factors, *inter alia*, (as set out in s.3A) the likely effect of the retirement age on recruitment, promotion and retention of staff in the public service, the pensionable age applicable, evidence as to an increase in normal life expectancy and cost. These therefore are factors which are considered relevant and are weighed in arriving at fixing retirement ages within the public service. Should these factors in time lead to a raising for the mandatory

retirement age generally, the case that it is appropriate and necessary to also raise the retirement age of the sheriff will be made more compelling.

115. In the meantime, I accept that the fixing of a mandatory retirement age is effective in achieving intergenerational fairness and avoids difficulties within the workforce occasioned by health and capacity issues more prevalent in old age. I am satisfied that where the mandatory retirement age is fixed at 70 years of age generally and keeps ahead of the State pension age, a proper balance is maintained between competing interests. I further accept that in taking the decision to select 70 as the age in respect of persons to whom it has more recently applied and to maintain in respect of those to whom it previously applied (including sheriffs), consideration was given to the benefits of having a specific age limit which both reflected an increase in longevity but simultaneously respected the existence of a retirement horizon. It is clear the Legislature were seeking to strike a balance in arriving at the age of 70. I am satisfied that in so doing they were within the boundaries of discretion afforded under the Directive.

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

CONCLUSION

117. It is established that compulsory retirement on reaching a particular age constitutes less favourable treatment on the age ground but that this may be justified by a legitimate aim referable to factors identified in Article 6 of the Framework Directive and/or s. 34(4) of the Employment Equality Act, 1998 (as amended) such as legitimate employment policy, labour market and vocation training objectives. It is also established that the aim sought to be achieved need not be set out in the measure itself but may be discerned from the general context and may include developments since the measure was first adopted. Within the terms of the Framework Directive individual states have a broad discretion in setting social and

employment policy and as to the measures adopted in pursuing said policies. The choices made by the State from a policy perspective are, as a general rule, for the executive and legislative branches of government. It is not for a court to substitute its own assessment of policy issues for the legislative and political branches of government unless satisfied that a measure is neither appropriate nor necessary.

118. By requiring mandatory retirement, s. 12(6)(b) is *prima facie* directly discriminatory. Nonetheless, it seems to me that it can be said that the overall aims, as identified in evidence in this case from the general history of compulsory retirement in the public service, are legitimate ones.

119. While the aims are legitimate, the mandatory retirement measure must also be proportionate (as in appropriate and necessary). An important consideration in considering whether a measure is proportionate is whether when determining the measure, assessment is possible in respect of the features of the job in question. I have concluded that the absence of specific provision for a variation of the retirement age for sheriffs such as that provided in respect of public servants generally does not fatally undermine the proportionality of the mandatory retirement age because it is clear that insofar as the office of sheriff is concerned, it is already subject to its own legislative regime which is tailored specifically to that office. I am also satisfied that the fact that some workers or office holders within the public sector are subject to a different regime does not make the application of the impugned measure in the case of the Sheriff unlawfully discriminatory where there are identifiable differences explaining the different treatment which differences include historic treatment leading to accrued rights and vested interests.

120. It is not apparent to me that the mandatory retirement measure to achieve the interests identified is either inappropriate and unnecessary for those purposes. I am satisfied that there is no incompatibility between s. 12(6)(b) and the provisions of the Framework Directive. Accordingly, I refuse the relief sought.