Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

19 April 2016*

(Reference for a preliminary ruling — Social policy — Charter of Fundamental Rights of the European Union — Directive 2000/78/EC — Principle prohibiting discrimination on grounds of age — National legislation incompatible with the directive — Possibility for a private person to bring proceedings to establish the liability of the State for breach of EU law — Dispute between private persons — Balancing of various rights and principles — Principles of legal certainty and the protection of legitimate expectations — Role of the national court)

In Case C-441/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Højesteret (Supreme Court, Denmark), made by decision of 22 September 2014, received at the Court on 24 September 2014, in the proceedings

Dansk Industri (DI), acting on behalf of Ajos A/S,

v

Estate of Karsten Eigil Rasmussen,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz, J.L. da Cruz Vilaça, A. Arabadjiev and F. Biltgen (Rapporteur), Presidents of Chambers, J. Malenovský, E. Levits, J.-C. Bonichot, M. Berger, E. Jarašiūnas and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2015,

after considering the observations submitted on behalf of:

— Dansk Industri (DI), acting on behalf of Ajos A/S, by M. Eisensee, advokat,

— the estate of Karsten Eigil Rasmussen, by A. Andersen, advokat,

— the Danish Government, by J. Bering Liisberg and M. Wolff, acting as Agents,

— the German Government, by B. Beutler, acting as Agent,

* Language of the case: Danish.

— the Netherlands Government, by M. Bulterman and M. Gijzen, acting as Agents,

— the European Commission, by M. Clausen and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 November 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of, first, Article 2(1) and (2)(a) and Article 6(1) of 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) and, second, the principle prohibiting discrimination on grounds of age and the principles of legal certainty and the protection of legitimate expectations.

2 The request has been made in proceedings between Dansk Industri (DI), acting on behalf of Ajos A/S ('Ajos'), and the legal heirs of Mr Rasmussen concerning Ajos's refusal to pay Mr Rasmussen a severance allowance.

Legal context

Directive 2000/78

3 The purpose of Directive 2000/78, according to Article 1 thereof, is 'to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'.

4 Article 2 of Directive 2000/78 provides as follows:

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

2. For the purposes of paragraph 1:

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

…'

5 Article 6 of Directive 2000/78 is worded as follows:

'1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

(a) the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection;

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

…

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

Danish law

6 The Law on legal relationships between employers and employees (lov om retsforholdet mellem arbejdsgivere og funktionærer (funktionærloven)), in the version applicable to case before the referring court ('the Law on salaried employees'), contains in Paragraph 2a thereof the following provisions concerning the severance allowance:

'1. In the event of the dismissal of a salaried employee who has been continuously employed in the same undertaking for 12, 15 or 18 years, the employer shall, on termination of the employment relationship, pay a sum to the employee corresponding to, respectively, one, two or three months' salary.

2. The provisions of subparagraph (1) shall not apply if the employee will receive a State retirement pension on termination of the employment relationship.

3. No severance allowance shall be payable if, on termination of the employment relationship, the employee will receive an old-age pension from the employer and the employee joined the pension scheme in question before reaching the age of 50.

4. The provisions of subparagraph (3) shall not apply if, as at 1 July 1996, the question of the reduction or withdrawal of the severance allowance on account of the employer's payment of an old-age pension is governed by a collective agreement.

5. The provisions of subparagraph (1) shall apply *mutatis mutandis* in the case of unfair dismissal.'

7 The referring court states that the Kingdom of Denmark transposed Directive 2000/78 by adopting Law No 253 amending the law relating inter alia to prohibition of discrimination on the employment market (lov nr. 253 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v.) of 7 April 2004 and Law No 1417 amending the law relating inter alia to prohibition of discrimination on the employment market (lov nr. 1417 om ændring af lov om forbud mod forskelsbehandling på arbejdsmarkedet m.v) of 22 December 2004.

8 Paragraph 1 of Law No 253 of 7 April 2004, as amended (the Anti-discrimination law'), provides, in the first subparagraph thereof, as follows:

'Discrimination for the purposes of this law shall be understood to mean direct or indirect discrimination on the grounds of race, skin colour, religion or belief, political affiliation, sexual orientation, age, disability or national, social or ethnic origin.'

9 Paragraph 2(1) of the Anti-discrimination law states as follows:

'An employer may not discriminate against employees or applicants for available posts in hiring, dismissal, transfers, promotions or with respect to remuneration and working conditions.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Mr Rasmussen was dismissed by Ajos, his employer, on 25 May 2009 at the age of 60. A few days later, he tendered his notice to Ajos and agreed with it that he would leave his job at the end of June 2009. He was subsequently employed by another undertaking.

