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Sources of law

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation;; article 2 (5)

Basic Law for the Federal Republic of Germany; GG, Grundgesetz; article 3, article 12

Code of Administrative Court Procedure; VwGO, Verwaltungsgerichtsordnung; section 47 (1) no. 2, section 47 (2) first sentence

General Equal Treatment Act; AGG, Allgemeines Gleichbehandlungsgesetz; section 2 (1) no. 1, section 3 (1) first sentence, section 6 (3), section 7 (1) first half sentence, section 8 (1), section 10 first sentence

Ordinance of the Federal State of Hesse on Authorised Inspectors and Expert Inspectors pursuant to the Building Law of the Federal State of Hesse; HPPVO, Hessische Verordnung über Prüfberechtigte und Prüfsachverständige nach der Hessischen Bauordnung; section 7 (1) no. 2

Headnote

The guarantee as to construction safety serves the purpose of meeting the requirement of maintaining public security within the meaning of article 2 (5) of Directive 2000/78/EC. It constitutes a legitimate aim that may justify a difference in treatment on grounds of age by means of establishing a general maximum age limit of 70 years which applies to expert inspectors for technical equipment and installations in buildings.

Judgment of 21 January 2015 - BVerwG 10 CN 1.14

Summary of the facts

The applicant challenges the age limit of 70 years which applies to expert inspectors and which stipulates that the approval as expert inspector pursuant to the Ordinance of the Federal State of Hesse on Authorised Inspectors and Expert Inspectors pursuant to the Building Law of the Federal State of Hesse (*Hessische Bauordnung*) expires when this maximum age limit is reached.

On 2 April 2013, the applicant lodged an application (*Normenkontrollantrag* ((application for judicial review with respect to the compatibility of a legal provision with higher-ranking law pursuant to § 47 of the Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)) with the Higher Administrative Court directed at the judicial review of the age limit of 70 years that applies to expert inspectors pursuant to the Building Law of the Federal State of Hesse, petitioning that section 7 (1) no. 2 of the Ordinance of the Federal State of Hesse on Authorised Inspectors and Expert Inspectors pursuant to the Building Law of the Federal State of Hesse (HPPVO, *Hessische Verordnung über Prüfberechtigte und Prüfsachverständige nach der Hessischen Bauordnung*) to be declared null and void.

In its judgment dated 7 August 2013, the Higher Administrative Court rejected the application for judicial review. The application as such, the Court held, was admissible, however, it was unfounded. The age limit of 70 years for expert inspectors pursuant to the Building Law of the Federal State of Hesse did not infringe national (German) law, nor did it infringe EU law, the Court explained. The age limit does constitute a direct discrimination on grounds of age within the meaning of section 3 (1) sentence 1 of the General Equal Treatment Act (AGG; *Allgemeines Gleichbehandlungsgesetz*), the Court continued. However, the Court explained, the general safety reservation as stipulated in article 2 (5) of Directive 2000/78/EC justified the less favourable treatment.

Reasons (abridged)

11 The admissible appeal on points of law is unfounded. The challenged decision does not infringe any federal law (section 137 (1) no. 1 VwGO). The Higher Administrative Court was correct in holding that the application for judicial review was admissible (1.), but, nonetheless, unfounded (2.).

12 1. The Higher Administrative Court was correct in holding that the application for judicial review was admissible. (...)

14 2. The Higher Administrative Court's assumption that the application for judicial review was unfounded is also not subject to objection by this Court in the context of the present appeal proceedings. The decision of the lower court neither infringes federal German law, nor does it infringe European Union law. It is the case that the age limit set forth in section 7 (1) no. 2 HPPVO does constitute a direct discrimination on the grounds of age within the meaning of the General Equal Treatment Act of 14 August 2006 (Federal Law Gazette (BGBl., Bundesgesetzblatt) I p. 1897), as last amended by the Act of 3 April 2013 (BGBl. I p. 610). However, it is justified by the safety reservation as stipulated in article 2 (5) of Directive 2000/78/EC of the European Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303 p. 16) - hereinafter referred to as Directive 2000/78/EC.

