Appeal No. UKEAT/0071/17/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 11-14 December 2017
Judgment handed down on 29 January 2018

Before

SIR ALAN WILKIE

(SITTING ALONE)

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(1) THE LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE
(2) THE MINISTRY OF JUSTICE — APPELLANTS

(1) MS V McCLOUD & OTHERS
(2) MR N MOSTYN & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants	MR JOHN CAVANAGH (One of Her Majesty's Counsel) and MR RAYMOND HILL (of Counsel) and MS KATHERINE APPS (of Counsel) Instructed by: Government Legal Department One Kemble Street London WC2B 4TS
For Ms V McCloud & Others	MR ANDREW SHORT (One of Her Majesty's Counsel) and MS NAOMI LING (of Counsel) Instructed by: Leigh Day Solicitors Priory House 25 St John's Lane London EC1M 4LB
For Mr N Mostyn & Others	MR MICHAEL BELOFF (One of Her Majesty's Counsel) and MR BEN JAFFEY (One of Her Majesty's Counsel) Instructed by: Bindmans LLP 236 Grays Inn Road London WC1X 8HB

SUMMARY

AGE DISCRIMINATION

1. The Employment Tribunal considered whether the Appellants had established "a legitimate aim" with a view to justifying the acknowledged age discriminatory effect of operating the transitional provisions of the New Judicial Pension Scheme. The Employment Tribunal misunderstood and/or misapplied the facts and erred in law in concluding that the Appellants had not established a legitimate aim.

2. The Employment Tribunal considered whether, on the assumption that the Appellants had established a legitimate aim, the means adopted, namely the operation of the transitional arrangements, were proportionate means for pursuing a legitimate aim. In so doing the Employment Tribunal properly applied ECJ, CJEU and domestic authorities and adopted the appropriate level of scrutiny.

3. In applying that appropriate level of scrutiny to the facts which it had found, the Employment Tribunal was entitled to conclude, and did not err in law in concluding, that the Appellants had failed to justify the discriminatory effect of the transitional provisions of the NJPS.

4. Accordingly, notwithstanding the error of law described in paragraph 1, the decision of the Employment Tribunal on justification was not wrong in law and the Appellants' appeal on this issue is dismissed.

A **SIR ALAN WILKIE**

Chapter 1. Introduction

B 1. The Appellants, the Lord Chancellor and the Ministry of Justice, appeal from the decision of the Employment Tribunal, entered in the Register on 13th January 2017, sent to the parties on 16th January 2017, whereby the Appellants were found to have treated the Respondents less favourably on the grounds of age by reason of the transitional provisions C contained in the **Judicial Pension Regulations 2015** and that the Appellants had failed to show that such treatment was a proportionate means of meeting a legitimate aim.

D 2. These appeals are being heard by the same constitution of the EAT and on the same occasion as appeals concerning Employment Tribunal decisions in relation to the transitional provisions of the New Firefighters Pensions Scheme (NFPS) and 2015 Firefighters' Pension E Scheme as there are a number of common issues to be determined in relation to all of these appeals.

Chapter 2. Background

F 3. In March 2011 the Independent Public Services Pension Commission (IPSPC) published a review of Public Sector Pensions, the Hutton Report. It recommended wholesale public sector pension reform in order to place them on a more sustainable footing. The Government G largely accepted the recommendations of that Report and enacted pension reforms through the **Public Service Pensions Act 2013**.

H 4. Paragraph 7.34 of the Report stated:

> **"The Commission's expectation is that existing members who are currently in their 50s should, by and large, experience fairly limited change to the benefits which they would otherwise have expected to accrue by the time they reach their current scheme NPA. This**

would particularly be the case if the final salary link is protected for past service, as the Commission recommends. This limitation of impact will also extend to people below age 50, proportionate to the length of time before they reach their NPA. Therefore, special protections for members over a certain age should not be necessary. Age discrimination legislation also means that it is not possible in practice to provide protection from change for members who are already above a certain age."

5. Paragraph 1.132 of the Budget Report of the Government dated 23rd March 2011 read as follows:

"The Government accept Lord Hutton's recommendations as a basis for consultation of Public Service Workers, Trade Unions and others, recognising that the position of the Uniformed Services would require particularly careful consideration. The Government will set out proposals in the Autumn that are affordable, sustainable and fair to both the public sector workforce and the tax payer."

6. The Government published a Green Paper on 2nd November 2011 concerning public sector service pensions. It contained a foreword by the Chief Secretary to the Treasury in which he said:

"I believe it is right that we protect those public service workers who, as of 1st April 2012, have ten years or less to their pension age. It is my objective that these people see no change in when they can retire, or any decrease in the amount of pension they receive at their Normal Pension Age …"

7. The Chief Secretary to the Treasury made a statement in Parliament 2nd November 2011 recorded in Hansard as follows:

"In addition, I have listened to the argument that those closest to retirement should not have to face any change at all. That is the approach that has been taken over the years in relation to increases to the State Pension Age and I think it is fair to apply that here too. I can also announce that Scheme negotiations will be given the flexibility, outside the costs ceiling, to deliver."

8. On the same day, the Chief Secretary to the Treasury wrote to the TUC General Secretary in the following terms:

"9. I have accepted your argument that there should be transitional protection. It is my objective to ensure that those closest to retirement should not have any detriment either to when they can retire nor any decrease in the amount of pension they receive at their current Normal Pension Age. Over and above the costs ceiling, the Governments objective is to provide this protection to those who on 1st April 2012 are within ten years of Normal Pension Age. Schemes and Unions should discuss the fairest way of achieving this objective and for providing some additional protection to those who are just over ten years from their Normal Current Pension Age. I would be willing to consider tapering of transitional protection over a further three to four years. Full account must be taken of equalities impacts and legislation,

while ensuring that costs to the tax payer each and every year should not exceed the OBR forecast for public service pension costs - i.e. those forecasts made before the further reform set out in this letter …

11. … the Government's offer is conditional on reaching agreement. If agreement has not been reached we may need to revisit our current proposals."

Chapter 3. The Changes in the Provisions in Respect of Judicial Pensions

9. Each of the Claimants (save for one regional medical member whose circumstances are in all material respects the same) are full time Judges appointed before 1st April 2012 and are office holders appointed to public office within the meaning of section 50 of the **Equality Act 2010**. The Appellants are the "relevant person" in relation to the Claimants for the purposes of sections 50, 51 and 52 of the **Equality Act 2010**.

10. The salary of each of the Claimants was set by the Lord Chancellor having regard to the recommendation of the review body on senior salaries. The compulsory retirement date of each Claimant was their seventieth birthday.

11. Each Claimant automatically became entitled to benefits under the Judicial Pension Scheme (JPS) established under the **Judicial Pensions and Retirement Act 1993**. Each Claimant, as of 31st March 2015, was an active member of the JPS whose current service entitled him/her to benefits under that scheme.

