

Compulsory Retirement and Age Discrimination: a new deference to derogation?

Palacios de la Villa v. Cortefiel Servicios SA Case C-411/05, Judgment 16th October 2007

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ABSTRACT

This article examines a recent decision of the ECJ on state derogation from the age discrimination principle contained in the Employment Equality ('Framework') Directive 2000/78/EC. The case, *Palacios de la Villa v. Cortefiel Servicios SA*, originating from Spain, involved a challenge to legislation permitting for compulsory retirement in collective agreements. It also examines a similar British challenge, due in the ECJ sometime in 2009, and comparative case law from the United States, where federal age discrimination law has been in place since 1967. It concludes that (1) the decision in *Palacios de la Villa*, rejecting the challenge, departed from established ECJ jurisprudence and signalled a new deference to derogation in the field of age discrimination; (2) is out of line with US law; and (3) in any case should not threaten the British challenge. However, it also concludes that lawmakers in Europe and the US generally consider age discrimination to be a lesser wrong than discrimination on other grounds.

INTRODUCTION

The Employment Equality ('Framework') Directive 2000/78/EC imposed an obligation on member states to outlaw employment discrimination on the ground of age (as well as sexual orientation, religion or belief, and disability). In the UK, the age strand was implemented by the Employment Equality (Age Discrimination) Regulations 2006^[i] (the 'Age Regulations'). Workers with perhaps the highest expectation of the regulations were those wishing to work beyond their customary retirement age. However, this expectation was dashed by the inclusion of a major exemption that permits employers to retire workers in much the same way that they could before the regulations came into force. Regulation 30 provides a default retirement age for those aged 65^[ii] or over.^[iii] It permits employers to dismiss workers who have reached 65, so long as they follow a complex procedure (set out in schedule 6), but no reason other than retirement need be given. Should employers agree to keep on a worker beyond 65, the general principle against age discrimination will apply, save for retirement. For instance, discriminatory discipline, pay, harassment, and job classification against those working beyond their retirement age would remain unlawful.

An interest group for older workers is challenging this exemption as being incompatible with the parent Directive. This has become known as the *Heyday* challenge, after an interest group involved in the case,^[iv] although its formal title is *R (on the application of the Incorporated Trustees of the National Council for Ageing (Age Concern England)) v. Secretary of State for Business, Enterprise and Regulatory Reform*.^[v] A hearing is due in the ECJ sometime in 2009. The challenge appears to have suffered a setback by the recent judgment of the ECJ in another age discrimination case, *Palacios de la Villa v. Cortefiel Servicios SA* (2007).^[vi] This was a challenge to a Spanish exemption from the age discrimination principle permitting compulsory retirement ages to be negotiated in collective agreements. The ECJ dismissed the challenge and held that the

Spanish measure was compatible with the Directive.

This note examines that decision, focusing on the whether the exemption was objectively justified, compares it with long-standing United States jurisprudence, and concludes that the decision departed from established ECJ jurisprudence, is out of line with US law, and in any case should not threaten the *Heyday* challenge. However, it also shows how the law generally considers age discrimination as a lesser wrong than discrimination on other grounds.

THE LEGISLATION

The EU and domestic legislation relevant to *Palacios de la Villa* is as follows. Article 2(1) of the Framework Directive provides that in the field of employment the “principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever’ on grounds of religion or belief, disability, sexual orientation, and age. The definitions of discrimination follow the models developed by the ECJ and used in the Equal Treatment (sex) and Race Directives.[vii] Thus, the Directive carries standard definitions of direct and indirect discrimination. Article 4(1) provides the now standard exception for ‘genuine and determining occupational requirements.’ This allows employers to discriminate directly when a particular age is necessary for the job in question. In addition, article 6(1) provides the standard defence of objective justification, tailored for age:

Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.[viii]

The striking feature of article 6 is that it applies to *direct*, as well as indirect, discrimination. This is not possible on other grounds, such as race or sex. It permits facially discriminatory practices to be justified for reasons unrelated to the job in question.

Finally, Recital 14 of the preamble, states: ‘This Directive shall be without prejudice to national provisions laying down retirement ages.’

Three Spanish measures became pertinent to this case: (1) the ‘original measure’, (2) Law 14/2005, and (3) the ‘transitional measure’. The original measure, passed in 1980, provided a maximum working age of 69 years, and allowed compulsory retirement to be negotiated in collective agreements, with the single condition that the worker had made sufficient contributions to qualify for a retirement pension. This measure was repealed in 2001 as Government policy shifted from encouraging employment to easing the burden of state pension payments to retired workers.