15 The General Equal Treatment Act is applicable to expert inspectors for technical equipment and installations in buildings pursuant to the Building Law of the Federal State of Hesse. The age limit set forth in section 7 (1) no. 2 HPPVO constitutes a condition for the admission to a self-employed economic activity within the meaning of section 2 (1) no. 1 AGG. The General Equal Treatment Act which serves the purpose of implementing Directive 2000/78/EC, is to be interpreted in the light of that EU law. According to this Directive, a restriction of the admission to a self-employed economic activity is already then existent if the age limit is suitable to actually, i.e., de facto, restrict the demand for the service offered by the applicant (cf. Federal Administrative Court

(BVerwG, Bundesverwaltungsgericht), judgment of 1 February 2012 - 8 C 24.11 – Rulings of the Federal Administrative Court (BVerwGE, Entscheidungen des Bundesverwaltungsgerichts) 141, 385 para. 12; Court of Justice of the European Union (ECJ), judgment of 12 January 2010 - C-341/08, Domnica Petersen (...) para. 33). These conditions are met in the present case. (...)

17 The age limit pursuant to section 7 (1) no. 2 HPPVO constitutes a direct discrimination on the grounds of age within the meaning of section 3 (1) sentence 1 AGG. Pursuant to section 6 (3) and section 7 (1) first half sentence AGG, such discrimination is impermissible as a matter of principle. It is not justified by means of section 8 (1) AGG because there exist no requirements which are imposed on the activity of an expert inspector which constitute, according to the nature of this activity, a genuine and determining occupational requirement and which are age-related (cf. Federal Administrative Court (BVerwG, Bundesverwaltungsgericht), judgment of 1 February 2012 - 8 C 24.11 – Rulings of the Federal Administrative Court (BVerwGE, Entscheidungen des Bundesverwaltungsgerichts) 141, 385 para. 19). Section 10 first sentence AGG is equally incapable of justifying the discrimination on the grounds of age. This is because the challenged provision does not serve any social policy aim which might legitimise the difference in treatment (cf. BVerwG, judgment of 1 February 2012 - 8 C 24.11 - BVerwGE 141, 385 para. 16).

18 c) However, the Higher Administrative Court was correct in concluding that the general age limit for inspectors for technical equipment and installations in buildings, which is at issue here, is justified by the safety reservation as stipulated in article 2 (5) of Directive 2000/78/EC as regards the fields of specialisation practised by the applicant. Pursuant to this, this Directive shall be without prejudice to measure laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others. By means of adopting this safety reservation, it was the EU legislator's intention, with respect to the area of employment and occupation, to prevent and arbitrate a conflict between, on the one hand, the principle of equal treatment and, on the other hand, the

necessity of ensuring public order, security and health, the prevention of criminal offences, and the protection of individual rights and freedoms, which are necessary for the functioning of a democratic society (ECJ, judgment of 13 September 2011 - C-447/09, Prigge (...) para. 55; BVerwG, judgment of 1 February 2012 - 8 C 24.11 - BVerwGE 141, 385 para. 23). The safety reservation must be interpreted strictly, as it constitutes an exception to the principle of the prohibition of discrimination (ECJ, judgments of 12 January 2010 - C-341/08, Domnica Petersen (...) para. 60 and of 13 September 2011 C-447/09, Prigge (...) para. 56; BVerwG, judgment of 1 February 2012 - 8 C 24.11 - BVerwGE 141, 385 para. 23). While the federal legislator has not explicitly included the safety reservation in the General Equal Treatment Act, it has not waived it deliberately either, so that this silence on the part of the General Equal Treatment Act is not in conflict with any other rule laid down in national law beyond the rules contained in the General Equal Treatment Act (cf. BVerwG, judgment of 1 February 2012 - 8 C 24.11 - BVerwGE 141, 385 para. 24 et seq.).