11 The referring court states that as Mr Rasmussen had been employed by Ajos since 1 June 1984, he was, in principle, entitled to a severance allowance equal to three months' salary under Paragraph 2a(1) of the Law on salaried employees. However, since he had reached the age of 60 by the date of his departure and was entitled to an old-age pension payable by the employer under a scheme which he had joined before reaching the age of 50, Paragraph 2a(3) of that law, as interpreted in consistent national case-law, barred his entitlement to the severance allowance, even though he remained on the employment market after his departure from Ajos.

12 In March 2012, the trade union Dansk Formands Forening brought an action on Mr Rasmussen's behalf against Ajos claiming payment of a severance allowance equal to three months' salary, as provided for in Paragraph 2a(1) of the Law on salaried employees. The trade union relied on the judgment of the Court of Justice of 12 October 2010 in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600).

13 On 14 January 2014, the Sø- og Handelsretten (Maritime and Commercial Court) upheld the claim brought on behalf of Mr Rasmussen, now represented by his legal heirs, for payment of the severance allowance in question. That court stated that it was clear from the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) that Paragraph 2a(3) of the Law on salaried employees was contrary to Directive 2000/78 and found that the previous national interpretation of Paragraph 2a was inconsistent with the general principle, enshrined in EU law, prohibiting discrimination on grounds of age.

14 Ajos appealed against that decision before the Højesteret (Supreme Court), contending that any interpretation of Paragraph 2a(3) of the Law on salaried employees that was consistent with the provisions interpreted in the judgment in *Ingeniørforeningen i Danmark* (C-499/08, EU:C:2010:600) would, in any event, be *contra legem*. It also maintained that the application of a rule as clear and unambiguous as that laid down in Paragraph 2a(3) of that law could not be precluded on the basis of the general principle of EU law prohibiting discrimination on grounds of age without jeopardising the principles of the protection of legitimate expectations and legal certainty.

15 Noting that the present case entails a dispute between private persons in which it is not possible to give direct effect to Directive 2000/78 and that any interpretation of Paragraph 2a(3) of the Law on salaried employees that was consistent with EU law would conflict with national case-law, the referring court is uncertain whether the general principle of EU law prohibiting discrimination on grounds of age may be relied on by an employee against his private-sector employer in order to

compel the employer to pay a severance allowance provided for under Danish law, even when, under national law, the employer is not required to make any such payment. The case before the national court thus also raises the question of the extent to which an unwritten principle of EU law may preclude a private-sector employer from relying on a provision of national law that is at odds with that principle.

16 The referring court considers that it is necessary, for the purpose of examining that question, to determine whether the general principle prohibiting discrimination on grounds of age has the same content and scope as Directive 2000/78 or whether the directive affords greater protection against discrimination on grounds of age.

17 If Directive 2000/78 does not afford greater protection than the general principle prohibiting discrimination on grounds of age, the question then also arises of whether that principle may, as appears from the judgments in *Mangold* (C-144/04, EU:C:2005:709) and *Kücükdeveci* (C-555/07, EU:C:2010:21), be directly applied in relationships between private persons and of how the direct application of that principle is to be weighed against the principle of legal certainty and its corollary, the principle of the protection of legitimate expectations.

18 The referring court also questions whether, in a situation such as that in the case pending before it, EU law permits a national court to weigh the general principle prohibiting discrimination on grounds of age against the principles of legal certainty and the protection of legitimate expectations and to conclude that the principle of legal certainty must take precedence over the general principle prohibiting discrimination on grounds of age, with the result that an employer is, in accordance with national law, relieved of its obligation to pay a severance allowance.

19 In this connection, the referring court also questions whether the fact that employees can, in appropriate cases, claim compensation from the Danish State on account of the incompatibility of Danish law with EU law may be taken into account when that balancing exercise is carried out.

20 It was in those circumstances that the Højesteret (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the general EU law principle prohibiting discrimination on grounds of age preclude legislation, such as the Danish legislation at issue, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement?

(2) Is it consistent with EU law for a Danish court hearing an action in which an employee seeks from a private-sector employer payment of a severance allowance which, under the Danish law described in question 1, the employer is not bound to pay, even though that is contrary to the general EU principle prohibiting discrimination on grounds of age, to weigh that principle and the issue of its direct effect against the principle of legal certainty and the related principle of the protection of legitimate expectations and to conclude on that basis that the principle of legal certainty must take precedence over the principle prohibiting discrimination on grounds of age, such that the employer is, in accordance with national law, relieved of its obligation to pay the severance allowance and, in order to determine whether such a balancing exercise may be carried out, is it necessary to take into consideration the fact that the employee may, in appropriate cases, claim compensation from the Danish State on account of the incompatibility of Danish law with EU law?’

