Trinity Term
[2021] UKPC 21
Privy Council Appeal No 0103 of 2019

JUDGMENT

Royal Cayman Islands Police Association and others (Appellants) *v* Commissioners of the Royal Cayman Islands Police Service and another (Respondents) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Briggs
Lady Arden
Lord Kitchin
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON

26 July 2021

Heard on 19 May 2021

Appellants	*Respondents*
Jeffrey Jupp James Robottom Guy Dilliway-Parry	David Perry QC Katherine Hardcastle Reshma Sharma Claire Allen
(Instructed by Priestleys (Cayman Islands))	(Instructed by Attorney General's Chambers (Cayman Islands))

Appellants:

(1) Royal Cayman Islands Police Association
(2) Dane Pinnock
(3) Claire Pinnock Jackson
(4) Clive Smith
(5) Leslie Franklin
(6) Antonio Lopez Jackson
(7) Clesford Lumsden
(8) Howard Campbell
(9) Hugh Cotterall

Respondents:

(1) Commissioner of the Royal Cayman Islands Police Service
(2) Attorney General of the Cayman Islands

LORD STEPHENS:

Introduction

1. Between 22 November 2010 and 9 September 2016 there were different mandatory retirement ages for police officers in the Royal Cayman Islands Police Service which applied to non-gazetted officers, that is to officers below the rank of Chief Inspector. Those non-gazetted officers in service on 22 November 2010 were subject to mandatory retirement at 55 whilst the mandatory retirement age for those appointed after 22 November 2010 was 60.

2. Mandatory retirement was not necessarily an end to police service as the Police Commissioner ("the Commissioner") had power to re-engage those non-gazetted officers who were subject to mandatory retirement. However, the Commissioner applied an unwritten administrative policy ("the re-engagement policy") under which re-engagement was only to be at the rank of constable regardless of the rank attained by the non-gazetted officer prior to retirement and regardless of the needs of the police service.

3. The Royal Cayman Islands Police Association, an association representing police officers ("the Association") together with 10 police or former police officers ("the individual police officers") commenced proceedings against the Commissioner and the Attorney General of the Cayman Islands ("the respondents"). The individual police officers' case was that they were discriminated against on the grounds of age because they were required to retire at 55 whereas colleagues appointed after 22 November 2010 were not, and that there was no justification for that discrimination. There is no specific legislation in the Cayman Islands dealing with age discrimination, so the individual police officers relied on the non-discrimination provision in section 16 of the Cayman Islands Constitution ("the Constitution") read with the private and family life provision in section 9 of the Constitution. Those sections are equivalent to, respectively, articles 14 and 8 of the European Convention on Human Rights ("ECHR"). The individual police officers contended that mandatory retirement on the grounds of age came within the ambit of section 9 (the Caymanian equivalent to article 8 ECHR) so that they could maintain a claim for unjustified discrimination under section 16 (the Caymanian equivalent to article 14 ECHR).

4. The individual police officers also contended that the re-engagement policy was in breach of section 19(1) of the Constitution which provides that "All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair". They asserted that the re-engagement policy, which had no room for any exception and only permitted the Commissioner to re-engage non-gazetted officers at the rank of

constable, was not rational as it did not allow the Commissioner to take into account the qualities of those being re-engaged or the needs of the police service.

5. By a judgment dated 15 March 2018 Acting Judge Hall ("the judge"), sitting in the Grand Court of the Cayman Islands, held that the imposition of a mandatory retirement age did not fall within the ambit of section 9 of the Constitution (see para 237) so she dismissed the claims based on age discrimination under section 16. On this basis it was not essential for the judge to make, nor did she make, any determination as to whether there was discrimination contrary to section 16 or whether, if there was, it was justified. In relation to the claims based on the re-engagement policy the judge held that the policy would have been unlawful on the basis of irrationality if it was a blanket policy which did not permit the exercise of any judgment as to the qualities of the re-engaged and the needs of the service (see para 254). However, the fact that it was subject to exceptions, demonstrated by the retention of one officer at a higher rank than constable (see paras 254-260), rendered it lawful. Accordingly, she dismissed the claims brought by all the individual police officers in relation to the re-engagement policy. However, in addition she held that two of the individual police officers, namely the third and the eleventh plaintiffs, did not have standing to challenge that policy, given that they had not applied to be re-engaged (see paras 250-252) so she also dismissed their claims based on the re-engagement policy on that additional basis.

6. The Cayman Islands Court of Appeal (Rix JA, Martin JA and Moses JA) dismissed the Association's and the individual police officers' appeals. Moses JA, giving the judgment of the Court of Appeal dated 6 February 2019, held that the individual police officers had no remedy under section 16 of the Constitution because their claims were not within the ambit of section 9, so that the prohibition against age discrimination in section 16 did not apply (see para 33). However, in case the matter should go further the Court of Appeal did consider whether there was discrimination contrary to section 16 and whether, if there was, it was justified. The Court of Appeal concluded at paras 47-48 that there was discrimination and at para 54 that "the retention of compulsory retirement at 55, once those entering service later were allowed to retire at 60, was not justified".

7. The Court of Appeal differed from the judge in the analysis of the claims based on the rationality of the re-engagement policy but upheld the judge's conclusion dismissing those claims. The Court of Appeal held that the existence of a unique exception to the re-engagement policy involving one officer, who had been rehired at a higher rank after retirement, did not mean that the re-engagement policy had sufficient flexibility. The Court of Appeal held that the rigid application of the re-engagement policy would be a breach of section 19 on the basis that it did not permit the exercise of any judgment as to the qualities of the re-engaged and the needs of the service (see paras 59 and 61) but that the policy was not free-standing. Rather it was to be considered as an ameliorative measure connected to mandatory retirement. The Court of Appeal concluded that it was not possible to consider amelioration of mandatory retirement as

being unfair or irrational so that it upheld the judgment below which had dismissed the claims of all the individual police officers based on the re-engagement policy.

8. Finally, the Court of Appeal upheld the judge's conclusion dismissing the claims of the third and eleventh plaintiffs under the re-engagement policy on the additional basis that they did not have standing to challenge the policy as neither was directly affected by it (see para 64).

The appeal and the issues on the appeal

9. The Association and certain of the individual police officers ("the appellants") appeal against the order of the Court of Appeal dismissing their claims. The respondents do not appeal from that part of the decision of the Court of Appeal holding that there was age discrimination which was unjustified. The only issue in relation to the claims of age discrimination based on section 16 of the Constitution is whether mandatory retirement comes within the ambit of section 9. Furthermore, the respondents do not appeal from that part of the decision of the Court of Appeal holding that one exception to the application of the re-engagement policy did not establish sufficient flexibility so that the policy, if viewed as a self-standing policy, was irrational. So, the only issues in relation to the re-engagement policy are whether it was free-standing or if not whether its connection to mandatory retirement as an ameliorative measure could be a reason for finding that it was rational.

10. In the view of the Board the essential issues on the appeal may therefore be stated as follows:

> (i) **Issue one**. Did the mandatory retirement of the individual police officers on the ground of age fall within the ambit of section 9?
>
> (ii) **Issue two**. Was the re-engagement policy in breach of section 19 of the Constitution as an irrational free-standing policy or could its connection to mandatory retirement provide a rational basis for the policy as an ameliorative measure in relation to those compelled to retire?
>
> (iii) **Issue three**. Do the third and eleventh plaintiffs have standing to challenge the re-engagement policy?

The latter two issues only fall to be considered if the appellants fail on issue one.