19 aa) The maximum age limit under review in the present case serves the need to comply with security issues within the meaning of article 2 (5) of Directive 2000/78/EC. It is true that neither the text of the challenged provision nor its explanatory memorandum make it sufficiently clear which aim is being pursued by means of the maximum age limit. However, the general context of the provision as well as the defendant's arguments in the course of the court proceedings make it possible to determine the aim pursued by means of this measure; and this is something that may be used in the context of the application of the Directive (cf. ECJ, judgments of 12 January 2010 - C-341/08, Domnica Petersen (...) para. 40, of 21 July 2011 –C-159/10 and C-160/10, Fuchs and Köhler (...) para. 39). According to the defendant's arguments as well as the provision's context, which relates to building regulations, the general maximum age limit for expert inspectors for technical equipment and installations in buildings serves the interests of buildings security, the protection of life and health of both the building occupants and the general public (construction safety). By introducing expert inspectors to the building regulations of the federal state of Hesse, the activity of such expert inspectors, which is governed by private law, takes the place of the conventional task

fulfilment of the building control authority with respect to the activity areas which were assigned to such expert inspectors. The construction safety as part of public security within the meaning of the security reservation as stipulated in article 2 (5) of Directive 2000/78/EC.

20 bb) The age limit for expert inspectors is necessary for guaranteeing public security within the meaning of article 2 (5) of Directive 2000/78/EC. It was not necessary to obtain a preliminary ruling from the Court of Justice of the European Union regarding the question whether a fixed age limit may be deemed to constitute a necessary measure within the meaning of article 2 (5) of Directive 2000/78/EC. The obligation of a national court giving judgment at final instance to refer a matter pursuant to article 267 (3) of the Treaty on the Functioning of the European Union (TFEU) does not take effect if a question on interpretation regarding EU law is irrelevant for the ruling, has already been interpreted by the Court of Justice, or if the correct application of community law is so obvious as to leave no scope for any reasonable doubt (ECJ, judgment of 6 October 1982 - C 283/81, C.I.L.F.I.T. (...) para. 21). According to this, it is not required in this case to refer the question pursuant to article 267 (3) TFEU. In the case-law of the European Court of Justice, it is acknowledged that a member state, allowing for the margin of discretion it enjoys in the context of article 2 (5) of Directive 2000/78/EG, is entitled to consider it necessary to establish an age limit (cf. ECJ, judgment of 12 January 2010 - C-341/08, Domnica Petersen (...) para. 52). Apart from that, the question at issue here - namely, whether the age limit set forth for expert inspectors in section 7 (1) no. 2 HPPVO constitutes a necessary measure within the meaning of article 2 (5) of Directive 2000/78/EC - does not concern the interpretation of EU law, but rather, its application in a specific individual case.

21 A measure is necessary within the meaning of article 2 (5) of Directive 2000/78/EC if it is suitable for the pursuit of a legitimate aim, is necessary and appropriate, and complies with the requirement of consistency. That is so in the present case. The maximum age limit for expert inspectors is suitable to contribute to construction safety. As the Higher Administrative Court has correctly explained, an age limit excludes risks resulting from the circumstance

that mistakes occur to a certain group of people, consisting of expert inspectors who are not fully capable anymore due to old age, when they carry out their inspection activities. Furthermore, the maximum age limit is necessary to promote construction safety. It is true that the individual review of the capability of the expert inspector in question, which was mentioned by the applicant, would represent a less severe measure which could take the individual capability of the person concerned into consideration. Moreover, the applicant correctly points out that the added administrative burden involved with such individual reviews cannot justify a different treatment on grounds of age (BVerwG, judgment of 1 February 2012 - 8 C 24.11 - BVerwGE 141, 385 para. 22). However, an individual capability review would not be equally suitable to contribute to construction safety as a maximum age limit, because such a review would be performed too late. The circumstance that a certain capability is, due to old age, no longer sufficient would only be determined after it already is diminished. The approval as expert inspector would continue to exist until any defects were to become apparent in the course of the next review (cf. BVerwG, judgment of 26 January 2011 - 8 C 46.09 - BVerwGE 139, 1 para. 37). Lastly, the maximum age limit of 70 years is not disproportionate in the pursuit of the aim of obtaining construction safety. Construction safety serves the need to protect important legal interests like life and health. It cannot be criticised if the legislator has given priority to this protective aim over the interest in expert inspectors continuing their activity beyond the age limit. In any case, the age limit of 70 years exceeds most age limits which are applicable to other professional activities. It even exceeds the age limit for expert inspectors in other countries as well as for persons who perform similar tasks, for example, in public inspection authorities.