Consideration of the questions referred

Question 1

21 By its first question, the referring court, which is adjudicating in a dispute between private persons, seeks to ascertain, in essence, whether the general principle prohibiting discrimination on grounds of age is to be interpreted as precluding national legislation, such as that at issue in the proceedings before it, which deprives an employee of the right to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement.

22 In order to answer that question, it is appropriate first of all to note that the source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found, as is clear from recitals 1 and 4 of the directive, in various international instruments and in the constitutional traditions common to the Member States (see judgments in *Mangold*, C-144/04, EU:C:2005:709, paragraph 74, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraphs 20 and 21). It is also apparent from the Court's case-law that that principle, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, must be regarded as a general principle of EU law (see judgments in *Mangold*, C-144/04, EU:C:2005:709, paragraph 75, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 21).

23 It should then be noted that, as Directive 2000/78 does not itself lay down the general principle prohibiting discrimination on grounds of age but simply gives concrete expression to that principle in relation to employment and occupation, the scope of the protection conferred by the directive does not go beyond that afforded by that principle. The EU legislature intended by the adoption of the directive to establish a more precise framework to facilitate the practical implementation of the principle of equal treatment and, in particular, to specify various possible exceptions to that principle, circumscribing those exceptions by the use of a clearer definition of their scope.

24 Lastly, it should be added that, in order for it to be possible for the general principle prohibiting discrimination on grounds of age to be applicable to a situation such as that before the referring court, that situation must also fall within the scope of the prohibition of discrimination laid down by Directive 2000/78.

25 It is sufficient to observe in that regard that, as the Court has previously held, by generally excluding a whole category of workers from entitlement to the severance allowance, Paragraph 2a(3) of the Law on salaried employees affects the conditions regarding the dismissal of those workers for the purposes of Article 3(1)(c) of Directive 2000/78 (judgment in *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraph 21). It follows that the national legislation at issue in the main proceedings falls within the scope of EU law and, accordingly, within the scope of the general principle prohibiting discrimination on grounds of age.

26 In those circumstances and in the light of the fact that the Court has previously held that Articles 2 and 6(1) of Directive 2000/78 are to be interpreted as precluding national legislation, such as the legislation that is the subject of the present request for a preliminary ruling, pursuant to which workers who are eligible for an old-age pension from their employer under a pension scheme which they joined before attaining the age of 50 cannot, on that ground alone, claim a severance allowance aimed at assisting workers with more than 12 years of service in the undertaking in finding new employment (judgment in *Ingeniørforeningen i Danmark*, C-499/08, EU:C:2010:600, paragraph 49), the same applies with regard to the fundamental principle of equal treatment, the general principle prohibiting discrimination on grounds of age being merely a specific expression of that principle.

27 In the light of the foregoing considerations, the answer to the first question is that the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, must be interpreted as precluding, including in disputes between private persons, national legislation, such as that at issue in the proceedings before the referring court, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement.

Question 2

28 By its second question, the referring court seeks to ascertain, in essence, whether EU law is to be interpreted as permitting a national court seised of a dispute between private persons, where it is established that the relevant national legislation is at odds with the general principle prohibiting discrimination on grounds of age, to balance that principle against the principles of legal certainty and the protection of legitimate expectations and to conclude that the latter principle should take precedence over the former. In that context, the referring court is also uncertain whether, in carrying out that balancing exercise, it may or must take account of the fact that the Member States are under a duty to compensate for the harm suffered by private persons as a result of the incorrect transposition of a directive, such as Directive 2000/78.

29 In the first place, it should be noted in that regard that, according to settled case-law, where national courts are called on to give judgment in proceedings between individuals in which it is apparent that the national legislation at issue is contrary to EU law, it is for those courts to provide the legal protection which individuals derive from the provisions of EU law and to ensure that those provisions are fully effective (see, to that effect, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 111, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 45).

30 While it is true that, in relation to disputes between individuals, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, inter alia, judgments in *Marshall*, 152/84, EU:C:1986:84, paragraph 48; *Faccini Dori*, C-91/92, EU:C:1994:292, paragraph 20; and *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 108), the fact nonetheless remains that the Court has also consistently held that the Member States' obligation arising from a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, to that effect, inter alia, judgments in *von Colson and Kamann*, 14/83, EU:C:1984:153, paragraph 26, and *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 47).

31 It follows that, in applying national law, national courts called upon to interpret that law are required to consider the whole body of rules of law and to apply methods of interpretation that are recognised by those rules in order to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU (see, inter alia, judgments in *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraphs 113 and 114, *and Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 48).