Factual background

(a) The legislation as to mandatory retirement including the power to re-engage and as to pension payments

11. Prior to 22 November 2010 the mandatory retirement provision for non-gazetted officers and the power of the Commissioner to re-engage non-gazetted officers subject to mandatory retirement was contained in section 20 of the Police Law (2006 Revision). Section 20(1) provided that "Non-gazetted officers who have attained the age of fifty-five years, shall be retired without prejudice to their being accepted for such further period or periods of service as may be fixed by contract". There was no requirement in section 20(1) that re-engagement of non-gazetted officers was to be at the rank of constable or at any other rank. Rather, that was a feature of the re-engagement policy. Furthermore, the Commissioner could refuse to re-engage an officer, should the officer not be suitable for continuing service.

12. By virtue of section 20(2) of the Police Law (2006 Revision) a non-gazetted officer who was re-engaged would receive his pension as well as his salary fixed by contract. That remained a consistent feature of all the subsequent legislative provisions.

13. On 22 November 2010 the mandatory retirement age was raised to 60 by section 21 of the Police Law, 2010. Section 21(1) provided that "A police officer who has attained the age of sixty years, shall be retired without prejudice and may, in special circumstances and for such temporary periods, be accepted for such service as may be fixed by contract". However, section 21(7) provided that "The provisions of this section shall not apply to a police officer appointed prior to the date of commencement of this Law but, on and after that date, the provisions of section 20 of the Police Law (2006 Revision) shall continue to apply to him as if this section had not come into force". In this way non-gazetted officers who were in the police service on 22 November 2010 were still required to retire at 55, even though those appointed after 22 November 2010 were not required to do so until they were 60. The power of the Commissioner to re-engage non-gazetted officers subject to mandatory retirement was expressed in section 21(1) in somewhat different terms to section 20(1) of the Police Law (2006 Revision), but, again, there was no requirement in section 21(1) that re-engagement was to be at the rank of constable or at any other rank. Rather, that remained a feature of the re-engagement policy.

14. The provisions in section 21(1) of the Police Law, 2010 were repeated in identical terms in section 21(1) of Police Law (2014 Revision).

15. The position in relation to mandatory retirement changed on 9 September 2016 by virtue of the Public Service Management (Amendment) Law, 2016. Section 8

removed the imposition of a mandatory retirement age of 55 for those in service prior to November 2010, raised the mandatory retirement age to 65, contained a requirement that police officers of the rank of Inspector or below were to be subject to mandatory retirement at 60 unless they completed a fitness and medical test and contained a power for the Commissioner to re-engage police officers subject to mandatory retirement. This change was achieved by repealing subsections (1) and (7) of the Police Law (2014 Revision) and substituting them with new subsections. Section 21(1), as substituted, provided that "A police officer who has attained the age of sixty-five years, shall be retired without prejudice and may, in special circumstances and for such temporary periods, be accepted for such service as may be fixed by contract; however, a police officer of the rank of Inspector or below who has attained the age of sixty years, shall be retired without prejudice unless the officer successfully completes a fitness and medical test immediately prior to attaining that age". So, after 9 September 2016, all non-gazetted officers could choose to stay on after 55, whatever their date of appointment, and they were permitted to remain until 65, subject to medical and physical tests.

(b) The proceedings and details in relation to the individual police officers

16. In 2016 the Association, as the first plaintiff and the individual police officers, as the second to eleventh plaintiffs, commenced proceedings against the Commissioner and the Attorney General of the Cayman Islands.

17. Each of the individual police officers was enlisted prior to 22 November 2010 and each was required to retire on a date between 22 November 2010 and 9 September 2016. Furthermore, each was required to retire at 55 or as soon thereafter as the Commissioner realised that they were over 55. All of them were re-engaged in the police except for the third and eleventh plaintiffs. Those re-engaged were re-engaged at the rank of constable or senior constable which represented a reduction in rank for the second, and fifth to tenth plaintiffs, though the claims by the seventh plaintiff have been discontinued.

18. The Board will set out some further details in relation to the individual police officers though the judge recorded at para 9 of her judgment that at the trial it was agreed by both sides that the evidence of the second and third plaintiffs was representative of all the remaining plaintiffs. On this basis it was only those individual police officers who gave evidence.

19. The second plaintiff, Dane Pinnock, enlisted in the police on 1 October 1991 and attained the rank of Inspector prior to mandatory retirement on 25 July 2013 a month after his 55th birthday. Five days before his 55th birthday, he was advised by Human Resources that he was close to the mandatory retirement age and that to continue

working he would have to sign a contract to re-enlist as a constable. He expressed the view that the law did not give the Commissioner the right to reduce his rank or salary and he raised his concerns with the Commissioner who confirmed the position as stated by Human Resources. A month after his 55th birthday the second plaintiff signed a contract to re-enlist at the reduced rank of senior constable.

20. The third plaintiff, Claire Pinnock-Jackson, enlisted in the police on 19 January 1987 as a constable. After five years she was transferred to the Commercial Crime Branch, now the Financial Crime Unit, remaining there for 23 years. On 1 April 2006 she was promoted to the rank of detective sergeant. Her responsibilities included the investigation of complex financial fraud and the supervision and training of other officers. After some 9 years at the rank of detective sergeant she was the senior and most experienced fraud investigator in the Unit. Prior to mandatory retirement on 17 September 2015 at 55, she expressed the desire to remain in the police at her existing rank, but this was refused. She did not wish to be re-engaged at the rank of constable so did not apply for re-engagement but rather she left the police.

21. The fourth plaintiff, Melbourne Warren, was an auxiliary constable prior to mandatory retirement at 55. After mandatory retirement he was re-engaged at the same rank. His claims have been discontinued.

22. The fifth plaintiff, Clive Smith, attained the rank of sergeant prior to mandatory retirement at 55 on 4 July 2014. After mandatory retirement he was re-engaged at the reduced rank of senior constable.

23. The sixth plaintiff, Leslie Franklin, attained the rank of sergeant prior to mandatory retirement at 55. After mandatory retirement he was re-engaged at the reduced rank of constable.

24. The seventh plaintiff, Derrick Elliott Senior, attained the rank of Inspector prior to mandatory retirement at 55. After mandatory retirement he was re-engaged at the reduced rank of senior constable. His claims have been discontinued.

25. The eighth plaintiff, Antonio Lopez-Jackson, attained the rank of senior constable prior to mandatory retirement at 55. After mandatory retirement he was re-engaged at the reduced rank of constable.

26. The ninth plaintiff, Clesford Lumsden, attained the rank of sergeant prior to mandatory retirement at the age of 55. After mandatory retirement he was re-engaged at the reduced rank of constable.

27. The tenth Plaintiff, Howard Campbell, enlisted with the police on a two-year fixed term contract on 5 September 2007 at the rank of senior constable. His contract was renewed for further fixed periods of two years on 18 September 2009 and 19 September 2011 at the same rank. He was required to retire on 28 January 2011 having attained the age of 55. After mandatory retirement and on 18 September 2014 his contract was renewed for a further period ending 28 January 2016 at the reduced rank of constable. It was again renewed for one year at the same reduced rank on 1 May 2016.

28. The eleventh plaintiff, Hugh Cotterall, attained the rank of senior constable prior to mandatory retirement at the age of 55. He was not re-engaged. It was agreed for the purposes of the trial before the judge that the evidence of the third plaintiff was to be representative of all the remaining plaintiffs, including the eleventh plaintiff. Because of that agreement the Board will proceed on the basis that the eleventh plaintiff did not wish to be re-engaged at the reduced rank of constable so did not apply for re-engagement.

The judgments of the Grand Court and the Court of Appeal

(a) The Grand Court of the Cayman Islands

29. The Board has set out (at para 5 above) a summary of the judge's conclusions. However, the judge made a number of findings which are important to the issues to be determined on this appeal so that it is necessary to provide a further summary of the evidence together with the judge's findings.