12. In broad terms, the key benefits provided by the JPS were:

a) An annual pension of an amount equal to one fortieth of the Judge's final "pensionable pay" multiplied by the aggregate length of service in a qualifying judicial office to a maximum of twenty years.

b) A lump sum of 2.25 times the annual rate of pension was payable on retirement.

c) The normal pension age (the date from which the pension could be taken as a right without actuarial reduction) was sixty five.

d) A surviving spouse, or civil partner's, pension was paid at half the rate of the member's pension. There was also provision for a child's pension.

13. Until 1st April 2012 members were not required to contribute towards their own pension but were required to pay contributions towards survivors' pensions. Since 2006, contributions in respect of survivors' pensions were 1.8% of the Judge's pension capped salary.

14. The **Pensions Act 2011** empowered the Lord Chancellor, by regulation, to require members of the JPS to make contributions in respect of their own pensions. That power has been exercised a number of times so as to require an increasing level of contributions with effect from 1st April 2012, 1st April 2013 and 1st April 2014 from which date members' contributions were 3.2% in addition to the 1.8% in respect of survivors' benefits.

15. The **Judicial Pensions Regulations 2015**, made pursuant to the **Public Services Pensions Act 2013**, came into force on 1st April 2015. They established the New Judicial Pension Scheme (NJPS).

16. In broad terms, the key benefits provided by NJPS are as follows:

(a) Pension is accrued at the rate of approximately 1/43 of pensionable pay in each year on a career average basis (rather then a final salary basis). There is no limit to the period of service during which pension may be accrued or taken into account in calculating the annual pension.

(b) No lump sum is payable in addition to the pension calculated in accordance with (a). Instead, a lump sum is available by commuting some of the annual pension entitlement.

(c) Normal pension age is defined as the same as the State Pension Age (varying according to the member's date of birth) so as to be the higher of sixty five or the relevant State Pension Age attributable to the individual.

(d) A surviving adult (spouse, civil partner or nominated partner) pension is paid at the annual rate of three eighths of the member's pension.

17. Initially the contribution rates under the NJPS are the same as in the JPS until year 2018 to 2019 when they will rise to between 4.6% and 8.05% of pensionable pay depending upon the annualised rate of pensionable earnings.

Tax Treatment of Judicial Pension Schemes

18. On 6th April 2006 a new regime for the taxation of pension schemes was introduced by the **Pensions Act 2004** and the **Finance Act 2004**. The JPS is not a registered pension scheme under that regime. It was treated as an "employer financed retirement benefits scheme". That meant that neither members' contributions nor the lump sum attracted favourable tax treatment available in respect of registered pension schemes. However, in practice, this was not a significant disadvantage because of special provisions which were introduced simultaneously. The fact that the JPS was not a registered pension scheme was of significant benefit to its members as benefits accrued within it were not subject to the annual or lifetime allowances imposed on registered schemes by the **Finance Act 2004**.

19. By contrast, the NJPS is a registered scheme and so is subject to the restrictions on accrual of benefits imposed by the **Finance Act 2004** by means of the annual allowance and lifetime allowance rules. This is significantly disadvantageous to members of the NJPS as there is the risk of a substantial increase in tax applied to lump sum and/or pension payments.

20. Judges entitled to membership of the NJPS are entitled to opt out of that scheme and, in the alternative, to join a "Partnership Pension Account" (PPA) which is a registered stakeholder pension scheme. A Judge taking that option terminates the final salary link for benefits accrued under the JPS.

21. The Claimants contend, and it is not in dispute, that membership of the NJPS or PPA is considerably less valuable than membership of the JPS, both in terms of the reduction in the benefits paid under each scheme and reflecting the tax treatment respectively of the JPS and the NJPS, being, respectively, un-registered and registered pension schemes.

22. By Schedule 2 of the **Judicial Pension Regulations**, Judges who, on 31st March 2015, were members of the JPS have been affected since 1st April 2015 in the following different ways:

(a) Those who were active members of the JPS before 1st April 2012 and were born on or before 1st April 1957 have full protection and remain entitled to continuing active membership of the JPS.

(b) Those who were active members of the JPS before 1st April 2012 and were born between the 2nd April 1957 and 1st September 1960 are entitled to tapering protection. They have the option of remaining active members of the JPS until their tapered protection closing date, being a date between 31st May

2015 and 31st January 2022, whereupon they fall to be excluded from active membership of the JPS and become entitled to membership of the NJPS (they also had the option to transfer to the NJPS on 1st April 2015).

(c) Those who were active members of the JPS before 1st April 2012 but were born after 1st September 1960 are not entitled to any protection and have been excluded from active membership of the JPS since 1st April 2015 on which date they were entitled to membership of the NJPS/PPA.

23. It follows that those who fall within (c) are treated less favourably than those who fall within (a) and (b) and those who fall within (b) are treated less favourably than those who fall within (a). The determining factor of whether a person falls within (a), (b) or (c) is their date of birth i.e. their age.

Chapter 4. The Relevant Pension Legislation

24. The **Public Service Pensions Act 2013** provides:

> **"18. *Restriction of existing pension Schemes***
>
> **(1) No benefits are to be provided under an existing scheme to or in respect of a person in relation to the person's service after the closing date**
>
> **…**
>
> **(4) The closing date is -**
>
> **…**
>
> **(b) 31st March 2015 …"**

25. Schedule 2 to the **Judicial Pension Regulations 2015** provides:

> **"Exceptions to section 18(1) of the Act: full protection members of an existing scheme**
>
> ***8.*—(1) A person (P) is a full protection member of an existing scheme if sub-paragraph (2) … applies**
>
> **(2) This sub-paragraph applies if -**
>
> **(a) P was an active member of an existing scheme on 31st March 2012;**

(b) P was an active member of that scheme on the scheme closing date; and

(c) unless P dies, P would reach normal pension age under that Scheme on or before 1st April 2022 …

PART 3

Exceptions to section 18(1) of the Act: tapered protection members of an existing scheme

***12.*—(1) A person (P) is a tapered protection member of an existing scheme if sub-paragraph (2) … applies**

(2) This sub-paragraph applies if -

(a) P was an active member of an existing scheme on 31st March 2012;

(b) P was an active member of an existing scheme on the scheme closing date; and

(c) unless P dies, P would reach normal pension age during the period beginning with 2nd April 2022 and ending with 1st September 2025."

Chapter 5. EU Directive and the *Equality Act 2010* Provisions

26. Article 1 of the Council Directive 2000/78 sets out a general framework for combating discrimination on grounds of amongst other things, age.

27. Article 2 provides:

"Concept of discrimination

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."

28. Article 6 provides:

"Justification of differences of treatment on grounds of age

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."

29. Section 13 of the **Equality Act 2010** provides:

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others.