In 2005, Law 14/2005 reinstated the exemption. Two conditions were attached. First, as before, no one could be retired until they qualified for a retirement pension. Second, the agreement had to be in pursuit of an employment policy, ‘such as increased stability in employment, the conversion of temporary contracts into permanent contracts, sustaining employment, the recruitment of new workers, or any other objectives aimed at promoting the quality of employment’. It was apparent at this time that the status of compulsory retirement clauses negotiated during the interim years

was uncertain. This had led to many disputes. To resolve these, a 'transitional' measure with retrospective effect was attached to Law 14/2005. It permitted compulsory retirement clauses in collective agreements negotiated between 2001 and 2005. The transitional measure differed from Law 14/2005 because only one condition was attached, that no one could be retired until they qualified for a retirement pension. Thus, the original and transitional measures each had one condition (pension qualification) attached, whilst Law 14/2005 had two (pension qualification and an employment policy aim).

FACTS AND DECISION

Felix Palacios de la Villa, aged 65, was 'retired' under a collective agreement negotiated during the period covered by the transitional measure, and so the issue in this case was whether the transitional measure complied with the Framework Directive.

The Spanish Government defended the measure on two grounds. The first was that by recital 14, the directive had no application at all to compulsory retirement measures. Although the Advocate-General accepted this argument,[ix] it was rejected tersely by the ECJ, holding that the recital 'merely states that the directive does not affect the competence of the Member States to determine retirement age and does not in any way preclude the application of that directive to national measures governing the conditions for termination of employment contracts where the retirement age, thus established, has been reached.'^[x]

The second and successful argument was that the measure was objectively justified under article 6. The difficulty for this defence was the absence of the 'second' condition (of promoting an employment policy) in the transitional measure. In isolation, the transitional measure did not appear to be in pursuit of an employment policy, or a 'legitimate aim', the primary requirement for objective justification. However, the Court took account of the context of the measure. First, the *original* measure was expressed to create vacancies at a time of high unemployment.[xi] Second, there was evidence that the transitional measure was adopted at the instigation of trade unions and employers' organisations, to promote intergenerational employment.[xii] Third, Law 14/2005 was enacted once again with the cooperation of trade unions and employers' organisations, this time with an expressed variety of employment policy aims (listed above).[xiii] And fourth, the compulsory retirement clause in the collective agreement was expressed to be 'In the interests of promoting employment.'^[xiv]

The Court reasoned, 'placed in its context, the ... transitional provision was aimed at regulating the national labour market, in particular, for the purposes of checking unemployment.'^[xv] Hence the measure, and the collective agreement, fulfilled a legitimate aim.

The next matter for the Court was whether the measure was 'appropriate and necessary' to achieve the aim ('proportionality'). To this purpose, the court noted the 'broad discretion' afforded to member states, employers and trade unions, in their choice and definition of measures capable of achieving a legitimate social or employment policy,[xvi] which allows for 'specific provisions which may vary in accordance with the situation in Member States.'^[xvii]

More specifically, the Court stated: 'It does not appear unreasonable for ... a Member State to take the view that a measure ... may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy, consisting in the promotion of full employment by facilitating access to the labour market.'^[xviii] Further, the transitional measure did not 'unduly prejudice' workers of retirement age because compulsory retirement was subject to a worker being entitled to a retirement pension, 'the level of which cannot be regarded as unreasonable.' 'Moreover', the measure enabled trade unions and employers' organisations to agree 'with considerable flexibility' a compulsory retirement mechanism that took account of the labour

market concerned, and the specific features of the jobs in question.[xix]

Thus, the Court concluded, the transitional measure (and the collective agreement) was objectively justified and so compatible with the Directive.

COMMENT

On Recital 14, the ECJ's decision undoubtedly is correct and is supported by the rule that the main body of a directive prevails over the preamble.[xx] Clearly, a broad reading of Recital 14, as urged by the Spanish Government and the Advocate-General, was inconsistent with the anti-discrimination rubric in article 2, and had no counterpart in the main body. Thus, the recital provides no blanket derogation for compulsory retirement.[xxi]

On the issue of legitimate aim, the Court confirmed that a state measure need not express its social or employment policy purpose, so long as there is evidence that the policy exists. But it took a generous view of the facts to associate the transitional measure with an employment policy. An equally valid view of two provisions passed at the same time, with only one expressly demanding an employment policy, is that the other (*ie* the transitional measure) was *not* intended to fulfil an employment policy. This view is reinforced by the evidence that during the interim Government policy was to *discourage* retirement in order to save on pension costs, and that transitional measure was intended purely to resolve the backlog of disputes.[xxii]