(i) Factual findings relating to the severity of the consequences of mandatory retirement

30. As will be apparent (see para 72 below) one of the questions to be addressed in relation to the ambit of section 9 of the Constitution is whether the consequences of the facts at issue involving mandatory retirement on the ground of age are "very serious" affecting private life "to a very significant degree". The facts at issue in this case not only involved mandatory retirement on the ground of age but also the re-engagement policy. The power to re-engage is contained in the statutory provisions which imposed a mandatory retirement age and the re-engagement policy applied to those who were subject to mandatory retirement. In this way the re-engagement policy was not free-standing but was inextricably linked to mandatory retirement. Accordingly, the adverse consequences of mandatory retirement must be considered in the context of the linked re-engagement policy.

31. The judge recorded the second plaintiff's evidence as to how important his career as a police officer was to him, how much he enjoyed the job, his rapport with his colleagues and his relationship with the members of the public that he served. The judge also recorded the second plaintiff's evidence that he initially felt embarrassed to be serving at a lower rank, that he expressed feelings of humiliation and dejection because to his former colleagues, it appeared as though he had been given a demotion and that it was difficult for him to make any further career progression either laterally or to a higher rank.

32. The judge recorded similar evidence from the third plaintiff as to how important her job had been to her both on a professional and a personal level given, in particular that the police was a close-knit and supportive community. Furthermore, as the third plaintiff decided not to apply to be re-engaged her contact with her former colleagues had decreased because they were busy. The third plaintiff stated that she had lost group support and that she found it hard to form new relationships. She also stated that she no longer had the daily contact that she had had with the public as a police officer. She stated that she lost income and had to compete with younger persons in the private sector for jobs.

33. The judge found the following facts in relation to the consequences of mandatory retirement of the second and third plaintiffs, which facts were agreed to be representative of all the other individual police officers:

> (a) The second and the third Plaintiffs were aware, upon contracting with the police that they faced a mandatory retirement age of 55 and each had made plans for this.
>
> (b) The second plaintiff's reduced rank on re-engagement meant that there was a reduction in salary. However, in addition to his salary as a senior constable he also received his pension. There were no details as to the overall extent of any financial loss nor were there any findings of any tangible consequences for his material well-being or for his "inner circle", let alone that those consequences were "were very serious" or affected his private life to "a very significant degree".
>
> (c) The third plaintiff had given evidence as to loss of salary but there were no findings as to the extent of any financial loss and again there were no findings as to any impact of a reduction in salary on the third plaintiff or on her inner circle.
>
> (d) The second plaintiff found it embarrassing to have been re-engaged as a senior constable having previously been an inspector before retirement.

However, his embarrassment upon re-engagement at a reduced rank was not due to any treatment he received from others. Despite his initial embarrassment, the second plaintiff's colleagues still showed him respect on the job. Furthermore, the second plaintiff's fellow officers were aware of the age at which retirement was required and they knew that after mandatory retirement he could only continue to serve in the police service as a constable. There was no suggestion that he had been demoted due to a lack of skill or competence.

(e) The second plaintiff was able to contribute positively to the police in his new role as senior constable and he believed that he was doing a valuable job.

(f) The second plaintiff's mandatory retirement did not cause him to suffer in reputation. His colleagues still treated him with respect.

(g) The reputation of the third plaintiff did not suffer as a consequence of her mandatory retirement.

(h) The mandatory retirement of both the second and third plaintiffs did not affect their personal relationships. The third plaintiff's relationship with her fellow police officers did not end or deteriorate because she left the workplace, it merely changed because they saw each other less frequently. Such an occurrence was not peculiar to retirement from police employment.

(i) There was no stigma or reputational damage attached to mandatory retirement at age 55.

(ii) The decision not to re-engage the third plaintiff at her pre-retirement rank of sergeant

34. Another issue which arose at the trial related to the circumstances surrounding the decision not to re-engage the third plaintiff at her pre-retirement rank of sergeant. The judge set out the third plaintiff's evidence that in February 2015, being aware that she was close to her mandatory retirement age, she informed the Human Resources Department that she did not wish to retire. That Department sent her a letter which set out the conditions for her to re-enlist. She then wrote to the Commissioner stating that given her level of experience she was not prepared to re-enlist as a constable but that she would be prepared to do so as a sergeant. The third plaintiff introduced in evidence two memos. In the first memo one of her superior officers supported her application to

remain on the service in her current position but another superior officer added a handwritten note expressing misgivings about her application. In the second memo both of her superior offices stated that they did not support her application to remain on the service in her current position. The judge recorded the third plaintiff's evidence as being that she could give no explanation for the positions taken by her superior officers and that she had performance development reviews which ran contrary to the low opinion of her which was expressed in these memos. The third plaintiff stated that on 14 July 2015, she received a letter denying her request to re-enlist as a sergeant.

35. The judge concluded (at para 210) that "The Third Plaintiff may have a remedy as it relates to the inconsistencies between the content of her performance development reviews and comments made by her supervisors about her work ethic" but added that the remedy "is not to be found in this action".

36. The Board considers that the question as to whether the third plaintiff has a remedy in relation to the re-engagement policy in this action depends on whether the policy is unlawful under section 19(1) of the Constitution on the basis of irrationality and whether she has standing under section 26 of the Constitution to bring her claim.

(iii) The statute of limitations

37. The judge found that the claims of the second, fifth, sixth, eighth, ninth and tenth plaintiffs had been filed outside the time limits in statute of limitations but she exercised discretion under section 26(4) of the Constitution to extend time.

(b) The Court of Appeal of the Cayman Islands

38. The Board has set out at paras 6-8 above a summary of the judgment of the Court of Appeal but it is necessary to give some further details.

(i) Ambit of section 9

39. The Court of Appeal (at para 24) relying on the judge's findings, held that the consequences of the mandatory retirement of the individual police officers were insufficiently serious so as not to be within the ambit of section 9 under the consequence-based approach in employment-related scenarios as set out by the European Court of Human Rights ("ECtHR") in *Denisov v Ukraine* (No 76639/11 25 September 2018). Furthermore, it held, at para 33, that age was not akin to gender or sexual orientation so as not to be within the ambit of section 9 under the reason-based approach in *Denisov*.

(ii) The mandatory retirement policy

40. The Court of Appeal concluded, at para 62, that the re-engagement policy ought not to be considered separately from mandatory retirement, the consequences of which it "was designed to ameliorate". On this basis, at para 63, the Court of Appeal concluded that it was not possible to "consider amelioration of that situation as unfair or irrational". Rather, the policy merely puts "officers in a better position, should they seek re-engagement …" and that "re-engagement merely mitigated the loss". The Court of Appeal upheld the judge's dismissal of all the claims based on the re-engagement policy.

(iii) The standing of the third and eleventh appellants to challenge the re-engagement policy

41. On the basis that there were no valid claims under section 19 based on the re-engagement policy it was not necessary for the Court of Appeal to consider the standing of the third and eleventh plaintiffs to maintain such claims. However, at para 64, the Court of Appeal stated that if it had been necessary to do so it would have concluded that neither the third or eleventh plaintiff had standing under section 26 of the Constitution as neither was directly affected by the policy "since, as the judge found, the Third Appellant would not have been re-engaged and the Eleventh had taken up different public service".

The relevant provisions of the Constitution and of the ECHR

42. The Constitution of the Cayman Islands is set out in schedule 2 of the Cayman Islands Constitution Order 2009. The relevant sections of the Constitution for the purposes of this appeal are set out in Part 1 of schedule 2 under the rubric "Bill of Rights, Freedoms and Responsibilities". Those sections can be referred to as either sections of the Constitution or as sections of the Bill of Rights though the Board will refer to them as sections of the Constitution.

43. The provisions of the Constitution are materially identical to those in the ECHR. The parties agreed and the Board considers that the provisions in the Constitution which are equivalent to the ECHR should be interpreted applying both United Kingdom and Strasbourg authorities. The relevant provisions of both the Constitution and of the ECHR are set out below.