(2) If the protected characteristic is age, A does not discriminate against B if it can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

30. Section 19 of the **Equality Act 2010** provides:

> **"Indirect discrimination**
>
> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if- -**
>
> > **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> >
> > **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> >
> > **(c) it puts, or would put, B at that disadvantage, and**
> >
> > **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**
>
> **(3) The relevant protected characteristics are -**
>
> > **age;**
> > **…**
> > **race;**
> > **…**
> > **sex;**
> > **…"**

31. Section 67 of the **Equality Act** provides:

> **"Sex equality rule**
>
> **(1) If an occupational pension scheme does not include a sex equality rule, it is to be treated as including one.**
>
> **(2) A sex equality rule is a provision that has the following effect -**
>
> > **(a) if a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable;**
> >
> > **(b) if a term confers a relevant discretion capable of being exercised in a way that would be less favourable to A than to B, the term is modified so as to prevent the exercise of the discretion in that way.**
>
> **(3) A term is relevant if it is -**
>
> > **(a) a term on which persons become members of the scheme, or**
> >
> > **(b) a term on which members of the scheme are treated.**
>
> **(4) A discretion is relevant if its exercise in relation to the scheme is capable of affecting -**
>
> > **(a) the way in which persons become members of the scheme, or**
> >
> > **(b) the way in which members of the scheme are treated.**
>
> **(5) The reference in subsection (3)(b) to a term on which members of a scheme are treated includes a reference to the term as it has effect for the benefit of dependants of members.**
>
> **(6) The reference in subsection (4)(b) to the way in which members of a scheme are treated includes a reference to the way in which they are treated as the scheme has effect for the benefit of dependants of members.**

A

…

(8) A relevant matter is -

(a) a relevant term;

(b) a term conferring a relevant discretion;

(c) the exercise of a relevant discretion in relation to an occupational pension scheme

B

…"

32. Section 69 of the **Equality Act** provides:

C

"Defence of material factor

…

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) "Relevant matter" has the meaning given in section 67.

D

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's."

Chapter 6. The Claimants' Claims

E

33. The claims brought by V McCloud and others all relate to categories of Judge other than High Court Judges. The claims brought by N Mostyn and others are brought in relation to High Court Judges.

F

34. The claims in the McCloud case are that the Claimants were treated less favourably than those falling within the protected and/or taper groups on the grounds of age and that the less favourable treatment was not justified pursuant to section 13(2) of the **Equality Act 2010**. Thereby they were directly discriminated against on grounds of age and in breach of the non-discrimination rule included in the JPS and the NJPS by section 67 of the **Equality Act 2010**.

G

H

35. Those Claimants also make a claim, in so far as they are female, for equal pay on the basis that the transitional provisions disproportionately adversely affect women and the relevant

A term is not objectively justified. To the extent that the **Equal Pay Act** claims brought by the female Judges succeed, then each male Claimant makes a "piggy-back" claim to the like effect relying on the success of the female Claimants.

B

36. The Claimants also brought claims of sex and race discrimination on the basis that the transitional provisions put women and BME Claimants at a disadvantage for the purposes of section 19 of the **Equality Act 2010** and those provisions are not objectively justified for the

C purposes of section 19(2)(d) of the **2010 Act**.

37. The Claimants contended that the Appellants were not able to justify less favourable or

D disparate treatments or impact by reference to the saving of costs.

38. Insofar as it is relevant to this appeal, the Mostyn Claimants' claims are couched in

E identical terms to those of the Claimants in the McCloud litigation.

Chapter 7. The Appellants' Case before the Employment Tribunal

39. The Appellants sought to place the claims within the context of pension reforms across

F the public sector, which resulted in members of public service pension schemes accruing less advantageous benefits than previously. This would require scheme members across the public sector to make adjustments to lifestyle and financial arrangements. They might wish to use part

G of their earned income to make investments to help make up the difference.

40. The Appellants contended that the Government recognised that scheme members closest

H to retirement had less time to make the necessary lifestyle and financial adjustments and

A concluded that it was appropriate to provide those members with protection from the effect of the reforms.

B 41. The decision was taken, across the public sector, that the starting point should be to provide protections so that:

i) benefits already earned would be protected,

ii) those with ten years or less to their current retirement age as of 1st April 2012 would see no change in the amount of pension they would receive,

C

iii) those with more than ten years and less than fourteen years to their current retirement age would be entitled to tapering protection,

D iv) those with more than fourteen years to their current retirement age are not protected from the effects of the reforms.

E 42. The First Appellant had to consider whether to apply these principles to Judges' pensions. An equality impact assessment was undertaken in 2013. A public consultation was undertaken in 2014 resulting in the **2015 Regulations** giving rise to the NJPS and transitional protection.

F

43. The Appellants accepted that the transitional protection involved less favourable treatment on the ground of age. Any scheme whose object was to protect those closest to

G retirement from the effects of pension reforms must necessarily do so. The Appellants also accepted that, because of the gender and racial profile of the relevant groups, the proposals had a disproportionate impact on female and BME Judges.

H

44. The Appellants contended that the transitional protection arrangements were a proportionate means of achieving their legitimate aim of protecting those closest to retirement from the financial effects of pension reform and that any differences in treatment were justified and lawful.

45. The Appellants, accordingly, denied liability for discrimination on the grounds of age on the basis that the discriminatory arrangements were a proportionate means of achieving a legitimate aim.

46. In relation to equal pay it was said that the apparent differentiation between male and female, which was on the basis of proximity to retirement, arose from a material factor other than sex.

47. In relation to the indirect sex and race discrimination claims, the Appellants contended that the differentiation represented a proportionate means of achieving a legitimate aim and so was justified.

48. Finally, the Appellants contended that the aim of the differentiation was not the saving of costs but was pursuit of a legitimate social policy objective.

Chapter 8. The Employment Tribunal's Decision of 16th January 2017

A. The Introduction

49. The Tribunal recorded its decision that, pursuant to Part 2 of Schedule 2 of the **Judicial Pensions Regulations 2015**, the Appellants treated the Claimants less favourably than their comparators because of age and had failed to show their treatment of the Claimants to be a

proportionate means of achieving a legitimate aim. This decision was stated to be on an issue arising under the Article 6(1) of the Directive and sections 13(1) and (2) of the **Equality Act 2010**.