On the question of whether the measure was 'appropriate and necessary', the first thing to note is that the court applied the state's 'broad discretion' by acquiescing in what *the Spanish Government* considered 'reasonable'.[xxiii] This endorses the Opinion of the Advocate General, who said:

Indeed, as a rule, it cannot be for the Court of Justice to substitute its own assessment of such complex issues for that of the national legislature or the other political and societal forces involved in the definition of the social and employment policy of a particular Member State (such as the social partners in the present case). At most, only a manifestly disproportionate national measure should be censured at this level.[xxiv]

This suggests that the court was willing to interfere only if the transitional measure went beyond the bounds of reason, rather than if it were merely disproportionate. This approach contrasts to that taken in the Court's only other judgment on state derogation from the age discrimination principle, *Mangold v. Helm*,[xxv] where it was held: 'the principle of proportionality requires every derogation from an individual right to reconcile, so far as is possible, the requirements of the principle of equal treatment with those of the aim pursued.'[xxvi] It is ironic then, that the *Palacios de la Villa* court cited *Mangold* in support of affording the state, employers, and trade unions, a broad discretion in their choice and definition of measures capable of achieving a legitimate social or employment policy.[xxvii]

Second, the application of this principle signals a departure from the stricter approach taken in previous discrimination cases. In the equal pay case, *R v. Secretary of State for Employment, ex p. Seymour-Smith* (1999)[xxviii] the ECJ acknowledged a state's broad margin of discretion, but observed that for objective justification, 'mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough.'[xxix] This view was applied in *Mangold v. Helm*.[xxx] Here, German law exempted from regulation fixed-term employment contracts for any worker over 52. This relaxation of protective legislation was

designed to encourage employers to recruit older workers. Its aim was to help older persons find jobs more easily.^[xxxii] Of course, the more direct result of this measure was to remove safeguards for older workers, who could now be employed on temporary contracts for the rest of their working lives. In a spirit less sympathetic to the state derogation, the ECJ observed: ‘This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members’ working life, of being excluded from the benefit of stable employment.’^[xxxiii] The Court applied its established interpretation of ‘broad discretion’, and held that the policy could not be objectively justified because it went beyond what was appropriate and necessary to help *unemployed* older workers.^[xxxiii] The *Palacios de la Villa* judgment cited neither *Seymour-Smith* nor this part of *Mangold*.

If this established approach had been adopted by the *Palacios de la Villa* court, vague notions such as ‘the promotion of full employment by facilitating access to the labour market’, ‘promoting intergenerational employment’, or (as stated in the collective agreement) ‘promoting employment’, would require specific evidence to substantiate the effectiveness of the transitional measure, and to justify its blatant discriminatory effect. *If* one accepts the measure was passed to fulfil an employment policy, the method chosen appears fallacious and rather disingenuous. For instance, ‘checking unemployment’ by retiring older workers is not creating more jobs, it is redistributing them to younger workers. The unemployment figures may fall, but only because those laid off and now unemployed are reclassified as ‘retired’. To aggravate the matter, the victims of this manoeuvre are those most in need of protection from age discrimination, a mischief that the age strand of the directive was designed to address. As such, the measure appears neither appropriate nor necessary.

This broader version of proportionality carries technical problems as well. Although, for age, the Directive departs from the norm and extends the objective justification defence to direct discrimination, nothing in the directive suggests that that the defence itself is less stringent. Article 6 reproduces the well-established formula for objective justification, which was restated in *Mangold*. The extension of the defence to direct discrimination suggests that the directive has accounted for any distinctive characteristics of age discrimination. The only modification implied by article 6, is that by permitting justification of direct discrimination, the legitimate aim need not be irrespective of age.^[xxxiv] The point is that the extra discretion intended for those defending age discrimination is expressed by the directive, and should not be extended further by the judiciary. This is especially so where the extension is to facially discriminatory conduct associated with direct discrimination, which society and lawmakers alike generally consider more repugnant, and in need of tighter control.

The ECJ’s generous association of the challenged measure with an employment policy, its partial citing of *Mangold*, and the exceptionally broad discretion afforded to the Spanish Government, all suggest that underlying the Court’s decision is that for age discrimination there is a new deference to derogations from the equal treatment principle.^[xxxv] Whether this new line will be maintained is a matter of speculation. One useful reference may be the approach taken in the United States, where age discrimination laws have been established for decades.