(a) Section 9 of the Constitution and article 8 ECHR

44. Section 9 of the Constitution, under the rubric of "Private and family life" in so far as relevant, provides:

> "(1) Government shall respect every person's private and family life, his or her home and his or her correspondence.
>
> (2) ….
>
> (3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society-
>
> (a) in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilisation of any other property in such a manner as to promote the public benefit;
>
> (b) For the purpose of protecting the rights and freedoms of other persons;
>
> (c) – (e) …."

45. Article 8 ECHR, under the rubric of "Right to respect for private and family life" provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

(b) Section 16 of the Constitution and article 14 ECHR

46. Section 16 of the Constitution, under the rubric of "Non-discrimination" in so far as relevant provides:

> "(1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.
>
> (2) In this section, 'discriminatory' means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, *age*, mental or physical disability, property, birth or other status.
>
> (3) No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is reasonably proportionate to its aim in the interests of defence, public safety, public order, public morality or public health.
>
> (4) Subsection (1) shall not apply to any law so far as that law makes provision … (d) whereby persons of any such description of grounds as is mentioned in subsection (2) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is objectively and reasonably justifiable in a democratic society and there is a reasonable proportionality between the means employed and the purpose sought to be realised" (emphasis added).

47. Article 14 ECHR, under the rubric of "Prohibition of discrimination" provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".

48. The statuses protected under section 16 of the Constitution expressly include age and disability whereas, for the purposes of article 14 ECHR, age is within "other status":

see *Schwizgebel v Switzerland*, Reports of Judgments and Decisions, 2010-V, 29, (Application. No. 25762/07) at para 85.

49. Section 16 of the Constitution prohibits discriminatory treatment "in respect of the rights under this part of the Constitution." Slightly different language is used in article 14 ECHR which prohibits discrimination in "the enjoyment of the rights and freedoms set forth in [the] Convention". It has not been suggested that the different language used in the Constitution and in the ECHR should lead to any difference in approach.

(c) Section 26 of the Constitution

50. Section 26 of the Constitution, under the rubric of "Enforcement of rights and freedoms" in so far as relevant, provides:

> "(1) Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights and freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time.
>
> (2) ….
>
> (3) …
>
> (4) Proceedings under subsection (1) shall be commenced within one year of the decision or act that is claimed to breach the Bill of Rights, or from the date on which such decision or act could reasonably have been known to the complainant; but the Grand Court shall extend time on application by the complainant where such an extension would in the opinion of the Court be in the interests of justice.
>
> (5) …".

(d) Admissibility of applications to the ECtHR under ECHR

51. Article 35 ECHR, under the rubric of "Admissibility criteria" in so far as relevant provides:

"…

> 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
>
> 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings".

Issue one. *Did the mandatory retirement of the individual police officers on the ground of age fall "within the ambit" of section 9?*

(a) The circumstances giving rise to consideration of "within the ambit"

52. Section 16 of the Constitution only complements the other substantive provisions in part 1 of the Constitution in the same way as article 14 ECHR only complements the other substantive provisions of the Convention and its Protocols. Section 16 has no independent existence since it has effect solely in "respect of the rights under this part of the Constitution". Similarly, article 14 has no independent existence. The application of section 16 and of article 14 does not presuppose, respectively, a breach of the substantive provisions of the Constitution or of the Convention and its Protocols and to that extent they are both autonomous. However, there can be no room for the application of either section 16 or of article 14 unless the facts at issue fall "within the ambit" of the substantive provisions.

53. On this appeal for the individual police officers to be able to rely on section 16 of the Constitution they have to establish that the facts at issue in relation to their mandatory retirement fall "within the ambit" of section 9. The parties to this appeal agreed and the Board considers that the phrase "within the ambit" should be given the same meaning as is applicable in relation to the ECHR applying both United Kingdom and Strasbourg authorities.

54. Ambit is a nebulous concept. As Lord Nicholls observed in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 at para 13 it "is a loose expression, which can itself be interpreted widely or narrowly. It is not a self-defining expression, it is not

a legal term of art. Of itself it gives no guidance on how the "ambit" of a Convention article is to be identified".

55. The question therefore arises, what is the test as to whether the facts at issue fall within the ambit of a substantive provision of the ECHR or of its Protocols?

(b) United Kingdom authorities as to the test in relation to ambit

56. *M v Secretary of State for Work and Pensions* is the leading United Kingdom authority in relation to the test as to what is "within the ambit" of a substantive provision of the ECHR or of its Protocols. Lord Bingham said (at para 4):

> "It is not difficult, when considering any provision of the Convention, including article 8 and article 1 of the First Protocol ('article 1P1'), to identify *the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all*. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for…I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind." (emphasis added)

A similar approach was adopted by Lord Nicholls at para 14 in which he stated:

> "… the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa. In other words, the ECtHR makes in each case what in English law is often called a 'value judgment'."

At para 60 Lord Walker stated that there is no simple bright-line test and the Strasbourg case law does not "lead to the conclusion that precisely the same sort of approach is appropriate, whatever substantive article is in point."

57. Subsequently, in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54; [2007] 1 AC 484 Lord Bingham stated (at para 13) that "expressions such as 'ambit', 'scope' and 'linked' used in the Strasbourg cases are not precise and exact

in their meaning. They denote a situation in which a substantive Convention right is not violated, but *in which a personal interest close to the core of such a right is infringed. This calls, as Lord Nicholls said in M, at para 14, for a value judgment*. The court is required to consider, in respect of the Convention right relied on, what value that substantive right exists to protect" (emphasis added).

58. The approach adopted by Lord Bingham at para 4 of *M v Secretary of State for Work and Pensions* remains appropriate. The closer the facts come to the protection of the core values of the substantive article, the more likely it is that they fall within its ambit. Both *M v Secretary of State for Work and Pensions* and *R (Clift) v Secretary of State for the Home Department* establish that a tenuous link to the core values is insufficient. In *R (Steinfeld) v Secretary of State for Education* [2017] EWCA Civ 81; [2018] QB 519, at para 150 Beatson LJ (with whom Briggs LJ agreed at para 166) stated that "If there is only a tenuous link to those core values that does not suffice". In *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] QB 804, at para 55, Sir Terence Etherton MR referred to the measure having "more than a tenuous connection with the core values protected by [in that case] article 8 …".

59. In this appeal the Board considers that ambit should be considered by reference to a value judgment as to the proximity between the facts at issue to the core values which are engaged in respect of an employment-related dispute between an individual and the State, as protected by section 9 of the Constitution (and by its equivalent, article 8 ECHR). The linkage must be more than tenuous for the facts at issue to be within the ambit of the substantive provision.

60. Lord Bingham's reference at para 4 of *M v Secretary of State for Work and Pensions* to the word "infringing" must, however, be clarified. That reference should not be interpreted narrowly, such that "there is [a] need for the substantive article to be 'infringed' in order for article 14 to be engaged": see the judgment of Lady Hale in *In re McLaughlin* [2018] 1 WLR 4250 at para 20 with which Lord Mance, Lord Kerr and Lady Black agreed. Rather, it should be interpreted by reference to the core values or interests which the right exists to protect, but which can be infringed or undermined without the substantive right being violated. Furthermore, Lord Bingham's reference to "core values" is subject to the qualification expressed by Lady Hale in *McLaughlin* (at para 22) that "core values" is a concept derived from United Kingdom rather than Strasbourg jurisprudence so that this may turn out to be too restrictive a test. However, she applied that test to the facts in *McLaughlin* by reference to the core value as being to secure the life of children within their families. It was also the test referred to by Arden LJ as meaning that "the Convention is only concerned with disputes about discrimination which are 'of moment' and not peripheral issues": see *R (Steinfeld) v Secretary of State for Education* [2017] EWCA Civ 81; [2018] QB 519, at para 61. Accordingly, while it may turn out to be too restrictive either generally or in some cases, it usefully focuses the inquiry on the values which the substantive right in question exists to protect.