B. The Findings of Fact

50. The Government, as employer of a wide range of public servants, and guardian of the public purse, established the Public Service Pensions Commission (Hutton) which produced a final report in March 2011. Its remit was:

> **"To conduct a fundamental structural review of public service pension provision and to make recommendations … on pension arrangements that are sustainable and affordable in the long term, fair to both the public service workforce and the taxpayer … while protecting accrued rights …"**

The Commission was to have regard to a number of matters including:

> **"The needs of public service employers in terms of recruitment and retention;**
>
> **the need to ensure that future provision is fair across the workforce …;**
>
> **implementation and transitional arrangements for any recommendations."**

51. At paragraph 7.34 Hutton said:

> **"The Commission's expectation is that existing members who are currently in their fifties should … experience fairly limited change to the benefit which they would otherwise have expected to accrue by the time they reach their current scheme NPA … This would particularly be the case if the final salary link is protected for past service … This limitation of impact will also extend to people below aged fifty proportioned to the length of time before they reach their NPA, therefore special protections for members over a certain age should not be necessary. Age discrimination legislation also means that it is not possible in practice to provide protection from change for members who are already above a certain age."**

52. The Commission recommended no transitional provisions beyond the protection of accrued rights but the Government did not agree. In the Green Paper dated 2 November 2011 the Chief Secretary to the Treasury said:

> **"I believe it is right that we protect those public service workers who, as of 1st April 2012, have ten years or less to their pension age. It is my objective that these people see no change in when they can retire, nor any decrease in the amount of pension they receive at their current normal pension age. Scheme-specific discussions will need to determine the fairest way of achieving this objective, taking full account of equalities impacts and legislation, while**

> **ensuring that costs to the taxpayer in each and every year do not exceed the Office for Budget Responsibility forecasts of public service pension costs."**

53. The JPS was closed on 31st March 2015 and replaced by the NJPS, but the Government gave effect to the Chief Secretary's objective by enacting Schedule 2 of the **2015 Regulations** containing the transitional provisions.

54. The EJ made a series of detailed findings about the nature and extent of the less favourable benefits provided by the NJPS when compared to the JPS benefits.

55. The EJ described the significant changes to the taxation of pensions arising from the **Finance Act 2004**. Registered schemes were subject to lifetime and annual allowance limits which would, if applied to Judicial Pensions, have had a dramatic effect on their value. The then Lord Chancellor had given a written assurance to the Lord Chief Justice on 18th March 2004 in the following terms:

> **"… The Government's objective of enabling judges to remain in an equivalent financial position in respect of their Judicial Pension benefits is settled and clear … I consider it extremely important to maintain the attractiveness of the Judicial Pension for the Judiciary as well as recognising the current entitlements and expectations of serving judges."**

56. This was confirmed in a letter which went from the Department to individual Judges in December 2005 and March 2006, which stated:

> **"The Judicial Pension Schemes will fall outside the ambit of the new pension's tax regime for Registered Pension Schemes under the Finance Act … This removes the prospect of the value of judicial pension benefits being reduced through the imposition of this new charge on pension benefits from registered pension schemes."**

57. As a consequence of the schemes remaining non-registered, there would have been substantial dis-benefits in respect of lump sum benefits and dependents' benefits. The Government put compensating arrangements in place to offset and replace those dis-benefits. The Lord Chancellor in Parliament in December 2005 had said:

> **"They serve to maintain but not improve the overall remuneration package for the serving judiciary and to protect the principle of judicial independence in so doing."**

58. The EJ rejected the contention of the Appellants that these arrangements were accidental or temporary and found that they were intended to be settled and clear and to be a lasting settlement. Prior to the introduction of the NJPS there was no notification of any intended change to the tax status of the JPS with the result that the Claimants had continued to seek, and had taken, full time appointment on the understanding that their terms and conditions, including taxation of pension, would remain. The Appellants recognised this in October 2012:

> **"Switching off this tax advantage has very significant implications for serving Judiciary that they could not have anticipated nor reasonably made revised arrangements for, and requires this change to be handled differently from the standard pension reform being applied across the public service."**

59. The NJPS is a registered scheme, with the result that on transfer into NJPS many Claimants incurred very significant additional tax liabilities compared with their position as members of the JPS. This affected Judges uniquely amongst public servants. These losses have been further increased by changes to the pension tax regime announced in 2015, which served to magnify the disparity between the unprotected and protected Judges. The loss sustained by the unprotected and taper protected Judges was very significantly greater than the loss sustained by other public servants whose pension schemes were reformed. The EJ found that officials were well aware of the unique position in which Judges were being placed in 2011-2012. On 2nd December 2011 one responsible official wrote to another:

> **"The value of their total reward package can drop significantly, probably far more than most in the public service who are affected by these reforms … It is hard to argue in a reasoned and rational way why this one group … should have such a disproportionate hit."**

60. The EJ also noted the fact that appointments to judicial office were intended to be for the remainder of the person's professional life and that in many cases the Claimants accepted

significant reductions in earnings on appointment in reliance on assurances that the value of their remuneration package would be maintained.

61. The EJ found that the clear and obvious effect of the transitional provisions is that protection was aimed at those least affected by the changes, that those unprotected would face a much bigger impact than those closer to retirement. The EJ found that, as envisaged by Hutton, the principle of maintaining the value of accrued rights under existing schemes was itself an important transitional protection, "for those who have built up rights in those schemes and will mean that those closest to retirement perhaps in their fifties who have less time to adjust are least affected, and all existing scheme members retain the link to final salary for the years they have already accrued".

62. The EJ found that, in the context of the wider reforms to public sector pensions, the question of securing agreement, if possible, with the relevant trade unions was an important factor and that offering enhanced transitional protection was one option to assist in securing a deal with the unions. In a submission to the Chief Secretary of the Treasury dated 13th October 2011 an official wrote: "getting further transitional protection for current members is hugely important to unions, who will want to be able to give a message to more concerned groups of active members that these reforms will not affect them". In describing one of the options as: "age protection" by means of those over a certain age staying in their current scheme the official wrote:

> **"Honouring accrued rights and the final salary link means that those who have been in this Scheme the longest will be least affected by changes, so the savings foregone would be targeted on those who would see least change."**

In the same document she said:

> **"As this issue is of disproportionate importance to the unions, any offer should be simple so that its benefit can easily be understood [sic] members."**

63. The EJ found, on that evidence, that the objective of securing agreements with trade unions was an important reason for the decision to extend transitional protection beyond that which was recommended by Hutton.

64. The EJ described the Government's summary of responses to its public consultation on the reform of State Pensions. It had to consider how it should respond to revisions in life expectancy projections whilst giving individuals sufficient time to prepare for the change. Giving notice of the changes, ranging from 4-15 years' notice was suggested by Respondents. The majority suggested that ten years would be appropriate notice for any future change to State Pension Age. The EJ found that, in adopting the ten year period for full protection from NJPS reforms, the Appellants invoked consistency with the arrangements for making changes to the State Pension Age.