COMPULSORY RETIREMENT AND AGE DISCRIMINATION IN THE UNITED STATES

The most comparable stateside legislation is the federal Age Discrimination in Employment Act

1967 (ADEA). Under this act, compulsory retirement is unlawful, although it is possible to retire a worker by *individual* agreement. To understand how this works, a little background is necessary. The general default position is the employment-at-will doctrine, allowing employers to dismiss a worker at any time for no reason.[xxxvi] Unlike the UK, there is no general right against unfair dismissal. A dismissal becomes unlawful, of course, if it is on a protected ground, such as sex, race, religion, national origin, disability, or age. In this context, compulsory retirement is dismissal on the ground of age.

The ADEA applies to employers with 20 or more workers, and protects only those aged 40 or above.[xxxvii] It affords the familiar direct and indirect discrimination models.[xxxviii] The Act contains two defences. First, a bone fide occupational requirement (BFOR), which corresponds to the Framework Directive's 'genuine and determining occupational requirements'. Second, there is a defence of 'reasonable factors other than age' (RFOA), which appears to be a less strict version of the usual 'business necessity' defence used for indirect discrimination on other grounds, such as sex and race, and the Framework Directive's own 'objective justification' defence.[xxxix] Logic dictates that this defence, referring to factors *other* than age, cannot be used to defend direct discrimination,[x] a major difference from the Directive.

Whatever doubts over the precise meaning and application of the RFOA defence, it is clear that neither this, nor the BFOR defence, permit compulsory retirement. This is reinforced by s 4(f)(2) of the Act, which provides that no seniority system or employee benefit plan (such as an occupational pension) 'shall require or permit the involuntary retirement of any individual ... because of the age of such individual'.[xli] There are two exceptions: employers may retire, without more, academics aged 70 with unlimited tenure, and 'high-policy makers' aged 65.[xlii]

The Act allows individual workers to waive their ADEA rights, although strict rules apply. This allows a worker to agree to retirement. A valid ADEA waiver must:

1. be in writing and be understandable;
2. specifically refer to ADEA rights or claims;
3. not waive rights or claims that may arise in the future;
4. be in exchange for valuable consideration;
5. advise the individual in writing to consult an attorney before signing the waiver; and
6. provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.[xliii]

If an employer requests an ADEA waiver in connection with an 'exit incentive programme or other employment termination program offered to a group or class of employees', more stringent rules apply. The time limit for consideration is extended to 45 days, whilst notice must be given of the 'job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.'[xliv] This transparency is designed to prevent an employer obtaining unconscionable waivers during a large scale lay-off, where workers would otherwise have no reason to suspect that age was a factor.[xlv] The Supreme Court held in *Oubre v. Entergy Operations* (1998)[xlvi] that doctrines of equitable estoppel or affirmation of a voidable agreement cannot undermine these waiver conditions. If the agreement is defective, the worker may bring an ADEA claim, even where she or he does not return the consideration, such as a severance payment.

The ADEA provides much less scope for derogation from age discrimination than the European Framework Directive. It does not permit direct discrimination to be objectively justified. Compulsory retirement is unlawful. And although *individuals* may agree to waive their

age discrimination rights, it is not possible for these rights to be bargained away in a collective agreement (as held in *Palacios de la Villa*).

More generally though, there is a broad consensus that age discrimination should be treated less seriously than other grounds, such sex, race, religion and national origin, covered by Title VII of the Civil Rights Act 1964. In *Smith v. Jackson* (2004), Stevens J., a long-standing liberal in the Supreme Court, observed in his majority opinion:

Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. ... Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.[xlvii]

This theme of greater deference to derogations from the age discrimination principle is firmly established in the Supreme Court's constitutional jurisprudence. The Equal Protection Clause of the Fourteenth or Fifth Amendments provides a constitutional guarantee of equal protection of the laws.[xlviii] The Supreme Court has identified three classes of protected groups under the Clause. First, the 'suspect class', who are entitled to strict scrutiny of the challenged law. Second, the 'quasi-suspect class', who are entitled to intermediate, or 'heightened' scrutiny. And third, a residual, or 'normal,' class, who are entitled to 'normal' scrutiny, where a law need only be 'rational'. Age falls into the residual class, because older people have not experienced a 'history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.'[xlix] Hence, it was constitutional for a state to retire police officers at 50,[l] as was the ADEA's exclusion of elected and high ranking officials, such as judges, permitting a state to retire judges at 70.[li]

DISCUSSION

Although the American experience presents a picture of greater deference to age discrimination derogations, the matter is not quite so simple. The closest equivalent to the Framework Directive is the ADEA. Its very limited waiver provision has been policed strictly by the Supreme Court, as shown in *Oubre*. Stevens' J. dicta in *Smith v. Jackson* is rooted in the differently worded legislative formula for justification. The Court has favoured derogation only when it is provided in the legislation, either expressly in the ADEA, or by the open-ended rubric of the constitution. These constitutional challenges are more akin to a petition under the European Convention on Human Rights, where governments generally are afforded more discretion than under EU legislation.

