Case C-349/23 [Zetschek] [1]

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 June 2023

Referring court:

Verwaltungsgericht Karlsruhe (Germany)

Date of the decision to refer:

24 April 2023

Applicant:

HB

Defendant:

Federal Republic of Germany

Subject matter of the case in the main proceedings

Directive 2000/78/EC – Direct discrimination on grounds of age – Rigid general retirement age – Postponement of the start of retirement – The terms ‘objectively’ and ‘reasonable’ in the first subparagraph of Article 6(1) of Directive 2000/78/EC – Coherence

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

1. Does it constitute direct discrimination on grounds of age within the meaning of Article 2(2)(a) of Council Directive 2000/78/EC of 27 November

[1] The present case is designated by a fictitious name which does not correspond to the actual name of a party to the proceedings.

2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, p. 16), when, under Paragraph 48(2) of the German Law on Judges (Deutsches Richtergesetz, 'the DRiG'), federal judges cannot postpone the start of their retirement, even though federal civil servants and, for example, judges in the service of Land Baden-Württemberg are allowed to do so?

2. In the context of the first subparagraph of Article 6(1) of Directive 2000/78/EC, do elements derived from the general context of the measure at issue also include aspects that are not mentioned at all in the legislative material or in the course of the entire parliamentary legislative process, but are presented only during the judicial proceedings?

3. How are the terms 'objectively' and 'reasonably' in the first subparagraph of Article 6(1) of Directive 2000/78/EC to be interpreted and what is their point of reference? Does the first subparagraph of Article 6(1) of the Directive require a twofold examination of reasonableness?

4. Is the first subparagraph of Article 6(1) of Directive 2000/78/EC to be interpreted as precluding, from the point of view of coherence, national legislation which precludes federal judges from postponing their retirement whereas federal public servants and, for example, judges in the service of Land Baden-Württemberg are allowed to do so?

Provisions of EU law relied on

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16), in particular Article 1, Article 2(1) and (2)(a) and the first subparagraph of Article 6(1)

National legislation cited

Basic Law (Grundgesetz), in particular Article 95(1) and (2).

Richterwahlgesetz (Law on the Election of Judges, 'the RiWG'), in particular Paragraph 1(1).

Deutsches Richtergesetz (German Law on Judges, 'the DRiG'), in particular Paragraph 48(1) to (3),

Bundesbeamtengesetz (Federal Civil Service Law, 'the BBG'), in particular Paragraph 51(1) and (2); Paragraph 53(1) and (1a), first sentence

Law of Land Baden-Württemberg on judges and prosecutors (LRiStAG), in particular Paragraph 6(1) and (2).

Brief summary of the facts and procedure

1 The applicant, a judge at the Bundesgerichtshof (Federal Court of Justice, Germany), who was born on 20 September 1960, seeks to postpone the start of his retirement.

2 As a federal judge, he is subject to a rigid retirement age of 66 years and four months for the year of birth 1960, in accordance with the second sentence of Paragraph 48(3) of the DRiG. The law does not allow the applicant to postpone the start of his retirement; on the contrary, Paragraph 48(2) of the DRiG expressly excludes it.

3 Federal civil servants are subject to the same general retirement age of 67 (see Paragraph 51(1) of the BBG). They may, however, postpone the start of their retirement for a maximum period of three years under the conditions laid down in Paragraph 53 of the BBG.

4 Judges in Baden-Württemberg are also subject to a general retirement age, currently 67, in accordance with Paragraph 6(1) of the LRiStAG. Under the first sentence of Paragraph 6(2) of the LRiStAG, however, they have the possibility, on request, to postpone the start of their retirement on account of reaching retirement age for up to one year, but not beyond the end of the month in which the judge reaches the age of 68.

5 By letter of 30 September 2021, the applicant asked the President of the Bundesgerichtshof (Federal Court of Justice) to inform him of the date of the start of his retirement by decision against which an appeal may be brought. She thereupon stated, by letter of 7 October 2021, that he would reach the general retirement age at the age of 66 years and four months and that he would therefore retire with the expiry of 31 January 2027. The Federal Ministry of Justice rejected the complaint lodged by the applicant against that letter.

6 The applicant is pursuing his claim for leave to serve as a judge of the Bundesgerichtshof (Federal Court of Justice) beyond the general retirement age before the referring court by seeking a judicial declaration that he will not retire with the expiry of 31 January 2027. The parties to the proceedings disagree, in view of EU law, on whether discrimination on grounds of age exists and, if so, whether it is justified.