65. The EJ found that there was no analysis or research underlying the decision to incorporate transitional provisions into the **Judicial Pensions Regulations**. He drew attention to a memo from an official in the MoJ to the Treasury dated 23rd January 2012:

> **"We have to have cogent arguments as to why there is a proposal to put judges who … are in one of the better/more advantageous Schemes into a Scheme which is already less advantageous and is, through a reform, being made even less so. We will need evidence to show the effect and why it is not disproportionate …"**

66. The EJ described the contentions of the Appellants that older Judges would have less time to prepare for the financial effects of pension reform and would be more likely to have fixed or concrete retirement plans as being "general assertion". The EJ described the evidence of Mr Kelly for the Appellants as acknowledging that they did not carry out any further survey of the Judges, though he was sure they could have done so if they had chosen to. He had said as follows:

> **"We had made the decision to protect across the public sector workers … individuals within ten years of their expected retirement date … When it came to looking at the judges we started from the principle the same would apply … As I said it clearly was an important thing to the unions and we did think about how we handled it in the context of the negotiations with the unions …"**

And:

> **"… when the options were put to consider, did we do something different for the judges, one of our concerns was maintaining consistency and if you did it for the judges what the potential knock-on considerations would be for other public sector workforces who would argue why wasn't the same being done for them."**

67. The EJ, in paragraph 56, found:

> **"… that the Government decided to incorporate the transitional provisions into the JPS for no reasons specific to the Judiciary but rather because similar provisions had been agreed with Trade Unions for other workforces and the Government's preference was for a consistent Scheme and, to a lesser extent, because the State Pension Age consultation had led to the view that a period of ten years' notice was appropriate in that case. I found the further arguments based on those nearing retirement having less time to prepare for the effects of reform and having fixed retirement plans lacked cogency for the reasons set out above."**

68. The EJ considered evidence presented on behalf of the High Court Judges in respect of a proposal to introduce a "recruitment and retention allowance" against the background of difficulty experienced in recruiting sufficient High Court Judges to fill vacancies, however, ultimately he did not consider this aspect of the evidence to be of significance.

69. The EJ found that the cost of the protection provided by the transitional provisions to salaried Judges was £23 million. The cost of including currently un-protected full time Judges was £70 million. If Judges who were fee paid before 1st April 2012 and subsequently became salaried were included, those figures rose to £28 million and £118 million respectively.

70. The EJ found that 85% of Judges in service as at 2012 were in the protected groups. The unprotected group contained 279, the fully protected group contained 1,123 and the taper protected a further 294.

C. The Law

71. The EJ set out the relevant provisions of the Council Directive 2000/78 and the relevant UK legislation.

D. The EJ's Discussion and Conclusions

i. A Constitutional Argument

72. The EJ first considered a constitutional argument advanced on behalf of the Claimants, which he did not, for the reasons stated, accept.

ii. The Test of Justification

73. The EJ accepted that the aim of the Appellants was to establish public service pension arrangements which were "sustainable and affordable in the long term, fair to both the public service workforce and the taxpayer, and consistent with the fiscal challenges ahead whilst protecting accrued rights". As those aims were taken from the terms of reference of Hutton, the EJ accepted that those matters belonged in the realm of public policy and finance. It was for the Government to define its policy objectives, identify its priorities and determine what resources to allocate. It was not an area into which the Tribunal could properly trespass. The EJ was concerned solely with the Appellants' justification of the disparate impact of the transitional provisions in Schedule 2 of the **JPR 2015**.

74. At paragraph 80, the EJ recognised that to avoid less favourable treatment from amounting to unlawful discrimination it must be established that the transitional provisions are objectively justified, that is "a proportionate means of achieving a legitimate aim". The EJ set out what he took as the relevant principles. Some were non-controversial, others were disputed. They included:

a) The onus is on the Appellants to make out their justification:

> **"notwithstanding their broad discretion in matters of social policy, the burden of establishing to a high standard of proof the legitimacy of the aim pursued" (*Age Concern* para 65) C 388/07 Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform [2009] ICR 1080.**

b) "Only certain kinds of aim are capable of justifying direct age discrimination … The distinction drawn in the evolving case law … is between aims relating to 'employment policy, the labour market or vocational training' which are legitimate, and 'purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness' which in general are not" (**Seldon** paragraph 30).

c) "The aims which may be considered legitimate within … Article 6(1) … are social policy objectives" (**Age Concern** in the ECJ paragraph 46).

It was common ground that Article 6(1) did not contain an exhaustive list of objectives.

d) Lack of precision in formulating the aim does not preclude it being justified however:

> **"In the absence of such precision, it is important, however, that other elements, … enable the underlying aim … to be identified for … review by the courts of its legitimacy and whether the means … to achieve that aim are appropriate and necessary." (ECJ in *Age Concern* para 45)**

e) In addition to their broad discretion in matters of social policy the ECJ has stated (**Specht**) that Member States enjoy:

> **"Broad discretion in their choice not only to pursue a particular aim in the field of social and economic policy but also in the definition of measures capable of achieving it."**

The EJ concluded that the same formulation was to be found in other decisions of the ECJ but he also stated:

> **"I see no basis for saying that the Government's acknowledged broad discretion in matters of social policy extends beyond that public arena into the arena of private relations between employer and employee" (para 80(5)).**

f) When choosing the means to achieve social policy objectives the broad discretion is not without limit. In **Age Concern** ECJ at paragraph 51:

> **"Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough to show that the aim of that measure is capable of justifying derogation from that principle and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim."**
>
> **"It is for the Employment Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweighs the latter. There is no range of reasonable response test in this context.**
>
> **(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardy & Hansons plc v Lax [2005] ICR 1565* , per Pill LJ, at paras 19–34, Thomas LJ, at paras 54–55 and Gage LJ, at para 60. (4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no "range of reasonable response" test in this context: Hardy & Hansons plc v Lax."**

Hardys & Hansons plc v Lax (**MacCulloch v ICI** [2008] ICR 1334 paragraph 10(4) Elias (P).

g) The means must be shown both to be appropriate and reasonably necessary (**Homer v Chief Constable of West Yorkshire Police** [2010] ICR 987, paragraph 22):

> **"… to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so.**
>
> **…**
>
> **23. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate."**

h) It is not always possible or necessary to distinguish between aims and means (**HM Land Registry v Brndon** [2012] ICR 627 EAT, Underhill (P)).

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E. The Application of the Test by the EJ to the Facts

i. Legitimate Aim

75. The EJ stated that, in the authorities, wherever an aim had been found to be legitimate, there was some broad objective identified in terms going beyond the age, per se, of the group to be more or less favourably treated. In each case the question "why" a measure had been chosen to treat, less favourably, workers in a particular age group, brought forth the answer "in order to achieve the stated aim".

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76. The EJ concluded that the aim stated by the Chief Secretary to the Treasury was "to protect a group by reference to the number of years remaining to their normal pension age". The EJ stated that such an aim was simply another way of identifying a particular age group but that no wider underlying aim was identified. Thus, the EJ concluded, the question "why" does not receive an answer.

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77. The EJ characterised this as a lack of precision, calling for the identification of the underlying aim by other means.

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78. The EJ considered that the formulation of the legitimate aim by the Appellants, "to protect those closest to retirement from the financial effects of pension reform", identified no particular need for protection, because the older Judges were, the less adversely they were affected by the reforms.