61. Furthermore, in relation to para 13 of *R (Clift) v Secretary of State for the Home Department* the Board agrees with the observation of Sir Terence Etherton MR delivering the judgment of the Court of Appeal in *Smith v Lancashire Teaching Hospitals NHS Foundation Trust and others* [2017] EWCA Civ 1916; [2018] 2 W.L.R. 1063, at para 46 that "Lord Bingham's reference to a 'core value' (in *M* [2006] 2 AC 91, para 4) is more apposite than his reference to 'the core of … a right' (in *Clift* [2007] 1 AC 484, para 13) when considering whether the facts fall within the ambit of one of the substantive Convention provisions, for the purposes of article 14". Infringement of the "core of a right" is more appropriate language in connection with an infringement of one of the substantive provisions of the Convention whereas ambit is concerned with the core values or interests which the substantive right exists to protect.

(c) Strasbourg authorities as to the test in relation to ambit

62. In *Petrovic v Austria* (2001) 33 EHRR 14 at para 28 the ECtHR, (relying on *National Union of Belgian Police v Belgium* (A/19): (1975) 1 EHRR 578, para. 45 and *Schmidt and Dahlström v Sweden* (A/21): (1976) 1 EHRR 632, para. 39) expressed the ambit test as follows:

> "The Court has said on many occasions that Article 14 comes into play whenever 'the subject matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed', or the measures complained of are 'linked to the exercise of a right guaranteed'."

63. In a much-quoted passage Sir Nicholas Bratza analysed the test as to whether the facts at issue fall within ambit in his concurring opinion in *Zarb Adami v Malta* (2007) 44 E.H.R.R. 3. Mr Adami complained of discrimination on grounds of sex in respect of his call for compulsory jury service. He relied, inter alia, on the prohibition on "forced or compulsory labour" contained in article 4(2) ECHR read in conjunction with article 14. Article 4(3)(d) excludes from that prohibition "any work or service which forms part of normal civic obligations" and therefore excludes jury service. The majority judgment of the ECtHR held that the fact that a situation corresponded to a normal civic obligation did not preclude the applicability of article 4 read in conjunction with article 14. However, Sir Nicholas Bratza expressed hesitancy (at O-I1) as to "whether the facts of which complaint is made fall within the ambit of Article 4 and thus whether Article 14 has any application at all". He raised the question (at O-I5) "as to how compulsion to perform work or services forming part of 'normal civic obligations', which are expressly excluded from the protection afforded by Article 4, can at the same time be said to fall 'within the ambit' of that provision so as to render Article 14 applicable". However, he made the following observation in a particularly illuminating passage (at O-I7):

> "The central question which arises is what constitutes 'the ambit' of one of the substantive articles, in this case article 4. It has been argued that 'even the most tenuous links with another provision in the Convention will suffice' for article 14 to be engaged (see Grosz, Beatson & Duffy, The 1998 Act and the European Convention (2000), para C14-10). Even if this may be seen as going too far, it is indisputable that *a wide interpretation has consistently been given by the court to the term 'within the ambit'.* Thus, according to the constant case law of the court, the application of article 14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such right, *but it does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the article*. This is best illustrated by the fact that article 14 has been held to cover not only the enjoyment of the rights that states are obliged to safeguard under the Convention but also those rights and freedoms that a state has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention. This would indicate in my view that *the 'ambit' of an article for this purpose must be given a significantly wider meaning than the 'scope' of the particular rights defined in the article itself.* Thus, *in the specific context of article 4 of the Convention*, the fact that work or service falling within the definition of 'normal civic obligations' in paragraph 3 are expressly excluded from the scope of the right guaranteed by paragraph 2 of that article, in no sense means that they are also excluded from the ambit of the article seen as a whole" (emphasis added).

64. Based on those parts of this passage to which emphasis has been added, a wide interpretation has consistently been given by the ECtHR to the term "within the ambit" which interpretation does not even require the discriminatory treatment of which complaint is made to fall within the four corners of the individual rights guaranteed by the article. Furthermore, ambit must be given a significantly wider meaning than scope. However, though a wide interpretation is appropriate it is still necessary to consider the phrase "within the ambit" in the specific context of the article in question. In *Adami* the specific context was article 4 ECHR whereas in this appeal the specific context is an employment-related dispute between an individual and a State involving section 9 of the Constitution informed by the equivalent provision of the ECHR, namely article 8. The understanding in United Kingdom jurisprudence of Strasbourg case law is that the particular substantive right is relevant to ambit, see para 56 above. Accordingly, an analysis as to what is protected by article 8 in relation to an employment-related dispute between an individual and a State enables identification of the relevant core values in relation to which there should be a value judgment as to whether a personal interest close to that core is infringed or undermined.

(d) Strasbourg case law in relation to employment-related disputes

65. The ECtHR (Grand Chamber) revisited its case-law concerning the scope of article 8 ECHR in employment-related disputes between an individual and a State in its judgment in *Denisov v Ukraine* delivered on 25 September 2018. Subsequently the ECtHR in its decision delivered on 20 December 2018 in *JB and others v Hungary* (Application no. 45434/12), applied the principles set out in *Denisov*, to a complaint under article 8 about the lowering of a mandatory retirement age and the consequences of that measure on the applicants. In *Novakovic v Croatia* (Application no. 73544/14, 17 December 2020) the ECtHR considered the applicability of article 8 in the context of ethnic origin and age. It is necessary to consider these judgments in some detail. None of them concerned the ambit of article 8 as opposed to its applicability. However, consideration of ambit must be informed by the content of the substantive right under article 8, which in this appeal is confined to employment-related disputes between an individual and a State.

(i) Denisov v Ukraine

66. In *Denisov v Ukraine*, Mr Denisov had been dismissed from his position as President of the Kyiv Administrative Court of Appeal for failure to perform his administrative duties properly, but he remained a judge. He complained, inter alia, under article 8 ECHR that his right to respect for his private life had been violated by his dismissal as President of the Administrative Court of Appeal. He submitted that his right to respect for his private life was engaged because his career, reputation and social and professional relationships had been irreparably damaged. He argued that the position of President of a Court of Appeal was prestigious and powerful, and that the position from which he had been dismissed represented the apex of his legal career and the culmination of decades of personal dedication and professional commitment. He stated that the dismissal from that position had damaged his peers' perceptions of his personal authority and competence. Furthermore, he asserted that the reason for his dismissal, namely breaches of laws relating to the organisation of the justice process, had affected his professional standing generally and his future career and promotion prospects. He stated that this was particularly relevant in view of the fact that the information about his dismissal had been widely disseminated. Furthermore, he contended that his material well-being had been affected given the reduction in his salary and the loss of prospective pension benefits.

67. The decision of the ECtHR has particular significance in relation to this appeal for two main reasons. First, it determined that ordinarily the applicability of article 8 in a case concerning an employment-related dispute between an individual and a State involves consideration of the merits at the admissibility stage, and that if article 8 was not applicable then the application would be inadmissible. Second, it set out the "reason-based approach" and the "consequence-based approach" as the two ways in which,

ordinarily, a private-life issue under article 8 might arise in employment-related scenarios.

68. In relation to the first main reason why this decision was significant, the ECtHR observed under the heading "Admissibility (a) Preliminary remarks" (at para 92) that in relation to an employment-related dispute between an individual and a State "there is a strong tie between the questions of applicability and the merits". A finding that a measure has "seriously affected the applicant's private life, … means that the complaint is compatible ratione materiae with the Convention and, at the same time, that the measure constituted an 'interference' with the 'right to respect for private life' for the purpose of the three-limb merits test under Article 8 (assessment of the lawfulness, the legitimate aim and the necessity of such 'interference')". The ECtHR held that "the questions of applicability and the existence of 'interference' are inextricably linked in these categories of complaints".