32 It is true that the Court has stated that this principle of interpreting national law in conformity with EU law has certain limits. Thus, the obligation for a national court to refer to EU law when interpreting and applying the relevant rules of domestic law is limited by general principles of law and

cannot serve as the basis for an interpretation of national law *contra legem* (see judgments in *Impact*, C-268/06, EU:C:2008:223, paragraph 100; *Dominguez*, C-282/10, EU:C:2012:33, paragraph 25; and *Association de médiation sociale*, C-176/12, EU:C:2014:2, paragraph 39).

33 It should be noted in that connection that the requirement to interpret national law in conformity with EU law entails the obligation for national courts to change its established case-law, where necessary, if it is based on an interpretation of national law that is incompatible with the objectives of a directive (see, to that effect, judgment in *Centrosteel*, C-456/98, EU:C:2000:402, paragraph 17).

34 Accordingly, the national court cannot validly claim in the main proceedings that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law by mere reason of the fact that it has consistently interpreted that provision in a manner that is incompatible with EU law.

35 That point having been made clear, it should be added that even if a national court seised of a dispute that calls into question the general principle prohibiting discrimination on grounds of age, as given concrete expression in Directive 2000/78, does in fact find it impossible to arrive at an interpretation of national law that is consistent with the directive, it is nonetheless under an obligation to provide, within the limits of its jurisdiction, the legal protection which individuals derive from EU law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (judgment in *Kücükdeveci*, C-555/07, EU:C:2010:21, paragraph 51).

36 Moreover, it is apparent from paragraph 47 of the judgment in *Association de médiation sociale* (C-176/12, EU:C:2014:2) that the principle prohibiting discrimination on grounds of age confers on private persons an individual right which they may invoke as such and which, even in disputes between private persons, requires the national courts to disapply national provisions that do not comply with that principle.

37 Accordingly, in the present case, if it considers that it is impossible for it to interpret the national provision at issue in a manner that is consistent with EU law, the national court must disapply that provision.

38 In the second place, with regard to identifying the obligations deriving from the principle of the protection of legitimate expectations for a national court adjudicating in a dispute between private persons, it should be noted that a national court cannot rely on that principle in order to continue to apply a rule of national law that is at odds with the general principle prohibiting discrimination on grounds of age, as laid down by Directive 2000/78.

39 Indeed, the application of the principle of the protection of legitimate expectations as contemplated by the referring court would, in practice, have the effect of limiting the temporal effects of the Court's interpretation because, as a result of that application, such an interpretation would not be applicable in the main proceedings.

40 According to settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to EU law clarifies and, where necessary, defines the meaning and scope of that law as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that, unless there are truly exceptional circumstances, which is not claimed to be the case here, EU law as thus interpreted must be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that law before the courts having jurisdiction are satisfied (see, inter alia, judgment in *Gmina Wrocław*, C-276/14, EU:C:2015:635, paragraphs 44 and 45 and the case-law cited).

41 Moreover, the protection of legitimate expectations cannot, in any event, be relied on for the purpose of denying an individual who has brought proceedings culminating in the Court interpreting EU law as precluding the rule of national law at issue the benefit of that interpretation (see, to that effect, judgments in *Defrenne*, 43/75, EU:C:1976:56, paragraph 75, and *Barber*, C-262/88, EU:C:1990:209, paragraphs 44 and 45).

42 With regard to the referring court's question mentioned in paragraph 19 above, it should be noted that the fact that it is possible for private persons with an individual right deriving from EU law, such as, in the present case, employees, to claim compensation where their rights are infringed by a breach of EU law attributable to a Member State (see, to that effect, judgments in *Francovich and Others*, C-6/90 and C-9/90, EU:C:1991:428, paragraph 33, and *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, EU:C:1996:79, paragraph 20) cannot alter the obligation the national court is under to uphold the interpretation of national law that is consistent with Directive 2000/78 or, if such an interpretation is not possible, to disapply the national provision that is at odds with the general principle prohibiting discrimination on ground of age, as given concrete expression by that directive, or justify that court giving precedence, in the dispute before it, to the protection of the legitimate expectations of a private person, namely in this case the employer, who has complied with national law.

43 In the light of all the foregoing, the answer to the second question is that EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.

Costs

44 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The general principle prohibiting discrimination on grounds of age, as given concrete expression by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as precluding, including in disputes between private persons, national legislation, such as that at issue in the proceedings before the referring court, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme which the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement.**

2. **EU law is to be interpreted as meaning that a national court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of national law, to interpret those provisions in such a way that they may be applied in a manner that is consistent with the directive or, if such an interpretation is not possible, to disapply, where necessary, any provision of national law that is contrary to the**

general principle prohibiting discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of national law that is at odds with EU law to bring proceedings to establish the liability of the Member State concerned for breach of EU law can alter that obligation.

[Signatures]