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79. The EJ stated that, if an aim is to be described as a legitimate social policy aim there must be something for which there is a rational explanation. It may not be capricious or arbitrary. The EJ concluded that it was counter intuitive consciously to set out to treat more

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favourably a group known to be least adversely affected and that it called for a rational explanation. There was none and the EJ considered that the decision could properly be described as "bizarre".

80. The EJ considered the formulation of the aim in the grounds of resistance, "scheme members closest to retirement have less time to make the necessary lifestyle and financial adjustments". He concluded that this phrase merely stated, in different words, that the group to be protected was selected by reference to its age, whereas, although they had less time to adjust they had a correspondingly lesser need to adjust.

81. The EJ concluded that there was no evidence to support any suggestion that older Judges would be more likely to have made fixed or concrete plans which they would find difficult to change.

82. The EJ considered whether the Government's wish, so far as practicable, that public sector pensions should be consistent across the piece entitled the Respondents to claim justification. The EJ concluded, on the evidence, that the idea of protecting those within ten years of retirement had its origin in discussions with trade unions and that the Government wished to have consistency by including the Judges to avoid other groups arguing for special treatment.

83. Although consistency was not expressed as an objective in the grounds of resistance, the EJ considered it, but concluded that there were factors unique to the Judiciary which meant that consistency between the schemes was scarcely attainable which, he concluded, detracted significantly from the argument that, in this one respect, it could be an important objective.

84. The EJ accepted that consistency is an aim which might legitimately be pursued and it may be that transitional arrangements in other schemes, for which the trade unions had argued, might provide a perceived benefit to the Government of maintaining good industrial relations. The EJ concluded that the Appellants had not explained why there was a need to pursue the aim of consistency in this single respect.

85. In summary, the EJ's conclusions on legitimacy of aim were as follows:

a) The descriptions of the disadvantaged group necessarily defined it by reference to the age of those in the group;

b) An aim which amounts to treating one group more favourably solely by reference to age could not, without further rational explanation, be legitimate. It amounts to no more than a declaration of an intention to do that which the statute prohibits;

c) The Appellants had failed to advance any such rational explanation. Their formulations did not answer the question "why". There was no evidence of any disadvantage, suffered by the protected groups, which called for redress, nor any social policy objective served by treating those groups more favourably;

d) Whilst the pursuit of consistency could be conducive to a social policy objective, the Appellants had failed, beyond mere generalisations, to demonstrate how consistency in this case was capable of contributing to their social policy objective. Thus, the pursuit of consistency was not capable of justifying this derogation from the principle of non discrimination.

ii. Proportionate Means

86. The EJ identified the test of proportionality as involving the Tribunal in the task of balancing competing objectives. The entitlement of Government to set and pursue social policy objectives and appropriate means of achieving them must be weighed against the discriminatory effect of the chosen means on the Claimants. The question was whether the chosen means were both appropriate and reasonably necessary to achieve the aim, or were excessive because they go further than is reasonably necessary to achieve the aim.

87. Reliance had been placed by the Appellants on the cases of **R (UNISON) v First Secretary of State** [2006] IRLR 926 and **Commission v Hungary** [2013] 1 C.M.L.R. 44.

88. In **Unison**, the provision of the scheme in question permitted members aged 60 to take early retirement with unreduced benefits if the sum of their age and length of service was 85 years or more. The Government had taken the view that, if challenged, it would be unable to justify that provision under Article 6(1) because of less favourable treatment of younger scheme members. Unison sought a Judicial Review of the Regulations which were introduced to abolish that rule. Unison argued that, if the rule was discriminatory on the grounds of age, then it was justifiable. The amending Regulations had contained transitional provisions, which were the same as those in question in this litigation. The Deputy High Court Judge dismissed Unison's application for JR on conventional public law principles as applied to assessments made by Government. The Deputy High Court Judge had said:

> **"I have to decide whether the implicit judgment that the Government could not successfully defend the 85 year rule as justified … was legally open to it. That does not mean deciding whether the judgment was correct."**

89. At paragraph 39, referring to the transitional provisions. The Deputy Judge said:

> **"In my judgment these are all rational bases upon which the defendant could have made the choices as to transitional protection that he did. The fact that other arrangements could also**

> **have been lawfully adopted as the scheme which the Government might have wished to defend as justified within article 6(1) is nothing to the point."**

90. The EJ concluded that in **Unison** the court was not deciding whether the rule of 85 or transitional provisions were justified. Those issues, if they arose, would be for another day and another Tribunal.

91. In the **Hungary** case, the Government pursued the aims: of standardising compulsory retirement ages across the public sector; and a more balanced age structure within the public sector professions; by reducing the compulsory retirement age to 62. In the case of Judges, there was a well founded expectation that they could remain in office until 70. Thus, the change abruptly lowered the age limit for compulsory retirement without any transitional measures to protect the legitimate expectations of the persons concerned. They were obliged to leave the labour market without time to take protective measures and, as a result, their income would be 30% lower without any guarantee of a full pension.

92. The court concluded that the contested provisions were justified as the pursuit of legitimate aims and were appropriate means of achieving those aims. However, on the question of necessity, at paragraph 66 it said:

> **"… to examine whether the provisions … go beyond what is necessary for achieving that objective and unduly prejudice the interest of the persons concerned, those provisions must be viewed against their legislative background and account … taken of the hardship they may cause … and … the benefits derived from them by society in general …"**

The court concluded that **Hungary** had not established that more lenient provision would not have made it possible to achieve the objective at issue. Thus, the provisions were not necessary to achieve the objective. The more lenient measures the court had in mind were a gradual staggering of the amendment to reduce the hardship caused to those affected.

93. The Appellants argued that the absence of transitional protection in **Hungary** made the measure unlawful and on that basis sought to argue that transitional measures of the type in this case were similarly, reasonably necessary. The EJ considered that the factual background in the **Hungary** case was far removed from the instant case in which the transitional protection was focused on those least affected by the change.

94. The EJ considered the adverse impact of the reforms on the Claimants, reminding himself that it was the transitional provisions of which complaint was made, not the implementation of the NJPS itself.

95. The EJ considered what appeared to be common ground, that the unprotected Judges, compelled to transfer from JPS to the NJPS, suffered an extremely serious adverse impact on the value of their pension which was further exacerbated by the taxation reforms and that the effect of the transition provisions was that only the younger, unprotected, Judges would suffer losses of that order.

96. The EJ concluded that, if the Respondents had established that the protection of those closest to retirement was a legitimate aim, then the transitional provisions were, in principle, appropriate to achieve that aim because that was what they were designed to do.

97. The EJ also accepted that the transitional provisions would be an appropriate means of achieving consistency if that were capable of justifying derogation from the principle of non-discrimination.

98. The EJ considered the balance of the reasonable need for consistent transitional provisions against the extremely severe disparate impact on the Claimants. Whilst consistency may be thought a desirable result in public administration, it fell far short, in the EJ's judgment, of outweighing the very significant derogation from the principle of equal treatment which resulted from its application in this case (paragraph 114).