Thus, the American experience reveals that at federal level, there is a strict judicial adherence to the legislation. Further, the most comparable legislation, the ADEA, provides much less scope than the Framework Directive for compulsory retirement. There is nothing in the US

experience to underpin the approach taken in *Palacios de la Villa*.

One way of explaining this tolerance of direct age discrimination, be it statutory or judicial, is by a common theme of benign motive and consent. The ADEA's waiver provision and RFOA defence, the constitutional tolerance of age discrimination, article 6 of the Framework Directive, and the *Palacios de la Villa* decision all suggest that the law tolerates direct age discrimination that contains an element of benign motive. In the past, the ECJ has shown little sympathy for benign-motive sex discrimination.^[lii] In *Palacios de la Villa* however, the evidence of the measure being made with the instigation, or cooperation, of trade unions and employers' groups clearly influenced the court.^[liii] By contrast, one would expect the law to be highly *intolerant* of an agreement to dismiss a worker on racial grounds, for instance, an employer paying off a hairdresser because his customers 'prefer white girls'. This exposes age discrimination as belonging to a different legal class of wrongdoing from other grounds, such as race or sex. The common feature to the ADEA waiver and the Spanish measure is consent, although the consent associated with the Spanish measure, being rooted in majority rule, is somewhat diluted. Although the UK exemption arguably may have been enacted with a benign motive, its wholesale nature permits any employer hostile to older workers to 'retire' them,^[liv] and as such it is a conspicuous non-member of the benign motive and consent club.

THE HEYDAY CHALLENGE

It is possible that the ECJ will revert to its previous jurisprudence (expressed in *Mangold*) come the *Heyday* appeal. In which case, the challenge should succeed. But that is merely speculation. Further, the exemption cannot be challenged for contravening the directive's non-regression principle (article 8(2)), because the default retirement age cannot adversely affect those with a normal retiring age of over 65.^[lv] More substantial prospects lie in distinguishing *Palacios de la Villa* and arguing that the exemption cannot be objectively justified.

The Spanish exemption is subject to the worker's pension qualification, confined to collective agreements, and implemented with the support of trade unions (so incorporating some degree of consent by workers). By contrast, the UK exemption allows *all* employers to compel its workers to retire, without consideration of the worker's pension qualifications; and without any level of agreement whatsoever, from its inception (at the instigation of employers) to its execution (by employers).

When enacting the Age Regulations, the UK Government stated that the default retirement age was made in pursuit of a legitimate aim of social policy, comprising two elements: employers' workforce planning and the stability of occupational pension schemes and other work-related benefits.^[lvi] It is questionable whether this aim qualifies as a social policy, because it is to help individual employers and their benefit schemes. Further, at a time of a 'pensions crisis', caused by the ever-increasing proportion of retired persons, and a skills shortage, the policy is unconvincing as a legitimate social aim. However, it is arguable that a compulsory retirement age has a broader societal impact, such as a motivation for workers to save pre-retirement, and a reduction in 'job-blocking'.^[lvii] Given the ECJ's deference to member states' autonomy in social matters, it may well be that these relatively minor factors qualify the policy as a legitimate aim.

On the issue of proportionality, the UK Government maintained that in consultation a 'significant' number of employers use a set retirement age as a necessary part of their workforce

planning.[lviii] But the exemption covers *all* employers, not just this ‘significant’ number, and does not require that workforce planning is - to use the Government’s word - ‘necessary’.

Second, the Government claimed that its consultation showed that without a default retirement age there was risk to the stability of pensions.[lix] No supporting evidence or extended reasons were given,[lx] save that otherwise, ‘Some employers would instead simply reduce or remove benefits to offset the cost of providing them to all employees, including those over 65’.[lxi] The implication is that without the default retirement exemption workers would be worse off, as employers would prefer to cut benefits rather than face litigation. This is a tired industry mantra, that employment rights are bad for workers. Other failed excuses include: the expense of equal pay will cause unemployment, or maternity rights will encourage employers not to hire women. Moreover, it is the type of ‘mere generalisation’ rejected by the ECJ in *Seymour-Smith*.^[lxii] On the face of it, pension schemes should not suffer if workers carry on working and either draw their pensions, or defer entitlement and continue to contribute to the scheme. This is especially so with the increasingly common ‘defined contribution’ schemes, where the payout is governed by the size of the fund, rather than external factors, such as the final salary used for ‘defined benefit’ schemes. Of course, situations may arise where forced retirement becomes a necessary consequence of preserving the pension scheme, say where a restructuring may compel workers to retire to qualify for the more generous old scheme.^[lxiii] Again, the exemption goes far beyond what is necessary to address these situations.