69. At para 93 the ECtHR identified its previous divergent practice as to whether the relevant analysis should be carried out at the admissibility stage or at the merits stage, concluding that it should be carried out at the admissibility stage "unless there is a particular reason to join this question to the merits". The result is that the ECtHR will ordinarily analyse whether article 8 is applicable at the admissibility stage, which analysis will involve consideration as to whether the impugned measure constituted an "interference" with the "right to respect for private life" for the purpose of the three-limb merits test under article 8. If, following that analysis, article 8 is found not to be applicable then the ECtHR lacks jurisdiction ratione materiae and the application will be declared inadmissible under article 35(3)(a) ECHR. In this way the Board considers that applicability, merits and admissibility are linked in an employment-related dispute between an individual and a State involving article 8 ECHR.

70. In relation to the second main reason why this decision was significant, the ECtHR considered "'Private life' in employment related scenarios" (at paras 100-114) before setting out conclusions as to "the scope of Article 8 in employment-related disputes" (at paras 115-117). The court held (at para 115) that employment-related disputes are not per se excluded from the scope of "private life" within the meaning of article 8 ECHR. However, "there are two ways in which a private-life issue would usually arise in such a dispute: either because of the underlying reasons for the impugned measure (… the reason-based approach) or – in certain cases – because of the consequences for private life (… the consequence-based approach)". So, for an employment-related dispute between an individual and a State to come within article 8 ECHR, ordinarily the facts at issue have to fall within either the reason-based approach or the consequence-based approach.

71. At paras 103-106 the ECtHR considered the reason-based approach citing examples from its case law. In *Smith and Grady v the United Kingdom*, (Application

nos. 33985/96 and 33986/96, 27 September 1999), the reason for the measure was applicant's sexual orientation. In *Özpınar v Turkey* (Application no. 20999/04, 19 October 2010) the reason for the measure targeted aspects of the applicant's private life, in particular her close private relationships, the clothes and make-up she wore and the fact that she lived separately from her mother. In *Sodan v Turkey*, (Application no. 18650/05, 2 February 2016) the measure amounted to a disguised penalty and had been prompted by reasons relating to the applicant's beliefs and his wife's clothing. The Board considers it significant that age does not feature in any of those examples.

72. The ECtHR held (at para 116) that "If the consequence-based approach is at stake, the threshold of severity … assumes crucial importance. It is for the applicant to show convincingly that the threshold was attained in his or her case". The ECtHR stated that it "will only accept that Article 8 is applicable *where these consequences are very serious and affect his or her private life to a very significant degree*" (emphasis added). The very serious negative consequences which are to be established by the applicant relate to those aspects of private life which may be affected in employment related disputes which (at para 115) "include (i) the applicant's 'inner circle', (ii) the applicant's opportunity to establish and develop relationships with others, and (iii) the applicant's social and professional reputation". The ECtHR set out, at para 117, the "criteria for assessing the severity or seriousness of alleged violations". "An applicant's suffering is to be assessed by comparing his or her life before and after the measure in question". However, "in determining the seriousness of the consequences in employment-related cases it is appropriate to assess the subjective perceptions claimed by the applicant against the background of the objective circumstances existing in the particular case. This analysis would have to cover both the material and the non-material impact of the alleged measure".

73. The ECtHR, having set out the applicable principles analysed the facts at issue in *Denisov* at paras 118 -133, finding that they did not fall within either the reason-based approach or the consequence-based approach. Accordingly, the ECtHR held at para 134 that article 8 was not applicable and the application under that article was dismissed as "incompatible ratione materiae with the Convention pursuant to Article 35(3) (a) and (4)".

(ii) JB and others v Hungary

74. In *JB and others v Hungary* the applicants were all judges at different Hungarian courts, who complained, in essence, about the lowering of their mandatory retirement age and the consequences of that measure on their professional career and private life. The applicants claimed that their legitimate expectation to enjoy their status and remuneration until the age of 70 had been violated in breach of Article 1 of Protocol No. 1 ("A1P1"). They also complained that they had been the subject of discrimination on grounds of age, in breach of article 14 of the Convention read in conjunction with

A1P1. However, the ECtHR being the master of the characterisation to be given in law to the facts of the case decided, in addition, to communicate the applications to the Hungarian Government under article 8 ECHR.

75. In relation to the complaint under article 8 the ECtHR repeated (at paras 127-129) the general principles set out in *Denisov* and then proceeded to apply those principles to an analysis of the facts at issue on the reason-based approach and then on the consequence-based approach.

76. In relation to the reason-based approach (at para 131) the ECtHR stated that:

> "The direct reason behind the applicants' dismissal was that they had reached the lowered mandatory retirement age applicable to them. Although a person's age is obviously an aspect of his or her physical identity, it is at the same time an objective fact not capable of being influenced by freedom of choice in the sphere of private life. No other factors relating to the applicants' private life, in particular no factors connected directly to their conduct, were contemplated as qualifying criteria for being affected by the impugned measures".

The ECtHR concluded at para 137 that "The reasons for the applicants' dismissal were not linked to their 'private life' to a sufficient degree within the meaning of Article 8". Accordingly, article 8 was not applicable on a reason-based approach. *JB and others v Hungary* is ECtHR authority for the proposition that a mandatory retirement age, without more, is not sufficient for article 8 to be applicable on a reason-based approach.

77. In relation to the consequence-based approach the ECtHR examined whether the impugned measures had sufficiently serious negative consequences for the applicants' private life, in particular as regards their "inner circle", their opportunities to establish and develop relationships with others and their reputation. Having done so the ECtHR concluded (at para 137) that the consequences of the impugned measures did not sufficiently affect their private life so that article 8 was not applicable on a consequence-based approach.

78. The ECtHR, at para 138 dismissed the applicants' complaint as "incompatible ratione materiae with the Convention pursuant to Article 35(3) (a) and (4)".

(iii) Novakovic v Croatia

79. In *Novakovic v Croatia* (Application no. 73544/14) the applicant worked as a secondary school teacher in Eastern Slavonia and was dismissed for failing to use the standard Croatian language when teaching. The authorities held that the applicant could not be expected to learn Croatian, given that he was fifty-five years old at the time. The applicant complained that he had been arbitrarily dismissed from his teaching post, contrary to article 8. The ECtHR applied the principles in *Denisov* and at para 49 decided that:

> "Given that the crucial reason for the applicant's dismissal, i.e. the language he used in instructing students, was a factor so closely related to his Serbian ethnic origin and that the perception that he could no longer change this feature was directly linked to his age, the Court is satisfied that the underlying reasons for the impugned measure had been sufficiently linked to the applicant's private life … thus justifying the applicability of Article 8 to the facts of the present case under its reasons-based approach …".

Novakovic v Croatia is authority for both ethnicity and age leading to the application of article 8 on a reason-based approach.

(e) The core values in employment-related disputes

80. Before considering the appellants' submissions in relation to ambit it is appropriate for the Board to set out the core values in relation to an employment-related dispute between an individual and a State which are protected under article 8.

81. The overriding core value in the Convention is respect for human dignity and human freedom: see *Pretty v United Kingdom* (2002) 35 EHRR 1, para 65. In addition to the overriding core value of human dignity and human freedom the core values in relation to an employment-related dispute between an individual and a State which are protected under article 8 can be discerned from *Denisov* and from *JB and others v Hungary*. In *Denisov* the core values are protection from measures whose reasons are primarily, though not exclusively, connected with a suspect ground, see the cases referred to at para 71 above or from measures whose consequences are "very serious" affecting private life to "a very significant degree". In *JB and others v Hungary* at para 131 the core value is freedom of choice in the sphere of private life. The substantive right in issue is relevant to whether the material facts are within the ambit of that right: see paras 56, 63 and 64 above. In the context of an employment-related dispute between an individual and a State the reasons under the reason-based approach are limited and severity is a necessary component of a consequence-based approach. Those limitations

must affect the assessment of whether the material facts are within the ambit of that aspect of article 8 ECHR.