22 Contrary to the opinion of the applicant, section 7 (1) no. 2 HPPVO is not in conflict with the requirement of consistency. According to the case law of the European Court of Justice, a provision is only then appropriate for ensuring attainment of the aim pursued if it genuinely reflects a concern to attain it in a consistent and systematic manner (cf. ECJ, judgments of 12 January 2010 - C-341/08, *Domnica Petersen (...)* para. 53, of 21 July 2012 - C-159/10 and C-160/10, *Fuchs and Köhler (...)* para. 85; BVerwG, judgment of 26 January 2011

- 8 C 46.09 - BVerwGE 139, 1 para. 35). The challenged provision satisfies these requirements. The aim which is pursued by means of the maximum age limit, namely, construction safety, is not impaired by the provision set forth in section 9 (2) and (3) HPPVO. According to this, persons from other member states of the European Union may also work as expert inspectors in the federal state of Hesse, subject to further specified requirements and provided that their authorisation is equivalent, without the Ordinance of the Federal State of Hesse on Authorised Inspectors and Expert Inspectors explicitly requiring an age limit for this group of persons. However, it is settled in the established jurisprudence of the Higher Administrative Court of the federal state of Hesse that section 7 (1) no. 2 HPPVO also forbids that group of persons to work as expert inspectors after having attained the age of 70 years (Higher Administrative Court Kassel, decision of 26 February 2013 - 7 A 1644/12.Z (...)). Neither does section 9 (1) sentence 2 HPPVO run contrary to the aim pursued by means of the maximum age limit, namely, to attain construction safety. According to this, natural persons who are approved in other federal states are also approved in the federal state of Hesse. The defendant has correctly pointed out that none of the federal states that have assigned building supervision tasks to expert inspectors have fixed an age limit exceeding the age of 70; rather, the approval as expert inspector expires in all other federal states already upon attaining the age of 68. Since 1 December 2014, this also applies to the federal state of Saxony-Anhalt, which has reduced the previously applicable maximum age limit of 70 years, so that it now also amounts to 68 years (...).

23 d) The maximum age limit does not constitute an unlawful impairment of the freedom to choose and carry out one's occupation pursuant to article 12 (1) of the Basic Law (GG, Grundgesetz). It has its legal basis in section 80 (5) first sentence no. 2 and second sentence in conjunction with section 80 (4) third sentence no. 8 of the Building Law of the Federal State of Hesse in the version of 18 June 2002 (Law and Ordinance Gazette (GVBl., Gesetz und Verordnungsblatt) I p. 274), as amended by the Act of 28 September 2005 (GVBl. I p. 662). The encroachment upon the freedom to choose and carry out one's occupation is justified on the basis of the same considerations which

justify the difference in treatment on grounds of age in the context of article 2 (5) of Directive 2000/78/EC.

24 The maximum age for expert inspectors does not infringe the general principle of equal treatment set forth in article 3 (1) GG. The difference in treatment on grounds of age is objectively justified for the reasons set out above. The Higher Administrative Court did not infringe federal law when it held that the legislator was allowed to assess the extent of the respective hazard potential of older expert inspectors - in comparison to expert inspectors who have not yet reached that age limit - differently in a generalising way and in a manner permitted by law.

25 Neither is there an infringement of the prohibition of discrimination on grounds of age laid down in article 21 (1) of the Charter of Fundamental Rights of the European Union (CFR). This prohibition is specified by means of Directive 2000/78/EC (ECJ, judgment of 26 September 2013 –C-476/11 (...)). Consequently, the legitimisation of the difference in treatment on grounds of age pursuant to article 21 (1) CFR does not lay down any requirements which differ from those which also have to be complied with in the context of article 2 (5) of Directive 2000/78/EC. (...)