A more proportionate solution would be to provide two narrower exemptions, for where the retirement is in connection with workforce planning, and the stability of pension or other benefit schemes. No objective justification would be necessary. This rather loose exemption would at least prevent the habitual or casual retirement of workers for no good reason, as well as ‘age-hostile’ retirements. Employers would need to show a (genuine) connection between the retirement and its workforce planning, or pension/benefit scheme. An even more proportionate solution would be to remove the exemption altogether, save expressing workforce planning and pension/benefit stability as legitimate aims in the Age Regulations. This would compel an employer to objectively justify its retirement policy and allow compulsory retirement only where it is appropriate and necessary for its particular aim.

A *national* default retirement age goes far beyond what is appropriate and necessary for the workforce-planning needs of just a ‘significant’ number of employers, or to preserve the stability of just some pension or other benefit schemes. The scope for misuse of this exemption is enormous, and far beyond that provided by the Spanish transitional measure. The ECJ took a significant step away from its objective justification jurisprudence in *Palacios de la Villa*. It would have to take a yet further step to reject the *Heyday* challenge.

CONCLUSION

The availability of the objective justification defence for direct age discrimination marks out age discrimination as a lesser wrong than discrimination on other grounds, such as sex or race. The ECJ’s generous interpretation of the facts and unusually broad discretion afforded may signal a new extended tolerance of age discrimination, but the contrast with *Mangold*, its only other case on the issue, makes this a more tentative statement.

Tolerance of age discrimination accords with the broad picture in the United States, but closer analysis reveals that the most comparable legislation does not allow for compulsory

retirement, and the judiciary afford discretion only where legislation so provides. Unlike the ECJ in *Palacios de la Villa*, the US Supreme Court has not extended any derogations provided by legislation, in fact it has strictly policed the waiver provision.

The *Heyday* challenge is distinguishable from *Palacios de la Villa* because of the draconian nature of the UK exemption, which contains no element of consent and permits casual, habitual, and even age-hostile, retirements. For the *Heyday* challenge to fail, the ECJ would have to take a yet further step away from its established jurisprudence of objective justification, as well as from that established in the United States.

[i] SI 2006/1031. For Northern Ireland, see The Employment Equality (Age) Regulations (Northern Ireland) 2006 SI 2006/261. Both in force 1 October 2006.

[ii] Or the 'normal retirement age', if higher.

[iii] The exemption can only be applied to a narrower class of workers than those normally covered by discrimination legislation, applying to 'employees' within the meaning of the Employment Rights Act 1996, s 230(1) (An individual who 'works under ... a contract of employment'), those in Crown employment, and House of Lords and House of Commons staff. For Northern Ireland, 2006 SI 2006/261, reg 32.

[iv] See generally www.ageconcern.org.uk/AgeConcern/age_discrimination_12.asp.

[v] Case C-388/07.

[vi] Case C-411/05.

[vii] Respectively, 76/207/EEC (now consolidated in the 'Recast' Directive 2006/54/EC, due for implementation 15 August 2008), and 2000/43/EC.

[viii] Three examples, not relevant to this case, are provided by a non-exhaustive list: '(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection; (b) the fixing of minimum conditions of age, professional experience or seniority in service for access to employment or to certain advantages linked to employment; (c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.'

[ix] At para 65 of his Opinion.

[x] Case C-411/05, para 44.

[xi] Case C-411/05, para 58.

[xii] *ibid* para 53.

[xiii] *ibid* para 60.

[xiv] *ibid* para 27.

[xv] *ibid* para 62.

[xvi] *ibid* para 68, citing *Mangold v. Helm* Case C-144/04, [2006] 1 CMLR 43, para 63.

[xvii] *ibid* para 69, citing recital 25 of the Directive's preamble.

[xviii] *ibid* para 72.

[xix] *ibid* paras 73-74.

[xx] *Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn* Case C-162/97, [1998] ECR I-7477, ECJ. See also Opinion of A-G Tizzano in *R v. Sec of State for Trade and Industry ex p BECTU* Case C-173/99, [2001] ECR I-4881, para 39.

[xxi] For a more detailed analysis of Recital 14, including its legislative history, see M. Connolly and O. Gough, 'Age Discrimination, The Default Retirement Age and Occupational Pensions: Experiences from Canada and Predictions for Britain' [2007] 1 Web JCLI.