(f) The appellants' submissions in relation to ambit

82. On behalf of the appellants their written case on the ambit issue was summarised as follows:

> (i) *The first submission*. "The test for whether a measure falls within the ambit of section 9 is wider than the test for an interference with section 9. The Court of Appeal conflated the two tests and in doing so adopted too restrictive an approach to ambit".
>
> (ii) *The second submission*. "Mandatory retirement at age 55 is within the ambit of section 9 because it infringes a core aspect of the appellants' personal identity and is a decision taken because of an immutable characteristic".
>
> (iii) *The third submission*. "The Court of Appeal was wrong to determine that age discrimination resulting from a blanket retirement age was less serious than other forms of discrimination. The distinctive nature of age discrimination is more appropriately addressed at the justification stage of analysis".
>
> (iv) *The fourth submission*. "A mandatory retirement age of 55 which impacts the appellants' life choices, their autonomy and self-respect, and their ability to form professional relationships, has a more than tenuous connection with their private lives and is also within the ambit of section 9 for this reason".

The Board will consider each of those submissions.

83. *The first submission*. The appellants submit that the Court of Appeal conflated the test for interference with section 9 and article 8 with the question of the ambit of those provisions. In doing so the appellants relied, for instance, on the Court of Appeal's conclusion (at para 33) that section 9 was "not engaged and, accordingly the gateway to Section 16 has not been opened". The Board rejects this submission on a fair reading of the Court of Appeal's judgment. The Court of Appeal (at para 7) specifically identified that the issue of discrimination under section 16 "turned on whether the Plaintiffs could establish that mandatory retirement on the grounds of age fell within the *ambit* of Section 9 …" (emphasis added). As is apparent from paras 56-61 above ambit depends on a value judgment as to how seriously and directly the

measure impinges upon the values underlying the particular substantive provision. The Court of Appeal reached such a value judgment (at para 33), stating that:

> "Compulsory retirement on the grounds of age is *miles away* from the dismissal on the grounds of gender in *[Boyraz v Turkey* (2015) 60 EHRR 30]. Such retirement says nothing about the individual qualities of claimant officers; it does not have a bearing in any way on those personal characteristics which require particular protection, such as gender or sexual orientation. It is not even possible to equate mandatory retirement on the grounds of age with dismissal at all. A dismissal directed at a particular individual on the grounds of that person's age and on the grounds of consequential lack of capability may engage Article 8 but a blanket retirement policy does not" (emphasis added).

In this way the Court of Appeal applied a value judgment that mandatory retirement on the grounds of age is far removed from the core values protected by article 8 in relation to employment-related disputes between an individual and a State and therefore was not within the ambit of that provision.

84. *The second submission*. The appellants expanded on the submission that mandatory retirement at age 55 infringes a core aspect of the appellants' personal identity and is a decision taken because of an immutable characteristic. In their submissions the appellants sought to equiparate age with sex or gender, so that the facts at issue would not only be within the ambit, but also within the scope, of section 9 and article 8 on a reason-based approach. If that submission was correct, then their claims could have been formulated on the basis of a substantive breach of section 9. However, no substantive breach of section 9 has been advanced on this appeal.

85. In advancing the second submission Mr Jupp referred the Board to *Boyraz v Turkey* (Application No. 61960/08) (2015) 60 EHRR 30. In that case the applicant was not appointed as a security officer at a branch of a state-run Electricity Company as she was not male and had not completed military service. The applicant complained under article 14 ECHR that the administrative authorities' decisions and the domestic courts' judgments constituted discrimination against her on grounds of sex. The ECtHR (at para 33) as the master of the characterisation to be given in law to the facts of any case before it and having regard to the circumstances of the case, considered that the complaint fell to be examined under article 14 of the Convention, taken in conjunction with article 8. The ECtHR reiterated (at para 41) that:

> "the right of recruitment to the civil service was deliberately omitted from the Convention. Consequently, the refusal to appoint a person as a civil servant cannot as such provide the basis for a complaint under the Convention".

The ECtHR repeated the formula that for article 14 to be applicable, the facts of a case must fall within the ambit of another substantive provision of the Convention or its Protocols. At para 44 the court stated:

> "that the administrative authorities dismissed the applicant from her post in 2004 on the ground of her sex. In the Court's view, *the concept of "private life" extends to aspects relating to personal identity and a person's sex is an inherent part of his or her identity*. Thus, a measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person's identity, self-perception and self-respect and, as a result, his or her private life. The Court therefore considers that the applicant's dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life. …. Thus, the Court considers that article 8 is applicable to the applicant's complaint." (emphasis added).

The terminology used in para 44 was of article 8 being "applicable" but clearly the decision related to "ambit". Furthermore, it was a reason-based approach to the ambit of article 8 in an employment-related dispute between an individual and a State. Mr Jupp contended that this passage in para 44 should be read as if the reference to gender was replaced by a reference to age because "a person's age is an inherent part of their identity *just as* a person's sex, race, religion or sexuality is" (emphasis added). He also submitted that age is an immutable characteristic which provides the necessary link to article 8 and brings it within the ambit of that article for the purposes of a claim under article 14.

86. The Court of Appeal (at para 33) disagreed with the proposition that age should be equiparated with gender, which it considered were "miles away" from one another.

87. Gender is one of the suspect grounds of differential treatment identified by the ECtHR which are regarded as particularly serious. Other suspect grounds include race or ethnic origin, nationality or birth status. These suspect grounds form a somewhat inexact category, which has developed in the ECtHR case law over time. In general, the rationale is the link between the characteristic on which differential treatment is founded and a history of stigmatisation, stereotyping and social exclusion. A mandatory retirement age does not carry with it a history of purposeful unequal treatment or of stigmatisation, stereotyping and social exclusion. Lord Walker in *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] AC 173 at para 60 stated that "There is nothing intrinsically demeaning about age" and that "In relation to normal retirement ages lines have to be drawn somewhere, …". In *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; [2012] ICR 716, Lady Hale, delivering the judgment of the court stated at para 4 "that age is different" and continued by explaining that age is "a continuum which changes over time…. This means that younger people will

eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefited from a provision which favours younger people, such as a mandatory retirement age." In *British Gurkha Welfare Society and others v United Kingdom* (Application. No. 44818/11, 15 September 2016) at para 88 the ECtHR, whilst recognising that age might constitute "other status" for the purposes of article 14 of the Convention, stated that "it has not, to date, suggested that discrimination on grounds of age should be equated with other 'suspect' grounds of discrimination". The ECtHR has not included age alone as a relevant reason to engage article 8 in employment-related disputes between an individual and a State, see para 71 above, but rather, in *JB and others v Hungary* it expressly rejected a mandatory retirement age as being a reason sufficient to engage article 8 in relation to such disputes. The Board considers that age is a personal characteristic to be placed in a different category to characteristics such as gender or sexual orientation and rejects the submission that it is appropriate to read para 44 of *Boyraz* as if the reference to gender was replaced by a reference to age.

88. The Board considers that the reason-based approach to the engagement of article 8 should not be restricted to suspect grounds. The ECtHR at paras 103-105 of its judgment in *Denisov* did not restrict the reason-based approach to suspect grounds, nor did it do so at para 131 of its judgment in *JB and others v Hungary*. The distinction being drawn in *JB and others v Hungary* was not between reasons based on suspect grounds and other grounds but rather with reasons based on physical identity capable of being influenced by freedom of choice in the sphere of private life and other reasons, see para 76 above.

89. However, the value judgment of the Board is that mandatory retirement on the grounds of age, which is an ordinary incident of modern life, is far removed from the core values in relation to employment-related disputes between an individual and a State which article 8 (and section 9) are intended to protect so that in relation to such disputes it not only does not fall within the reason-based approach to the application of article 8 but also does not fall within the ambit of that article.