Brief summary of the basis for the reference

7 The referring court could declare the judicial finding sought by the applicant, according to which he would not retire with the expiry of 31 January 2027, if Article 2(2)(a) and the first subparagraph of Article (6)(1) of Directive 2000/78 were to be interpreted as precluding a rigid general retirement age laid down by national law, such as Paragraph 48(1) of the DRiG, at issue in the main proceedings, or if those provisions of the directive were to be interpreted as

precluding exclusion of the possibility to postpone the start of retirement laid down by national law for federal judges, such as in Paragraph 48(2) of the DRiG at issue in the main proceedings.

8 The Court's case-law appears to have clarified that the rigid retirement age laid down by law for federal judges in Paragraph 48(1) of the DRiG gives rise to direct discrimination on grounds of age (see, inter alia, judgments of 21 July 2011, *Fuchs and Köhler*, C-159/10 and C-160/10, EU:C:2011:508; of 6 November 2012, *Commission* v *Hungary*, C-286/12, EU:C:2012:687; and of 3 June 2021, *Ministero della Giustizia (Notaries)*, C-914/19, EU:C:2021:430).

9 However, the question arises concerning the extent to which this also constitutes direct discrimination on grounds of age on account of the fact that Paragraph 48(2) of the DRiG does not allow the applicant to postpone the start of retirement, although this possibility is open to federal civil servants and, for example, judges in the service of Land Baden-Württemberg.

10 Concerning that matter, the Federal Republic of Germany submitted at the hearing that, in order to answer the question of the existence of direct discrimination within the meaning of Article 2(2)(a) of Directive 2000/78, it was not permissible to make a comparison between the applicant, a federal judge, and federal public servants and Land judges, given that, under Article 95(2) of the Basic Law and Paragraph 1(1) of the RiWG, federal judges are chosen jointly by the competent federal minister and a competent committee for the selection of judges and appointed by the Federal President. The election by the committee for the selection of judges, consisting of the competent 16 Ministers of the Länder and of 16 members elected by the Bundestag, is fundamentally different from the appointment of federal civil servants and Land judges, if only in view of the longer lead time.

11 In the light of the openly formulated scope of the directive – in that connection, Article 3(1) speaks of 'all persons, as regards both the public and private sectors, including public bodies', – the chamber, on the other hand, tends towards allowing, in particular, a comparison between the applicant as a federal judge and (Baden-Württemberg) regional court judges. It may only be necessary to take into account the difference relied on by the Federal Republic of Germany as regards the appointment of federal judges, regional judges and federal civil servants at the level of justification.

12 The answer to that question is also significant for the decision in the main proceedings. If the difference of treatment of the applicant were not based on a characteristic referred to in Article 1 of Directive 2000/78, there would be no direct discrimination within the meaning of Article 2(1) and (2)(a) of the Directive by the national provision of Paragraph 48(2) of the DRiG.

13 Under the first subparagraph of Article 6(1) of Directive 200//78, notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds

of age are not to constitute discrimination if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

14 According to the case-law of the Court, Member States enjoy a broad discretion as to the legitimate aim and the means of achieving that aim. Moreover, the Court has held multiple times that it cannot be inferred from Article 6(1) of Directive 2000/78 that the lack of precision in the national legislation at issue as regards the aim pursued which may be considered legitimate under that provision automatically excludes the possibility that it may be justified under that provision. It is sufficient that other elements, taken from the general context of the measure concerned, enable the underlying aim of that measure to be identified for the purposes of review by the courts of whether it is legitimate and whether the means put in place to achieve it are appropriate and necessary (see judgments of 16 October 2007, *Palacios de la Villa*, C-411/05, EU:C:2007:604, paragraph 57; of 5 March 2009, *Age Concern England*, C-388/07, EU:C:2009:128, paragraph 45; and of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 39 et seq.).

15 To justify the difference of treatment on grounds of age, the Federal Republic of Germany argued during the judicial proceedings that Paragraph 48(1) and (2) of the DRiG is intended to ensure the favourable balancing of the age structure of the judiciary, since only the retirement of older workers allows access to vacant posts for people at the start of their profession. Furthermore, the provision also offers advantages in terms of staff planning, since staff change is continuous and foreseeable. As a result, there are judges from all age groups in the workforce and suitable younger-generation judges can be recruited in good time. In this way, older judges can pass on their experience to younger colleagues and thus guarantee, in the public interest, a consistently high quality of judicial work. At the same time, account is taken of the societal consensus that, from a certain point in time, older employees must (and may) retire in order to vacate jobs for younger colleagues and successors at the start of the profession. In addition, experience indicates that physical and mental capacities decline with advancing age and it is therefore increasingly to be feared that the specific tasks could no longer be carried out adequately, to the detriment of the employer and the general public, and also to the detriment of the individual employee, who must increasingly devote more energy for the proper performance of the tasks. Aspects of fiscal consolidation should also be taken into account to a certain extent in the determination of legitimate objectives.