[xxii] The ECJ did not speculate on the validity of a collective agreement made in the interim that did not mention an employment policy. Clearly, such agreements were intended by the transitional measure to be valid.

[xxiii] See text to n 18.

[xxiv] Opinion of Advocate General Mazák, Case C-411/05, at para 74. 'Social partners' refers to trade unions and employers' organisations.

[xxv] Case C-144/04, [2006] 1 CMLR 43.

[xxvi] *ibid* para 65, citing *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* Case C-476/99, [2002] ECR

I-2891, para 39.

[xxvii] In fact, the Mangold court said nothing about a choice of definition. The paragraph cited from Mangold reads: 'In this respect the member states unarguably enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy' *ibid* para 63.

[xxviii] Case C-167/97, [1999] 2 CMLR 273.

[xxix] *ibid* para 76. Note though that the House of Lords subsequently held that the measure was justified, [2000] 1 CMLR 770. For criticism see M. Connolly (2002) 5 JCL 212.

[xxx] Case C-144/04, [2006] 1 CMLR 43.

[xxxi] Or, as stated by the court, 'to promote the vocational integration of unemployed older workers, in so far as they encounter considerable difficulties in finding work'. *ibid* para 59.

[xxxii] *ibid* para 64.

[xxxiii] *ibid* para 65.

[xxxiv] This contrasts with other grounds, where, for instance, indirect sex discrimination must be 'justified by objective reasons unrelated to any discrimination on grounds of sex.' *R v. Secretary of State for Employment, ex p. Seymour-Smith* Case C-167/97, [1999] 2 CMLR 273, para 67, citing *Rinner-Kuhn* Case 171/88, [1989] ECR 2743, para 15.

[xxxv] See also the observations of Advocate General Jacobs in *Lindorfer v Council of the European Union*, Case C-227/04 (at para 85): '... in law and in society in general, equality of treatment irrespective of sex is at present regarded as a fundamental and overriding principle to be observed and enforced whenever possible, whereas the idea of equal treatment irrespective of age is subject to very numerous qualifications and exceptions, such as age limits of various kinds, often with binding legal force, which are regarded as not merely acceptable but positively beneficial and sometimes essential.'

[xxxvi] For a discussion of exceptions to the doctrine, state-by-state, see D. Walsh, and J. Schwarz, 'State Common Law Wrongful Discharge Doctrines: Up-Date, Refinement, and Rationales' (1996) 33(4) *ABLJ* 645. See also R. Bird and J. Knopf "Do Wrongful Discharge Laws Impair Firm Performance?" (November 22, 2005). Available at SSRN: <http://ssrn.com/abstract=854684>.

[xxxvii] s 12(a), codified as 29 USC § 630(b) and § 631(a) respectively. States are free to extend this coverage, eg New York State discrimination law applies to employers with four or more workers (NY Exec Law § 292.5).

[xxxviii] Known in the US respectively as disparate treatment and disparate impact. In fact, the ADEA and the Civil Rights Act 1964 (sex, race, religion, national origin) express only a general rubric against discrimination. The concepts of disparate treatment and disparate impact were developed by the Supreme Court, which in turn were adopted by the British legislation. See eg *McDonnell Douglas Corp v. Green* 411 US 792, *Griggs v. Duke Power* 410 US 424 (1971) and (for the ADEA) *Smith v. City of Jackson* 544 US 228 (2004).

[xxxix] The precise meaning of the RFOA defence is not settled. See eg *Smith v. City of Jackson*, where Stevens J. observed (*ibid* 233): 'Unlike [the Civil Rights Act 1964] the ADEA ... contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age."' Contrast the EEOC (the enforcement agency) view which holds to a 'business necessity' standard (29 CFR 1625.7(d)); see generally, www.eeoc.gov, click on 'Age'.

[xl] EEOC 29 CFR 1625.7(c) (see n 39). But in *Smith v. City of Jackson* Stevens J. said this is so for 'most' cases (*ibid* 238-239). Contrast O'Connor J. (dissenting from the plurality) who argued that 'The role of the RFOA provision is to afford employers an independent safe harbor from liability. It provides that, where a plaintiff has made out a prima facie case of intentional age discrimination ... thus "creating a presumption that the employer unlawfully discriminated against the employee," ... the employer can rebut this case by producing evidence that its action was based on a reasonable nonage factor.' (*ibid* 429.) This parallels the burden of proof rules set out for the Civil Rights Act 1964 in *McDonnell Douglas Corp v. Green* 411 US 792, 802, (Sup Ct 1973), and for the EU, in the discrimination directives, eg Framework Directive 2000/78, article 10.