99. The EJ then considered the question of reasonable necessity on the basis that protection of a particular age group was a legitimate aim. The EJ considered whether limiting these transitional arrangements by reading across the ten year criterion from the other public sector pension schemes was rational.

100. The EJ reminded himself of his finding that the ten year limit was in order to do a deal with the trade unions. There had been no research or analysis or process of reasoning beyond that.

101. The EJ had regard to the fact that the transitional provisions protected 85% of serving Judges, many, or most, of whom suffered only minor adverse effects from the reforms, leaving the unprotected Judges exposed to a severe adverse impact. The EJ concluded that the balance described in **Seldon (No 2)** by Langstaff (P) had not been properly struck. The EJ said (paragraph 118):

> **"The respondents have failed to provide evidence that a shorter period or lesser degree of protection would not have enabled them to achieve their aim, whether of protecting those closest to retirement or of consistency."**

The EJ concluded:

> **"These transitional provisions were not a reasonably necessary means of achieving the Government's aims because they go beyond what was necessary either to achieve consistency or to protect those closest to retirement."**

iii. Non-discriminatory Alternatives

102. The EJ accepted it was not his function to devise a Judicial Pension Scheme. He recorded that the Claimants argued there were non-discriminatory alternatives. One was that all serving Judges be allowed to remain members of the JPS until retirement. The Appellants contended that would be too expensive raising the cost from £23 to 70 million.

103. Two other options were referred to. One was to spend the £23 million granting all serving Judges the same period of deferment for compulsory transfer to the NJPS. This would result in one and a half years of additional membership of the JPS for all. Another option was to follow the Hutton Recommendation to make no transitional arrangements beyond the protection of accrued rights.

104. The EJ commented that the Appellants did not explain why they rejected those latter two options. The EJ concluded that the Appellants had failed to explain why they chose to implement a mechanism which they knew would exacerbate rather than mitigate a disparate impact of the proposed changes.

iv. The Claims of Indirect Discrimination and Equal Pay

105. The EJ commented that it had not been contended that there could or should be any different result when considering these different causes of action. In recent years efforts had been made to improve the diversity of the Judiciary so that the more recently appointed cohorts included a greater proportion of female and ethnic minority judicial office holders than those appointed earlier. The Appellants conceded that, for this reason, the transitional provisions put female and BME scheme members at a particular disadvantage and relied on the same matters

to justify the transitional provisions. For the reasons already given, the EJ found that the Appellants had failed to discharge the burden upon them.

Chapter 9. Grounds of Appeal and Parties' Submissions

Summary

106. The parties contending submissions are contained in detailed grounds of appeal and responses to those grounds and in comprehensive written submissions and detailed oral submissions. The issues raised can be summarised under a number of headings in respect of, respectively, legitimate aim and proportionate means.

A. Legitimate Aims

107. The overall submission of the Appellants is that the EJ fell into the trap of substituting his view on social policy issues for the view of a Member State, so that his conclusions on legitimate aims were wrong in law. The issues to which this overall formulation gave rise are as follows:

a) The EJ misdirected himself by applying the wrong standard of scrutiny on whether the aim was legitimate. He failed to accord the margin of discretion to which the Appellants were entitled in respect of social policy aims.

b) He misdirected himself that the aim relied on could not be legitimate because it involved treatment by reference to age.

c) He misdirected himself and/or misunderstood or misapplied the facts by focusing exclusively on whether there was any evidence that those who were protected suffered more financially than those who were unprotected, and concluding that in the absence of any such evidence, the EJ held that the policy to give them protection was irrational or bizarre.

d) He misdirected himself by failing to understand the Appellants' contention that its legitimate aim was informed by moral/political/social policy value judgments and so did not require hard evidence to support them.

e) He erred in law by treating consistency as a separate aim rather than as an intrinsic feature of the aim relied on.

B. Proportionate Means

108. On proportionate means, the Appellants contend that, though the EJ considered whether the means adopted had been proportionate he was disabled from doing so by his erroneous decision to conclude that the Appellants had not established legitimate aims.

i) He failed to accord the Appellants a margin of discretion to which they were entitled in respect of means.

ii) He considered adopting alternative means which would have been directed towards a different aim.

iii) He misdirected himself by focusing on the process followed by the Appellant, whereas he should only have considered the outcome.

iv) His conclusion that the means adopted were disproportionate was both wrong in law and perverse.

v) The EJ misdirected himself on the standard of scrutiny to be applied when considering legitimate aims and/or proportionate means.

109. The Respondents have relied on the reasons of the ET and upon the arguments which they presented to the ET.

Chapter 10. Discussion and Conclusions

110. It was common ground that the issue between the parties was direct discrimination on the ground of age and that, by Article 6(1) of Council Direction 2000/78, 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 and labour market objectives, and if the means of achieving that aim are appropriate and necessary. This defence of objective justification for direct discrimination on grounds of age is unique in respect of direct discrimination.

111. It is also common ground, and relied on by the Claimants, that Article 8 provides that Member States may introduce or maintain provisions more favourable to the protection of the principle of equal treatment than those laid down in the Directive. Put colloquially, the Directive provides a floor rather than a ceiling.

112. It is also common ground that section 13 of the **Equality Act 2010** gives effect to the Equal Treatment Directive in a way which provides a justification defence such as is envisaged by Article 6(1). Thus section 13 deals with direct discrimination. Subsection (1) provides that A discriminates against B if, because of a protected characteristic A treats B less favourably than A treats, or would treat others. Subsection (2) provides that, if the protected characteristic is age, A does not discriminate against B if A can show his treatment of B to be a proportionate means of achieving a legitimate aim.

113. The Appellants contend that section 13(2) does no more than reflect, in UK national law, the provisions of Article 6(1), so that decisions of the ECJ and CJEU, providing guidance

on how national courts should interpret Article 6(1), are binding on UK domestic courts because section 13(2) does no more than replicate Article 6(1) within UK domestic law.

114. The Appellants contend that the line of authority represented by decisions of the ECJ and CJEU in respect of Article 6(1), require courts to recognise that Member States and social partners at national level enjoy broad discretion in their choices, not only to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving that aim.

115. On that basis, the Appellants say that insofar as the EJ, in respect of either legitimate aim or proportionate means, consciously applied a different approach, said to be based on domestic authority, under which no margin of discretion is to be given by the ET to the Member State, then he misdirected himself in law.

116. The Claimants do not dispute that the ECJ and CJEU have given guidance on the interpretation and application of Article 6(1), but contend that section 13(2), when seen in its national legislative context, provides more extensive protection of the principle of equal treatment than does Article 6(1), as explained in the decisions of the ECJ/CJEU, by removing any margin of discretion to be granted to (in this case) the Government and by requiring the Employment Tribunal itself to decide the questions of the objective and reasonable justification of legitimate aim and/or proportionate means.