16 At the hearing, the Federal Republic of Germany also drew particular attention to the plannability and predictability of staff change in the context of the particular features of the election of federal judges.

17 Those factors relied on to justify the difference of treatment on grounds of age are not readily reflected in the statements of reasons for the law. Only the increase in

the general retirement age provided for in Paragraph 48(1) of the DRiG, meanwhile to 67 years, has been continually substantiated by demographic change. On the other hand, neither the statements of reasons for the law, nor the parliamentary minutes provide any indication of the legitimate objective pursued by the federal legislators by the exclusion of the possibility of postponing the start of retirement contained in Paragraph 48(2) of the DRiG. The question which arises is therefore whether there may still be such 'other evidence' taken from the general context of the measure at issue.

18 The answer to that question is also significant for the decision in the main proceedings. If the Federal Republic of Germany were deprived of any possibility of having recourse to the arguments submitted solely by means of written pleadings, there would be no evidence, with regard to Paragraph 48(2) of the DRiG, capable of being relied on to justify direct discrimination on grounds of age within the meaning of the first subparagraph of Article 6(1) of Directive 2000/78.

19 As regards the characteristics 'objective' and 'reasonable', it is questionable what exact meaning should be attributed to those terms. The background to this question is that, in German legal opinion, there are divergent views concerning the object of reference of these characteristics – the difference of treatment on grounds of age or the legitimate objective – and how those terms are to be interpreted.

20 In addition, the referring court requests clarification of the question as to whether Article 6(1) of Directive 2000/78/EC requires a twofold examination of reasonableness and, if so, what the point of reference for each of those assessments of reasonableness is, as that characteristic appears twice in the wording of the abovementioned provision of the Directive.

21 The answer to that question is also significant for the decision in the main proceedings. Only a precise understanding of the term allows the chamber to examine whether, in particular, the exclusion of postponing the start of retirement provided for in Paragraph 48(2) of the DRiG withstands judicial review in accordance with EU legal standards.

22 Finally, the chamber wonders whether the exclusion of being able to postpone the start of retirement provided for in Paragraph 48(2) of the DRiG and applicable to federal judges, in the light of the first subparagraph of Article 6(1) of Directive 2000/78, might be incoherent in comparison with Paragraph 53 of the BBG, which allows federal civil servants to postpone the start of retirement under the conditions laid down in that provision, and in comparison with, for example, the first sentence of Paragraph 6(2) of the LRiStAG, which confers that right on judges in the service of Land Baden-Württemberg.

23 In view of the federal structure of the Federal Republic of Germany and the resulting different legislative competence to regulate the start of retirement of civil servants and judges, the chamber wonders whether it is permissible to make an

analysis of the coherence of federal legislation and divergent legislation of the Länder at all. On the one hand, the Court has emphasised that a Member State's federal division of competences cannot be called into question, since it benefits from the protection conferred by Article 4(2) TEU, judgment of 12 June 2014, *Digibet und Albers*, C-156/13, EU:C:2014:1756, paragraph 34). On the other hand, however, a Member State may not rely on provisions, practices or situations of its internal legal order in order to justify non-compliance with its obligations under EU law (see judgment of 8 September 2010, *Carmen Media Group*, C-46/08, EU:C:2010:505, paragraph 69).

24 In addition, the chamber is uncertain whether, in the light of the first subparagraph of Article 6(1) of Directive 2000/78, Paragraph 48(2) of the DRiG constitutes a provision incoherent with Paragraph 53 of the BBG, in so far as, although the federal legislature allows federal civil servants to postpone retirement for flexible, family oriented and healthy work, the same legislature closes that course to federal judges, even though pension losses linked to periods of part-time work or leave of absence for family reasons seem equally conceivable. In other words, on the same grounds, the conditions for postponing the start of retirement for civil servants are facilitated on the one hand (see Paragraph 53(1)(a) of the BBG), while on the other hand, the categorical exclusion from postponing the start of retirement for federal judges is maintained.

25 The answer to that question is also significant for the decision in the main proceedings. If it were to be inferred from the interpretation of the first subparagraph of Article 6(1) of Directive 2000/78 that it is contrary to the national legislation in Paragraph 48(2) of the DRiG from the point of view of incoherence, the applicant could successfully request the judicial declaration sought that he need not retire on the expiry of 31 January 2027.