[xli] Codified as 29 USC § 623(f)(2). The Conference Committee Report expressly stated that this amendment was intended 'to make absolutely clear one of the original purposes of this provision, namely, that the exception does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age' (HR Rept No 95-950, p 8).

[xlii] 29 USC § 631(d) and (c) respectively. A 'high policy maker' is a person employed in a bona fide executive or a high policymaking position, for at least two years, and due a retirement benefit of at least at least \$44,000.

[xliii] 29 USC § 626(f)(1). The waiver provisions were added by the Older Workers Benefit Protection Act 1990. Extensive details and examples are provided by EEOC 29 CFR § 1625.22 (see n 39 above)

[xliv] 29 USC § 626(f)(1).

[xlv] See the legislative history: S Rep No 101--263, 101st Cong 2d Sess 32 (1990) reprinted in 1990 USCCAN

1509, 1537-38.

[xlvi] 522 US 422 (1998).

[xlvii] 544 US 228, 240-242 (2004). See also n 39 above. Stevens J. noted also that amendments made by the Civil Rights Act 1991 to broaden the scope of Title VII were not extended to the ADEA, further suggesting that its scope was more limited.

[xlviii] The equal protection component of the Fifth Amendment imposes precisely the same constitutional requirements on the federal government as the equal protection clause of the Fourteenth Amendment imposes on state governments: *Weinberger v. Wiesenfeld* 420 US 636, 638 n2 (Sup Ct 1975).

[xlix] *Massachusetts Board of Retirement v. Murgia* 427 US 307, 313 (Sup Ct 1976). Similarly in Canada, the Supreme Court stated (in *McKinney v. University of Guelph* [1990] 3 SCR 229, 297) that age differed from other grounds of discrimination. First, because, 'There is a general relationship between advancing age and declining ability.' Second, discrimination on other grounds is 'generally based on feelings of hostility and intolerance.' This should 'neutralise' any suspicion of laws that discriminate on the ground of age. The Court sanctioned a total derogation from the age discrimination rule provided by the Ontario Human Rights Code 1981, for any worker aged over 65. This exemption went even further than the British attempt, because in addition to permitting compulsory retirement at 65, it permitted age discrimination against those who remain in work above 65. Despite the striking similarities, *Guelph* was a constitutional challenge, where governments are afforded more discretion. For an analysis of *Guelph*, see M. Connolly and O. Gough, n 21 above.

[l] *ibid*. No claim was made under the ADEA.

[li] *Gregory v. Ashcroft* 501 US 452 (Sup Ct 1991).

[lii] See eg *Johnston v. Chief Constable of the Royal Ulster Constabulary* Case C-222/84, [1986] ECR 1651, especially paras 44-46. And note that the ECJ has held that clauses in collective agreements that discriminate on the grounds of nationality (*Schoning-Kougebetopoulou* Case C-15/96, [1998] ECR I-47) or sex (*Enderby v. Frenchay HA* Case C127/92, [1994] ICR 112 CA) cannot prevail over the principle of equal treatment.

[liii] Case C-411/05, eg paras 53, 60 and 74.

[liv] Of course, if the employer expresses hostility, it would be difficult for him to maintain retirement as the reason for dismissal. But the age-hostile employer need only follow the retirement procedure, and do no more other than give 'retirement' as the reason for dismissal.

[lv] See Connolly, M. and Gough, O. 'Age Discrimination, The Default Retirement Age and Occupational Pensions: Experiences from Canada and Predictions for Britain' Web Journal of Current Legal Issues [2007] 1 Web JCLI.

[lvi] 'Equality and diversity: coming of age. Consultation on the draft Employment Equality (Age) Regulations 2006' (July 2005) DTI, URN 05/1171, para 6.1.15. See also 'Notes on the Regulations' (www.dti.gov.uk/files/file27136.pdf), paras 99-101.

[lvii] 'Notes on the Regulations', para 100, *ibid*.

[lviii] See n 56 above.

[lix] *ibid*. For a detailed analysis of the Government's pension argument, see M. Connolly and O. Gough, n 21 above.

[lx] See the Government's Regulatory Impact Assessments: www.dti.gov.uk/files/file35877.pdf.

[lxi] 'Notes on the Regulations', para 101, see n 56 above.

[lxii] See n 29 above.

[lxiii] For an example of a person forced to retire because of changes to the pension scheme for reasons of 'intergenerational fairness' and sustainability, see the employment tribunal decision in *Bloxham v. Freshfields Bruckhaus Deringer* 2205086/2006; 2007 WL 3001838 (ET).