90. *The third submission*. This submission repeats the contentions in relation to the nature of age discrimination but in addition contends that such discrimination is more appropriately addressed at the justification stage of the analysis. In relation to the additional point the Board observes that in *Denisov* the ECtHR held that it was appropriate to consider all the issues at the admissibility rather than at the merits stage, see paras 68-69 above. The Board considers that in this discrete area of an employment related dispute between an individual and a State, even if a matter falls within the ambit of article 8 there is no reason why the approach of the ECtHR should not be followed so that all issues can be considered at the preliminary stage as to the applicability of section 16 or article 14.

91. *The fourth submission*. The contention that a mandatory retirement age of 55 which impacts the appellants' life choices, their autonomy and self-respect, and their ability to form professional relationships, has a more than tenuous connection with their private lives so as to be within the ambit of section 9 essentially involves the application of the general principles to the present case. The Board deals with that submission in the next section of this judgment.

(g) Application of the general principles to the present case

92. The Board considers that an analysis of the facts at issue leads to the conclusion that article 8 would not be engaged, so that the ECtHR would lack jurisdiction ratione materiae and the application would be declared inadmissible under article 35(3)(a) and (4) ECHR.

93. Applying the reason-based approach a mandatory retirement age on its own is insufficient for article 8 (and section 9) to be engaged, see *JB and others v Hungary* at para 131.

94. Applying the consequence-based approach it is necessary to consider the severity of the consequences for the individual police officers' private life, in particular as regards their "inner circle", their opportunities to establish and develop relationships with others and their reputations. It is for the individual police officers to show convincingly that the threshold is attained in his or her case and this is to be done applying the criteria set out by the ECtHR in *Denisov*, see para 72 above.

95. As to the consequences of the second and third plaintiffs' dismissal for their "inner circle" they contended that their mandatory retirement had resulted in a reduction in their salaries. However, neither of them established the amount by which their earnings were reduced (see para 33 (b) and (c) above) nor that the reduction affected their inner circles to "a very significant degree".

96. As to establishing and maintaining relationships with others the second plaintiff was re-engaged in the police and his colleagues still showed him respect and his personal relationships were not affected (see para 33 (d) and (f) above). The third plaintiff had the opportunity to be re-engaged so that she had the opportunity to maintain relationships with others. Her failure to avail herself of that opportunity did not end or cause a deterioration in her personal relationships but rather it meant that she saw her colleagues less frequently (see para 33 (h) above).

97. Finally, the judge found that mandatory retirement did not encroach on the second or third plaintiffs' reputations, (see para 33 (f) and (g) above).

98. The Board considers that the mandatory retirement on the ground of age of both the second and third plaintiffs had limited negative effects on their private lives and did not cross the threshold of seriousness for an issue to be raised under article 8 ECHR or section 9 of the Constitution.

99. The final question is whether mandatory retirement on its own comes within the ambit of article 8. This is a value judgment taking into account the core values as set out at para 81 above. The Board considers that on a reason-based approach mandatory retirement does not fall within the ambit of article 8 or section 9, see at para 89 above. Approaching ambit from the perspective of a consequence-based approach the lack of any "very serious" consequences which affect the individual police officers' private lives to "a very significant degree" not only informs the scope of article 8 but on the facts in issue on this appeal would only amount to a tenuous link to the core values so as not to fall within the ambit of article 8. For those reasons the Board considers that the facts in issue do not fall within the ambit of section 9 or of article 8. That conclusion is reinforced by the factor that the ECtHR would lack jurisdiction ratione materiae.

(h) Conclusion in relation to issue one

100. For those reasons section 16 of the Constitution has no application, when read in conjunction with section 9. The Board therefore dismisses the appellants' appeal in relation to issue one.

***Issue two**. Was the re-engagement policy in breach of section 19 of the Constitution as an irrational free-standing policy or could its connection to mandatory retirement provide a rational basis for the policy as an ameliorative measure in relation to those compelled to retire?*

101. The Board prefaces its analysis of both this issue and issue three by observing that, understandably, the focus of the parties' submissions before the Board related to issue one which is the most substantial issue on this appeal, so that both issues two and three were overshadowed by issue one. The Board has set out at paras 5, 7, 8, 34, 35, 40 and 41 the approach taken by the courts below to issues two and three and expressly recognises the considerable force of the conclusions that were reached. However, whilst the Board respectfully agrees with the conclusion reached in the courts below in respect of issue one it has arrived at different conclusions in relation to both issues two and three.

102. The Court of Appeal held that the re-engagement policy was irrational as it was insufficiently flexible to allow the Commissioner to consider the particular qualities of the non-gazetted officer or the particular needs of the police service (see para 7 above). The respondents have not appealed against that finding. The Board respectfully agrees

with the Court of Appeal that the re-engagement policy was inextricably linked to mandatory retirement so that the policy was not free-standing (see para 30 above) and agrees that its purpose was to ameliorate mandatory retirement. However, the Board considers that the linkage of the policy to mandatory retirement and the ameliorative purpose of the policy cannot change its irrationality. The constitutional requirement of rationality applies regardless as to whether the policy is linked to mandatory retirement and regardless as to any beneficial purpose. Whilst it is correct that the re-engagement policy was a response to ameliorate the position of officers forced to retire and, to that extent, they were in a better position than they would otherwise have been without any such policy, that does not mean that the policy was not irrational. A policy that is designed with the best of intentions can nevertheless be irrational when it is a blanket policy applied irrespective of the circumstances of the individual or the needs of the police service.

103. The Board therefore allows the appeals of the second, fifth, sixth, eighth, ninth, and tenth plaintiffs in relation to their claims in respect of the re-engagement policy and remits those claims to the Grand Court for reconsideration. The Board notes the agreement at trial that the evidence of the second and third plaintiffs would be representative of the other individual police officers, but that agreement could not have been considered to apply to the issues which will arise on remittal where the abilities of each of the individual police officers and the needs of the police service either generally or in the areas where the officers served will be of significance. Accordingly, on remittal to the Grand Court it will be open to *all* the parties to call further evidence.

Issue three. *Do the third and eleventh plaintiffs have standing to challenge the re-engagement policy?*

104. The issue is whether the third and eleventh plaintiffs have standing to claim under section 26 of the Constitution that the re-engagement policy was unlawful under section 19. Both the judge (at para 252) and the Court of Appeal (at para 64) held they did not have standing.

105. The third plaintiff wished to be re-engaged but without any reduction in rank. A rational policy would have allowed for flexibility taking into account her abilities and the needs of the police service. If there had been that flexibility, then she would have applied to be re-engaged. On this basis the Board considers that she was directly affected by the re-engagement policy and has standing. The Board allows the third plaintiff's appeal in relation to her claims in relation to the re-engagement policy and remits that claim to the Grand Court for reconsideration.

106. There was an issue before the judge as to the third plaintiff's abilities with conflicting evidence involving initial enthusiastic support from one of her superior

officers, changing to opposition, which was potentially in conflict with her performance development reviews. On remittal to the Grand Court, it will be open to the Commissioner to call further evidence and to contend that the abilities of the third plaintiff were such that in the context of the needs of the police service it was appropriate for the third plaintiff to be re-engaged at a reduced rank. The third plaintiff is also at liberty to call further evidence. In this way, evidence as to the abilities of the third plaintiff and as to the needs of the police service and any other relevant evidence will be considered by the Grand Court.

107. It was agreed that the third plaintiff's evidence would be representative of the other individual police officers. On that basis the eleventh plaintiff has standing. The Board allows the eleventh plaintiff's appeal in relation to his claim in relation to the re-engagement policy and remits that claim to the Grand Court for reconsideration.

Overall conclusion

108. For the reasons set out above the Board will humbly advise Her Majesty that the appeal in relation to issue one should be dismissed and that the appeal on issues two and three should be allowed, so that the second, third, fifth, sixth, eighth, ninth, tenth and eleventh plaintiffs' cases are remitted to the Grand Court to reconsider their claims based on the re-engagement policy.