117. The Claimants contend that the EJ did not err in declining, at least at the proportionate means stage, to permit any margin of discretion, and by reaching his own conclusions on that issue.

118. The Claimants rely on a line of English authority, originating in cases concerning indirect discrimination, in which ETs are directed not to grant employers any margin of discretion in circumstances where the justification defence, under section 19(2)(d) of the **2010 Act** is, for all intents and purposes, identical to the defence under section 13(2).

119. The EU cases relied on by the Appellants can be briefly summarised as follows:

a) **Denmark (HK) v Experian** [2014] ICR 27: a case of direct age discrimination brought against private sector employer in respect of discriminatory provisions of her employer's compulsory pension scheme on grounds of age. The ECJ concluded that age related increases in contributions enabled older workers, entering service at a later stage, to build up reasonable retirement savings over a short contribution period and permitted younger workers to join the same pension scheme at rates of contribution making it possible for them to have at their disposal a larger proportion of their wages. This was said to be justified by the need to cover risks, death, incapacity, serious illness, the cost of which increases with age. The ECJ accepted that those were aims in the field of social and employment policy and that Member States and social partners enjoy broad discretion in their choice, not only to pursue a particular aim in those fields of social and employment policy, but also in the definition of measures capable of achieving them.

b) **Experian** was the latest in a line of authorities to like effect involving private sector collective agreements, involving compulsory retirement age C45/09 **Rosenbladt v Oellerking Gebaudereinigungsgesellschaft GmbH** [2011] IRL 51, C-411/05 **Palacios de la Villa** [2009] 1 ICR 1111) where the legitimate aims were said to include those made on the basis of "political,

economic, social, demographic and/or budgetary considerations (paragraph 69); in C-20/13 **Unland v Land Berlin** [2015] ICR 1225, concerning Judges' level of pay, dependant on age at the date of appointment, where the ECJ described the level of scrutiny as ascertaining whether the means used are appropriate and necessary or "does not appear unreasonable"; in C-501/12 **Specht v Land Berlin** [2014] ICR 966 Civil Servants' level of pay depended on age at date of appointment; C-529/13 **Felber v Bundesministerin fur Unterricht, Kunst und Kultar** [2015] 2 CMLR 39 concerned a federal Civil Servant and Professor whose pensionable rights were determined by reference to employment after a certain age.

120. The Claimants rely on a line of UK authorities in support of their contention that, under UK law, section 13(2) does not require or permit any margin of discretion to be shown to the decision maker by the Employment Tribunal:

a) **Hardy and Hansons v Lax** [2005] EWCA Civ 847, a claim in respect of indirect sex discrimination where the justification defence was in issue. Lord Justice Pill, at paragraph 32, addressing the appropriate level of scrutiny accepted that the employer had to ensure that the means were reasonably necessary. But that did not permit a margin for discretion or range of reasonable responses approach. Whilst the employer did not have to demonstrate that no other proposal was possible, it had to be justified objectively, which required the Tribunal to take into account the reasonable needs of the business. But the Tribunal had to make its own judgment, upon a fair and detailed analysis, as to whether the proposal was reasonably

A necessary. The judgments of Lords Justice Thomas and Gage were to like effect.

B b) **MacCulloch** [2008] ICR 1334 (EAT) concerned a direct age discrimination claim in which, on the then UK provisions, it was said that the legal principles with regard to justification were not in dispute. Reference was made to the classic test in **Bilka-Kaufhaus** [1987] ICR 1110, in the context of indirect sex discrimination, where it was for the Tribunal to decide whether the measures C corresponded to a real need, were appropriate and were necessary to that end. Reference was made to **Rainey** [1987] ICR 129, where proportionality required an objective balance to be struck, the more serious the disparate D adverse impact the more cogent must be the justification. Passages in **Hardy and Hansons** from Lord Justice Pill were cited extensively in **McCulloch**. The court was referred to **Mangold** [2005] ECR I 9981 which is the origin of the line of European authorities that, in relation to Article 6(1), Member E States enjoy broad discretion in their choice of the measures capable of attaining their objectives in the field of social and employment policy.

F c) In **Loxley v BAE Systems** [2008] ICR 1348, the EAT dealt with a direct age discrimination case in respect of a contractual redundancy scheme. On an argument that the test for justification should be more rigorous for direct age discrimination and having referred briefly to **Mangold**, it stated:

G > **"there has been no suggestion in any of the Court of Justice cases on age discrimination…that there is any different principle to be applied when considering justification in the context of direct age discrimination however we await the decision of the Court of Justice for a definitive ruling."**

Accordingly the EAT in that case applied **Bilka-Kaufhaus**, **Rainey** and H **Hardy and Hansons**.

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121. The existence of two lines of authority: one deriving from the ECJ/CJEU and another deriving from domestic courts, which, on the face of it, impose different requirements of scrutiny upon Employment Tribunals when considering cases of direct age discrimination and the justification therefore, was considered by the Supreme Court in **Seldon v Clarkson Wright and Jakes** [2012] ICR 716. This concerned a compulsory retirement age in a partnership agreement, included with the object of giving younger associates in the firm the opportunity to become partners, thereby facilitating long-term planning and limiting the need to expel partners by performance management measures, all of which contributed to the congeniality of the firm. The claim was for direct age discrimination.

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122. Baroness Hale observed (paragraph 28) that Article 6 contemplated that the justifications for direct age discrimination should be broad social and economic policy objectives of the State, and not the individual needs of particular employers or partnerships, where only the State could make the choice between conflicting aims. She observed (paragraph 30) that the Secretary of State accepted that only certain kinds of aim are capable of justifying direct age discrimination and that the distinction was between aims relating to "employment policy, the labour market or vocational training" which are legitimate and "purely individual reasons particular to the employers' situation such as cost reduction or improving competitiveness" which in general were not.

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123. She referred to the case of **Palacios** and to the fact that Member States (and where appropriate social partners) enjoyed a broad discretion in the choice both of aims and of the means to pursue them.

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124. Baroness Hale then conducted a detailed examination of the European authorities and included reference to statements in **Age Concern** [2009] ICR 1080 at paragraph 46, that Member States may not frustrate the prohibition of discrimination on grounds of age and that, whilst budgetary considerations might underpin the chosen social policy, they could not in themselves constitute a legitimate aim within Article 6(1).

125. At paragraph 50 Baroness Hale asked what messages we take from the European case law. These messages included:

> **"… (2) If it is sought to justify direct age discrimination under article 6(1) the aims of the measure must be social policy objectives such as those related to employment policy, the labour market or vocational training. These are of a public interest nature which is distinguishable from purely individual reasons particular to the employer's situation such as cost reduction or improving competitiveness (*Age Concern* and *Fuchs* [2012] ICR 93).**
>
> **(3) … Flexibility for employers is not in itself a legitimate aim but a certain degree of flexibility may be permitted to employers in the pursuit of legitimate social policy objectives.**
>
> **(4) … A number of legitimate aims, some of which overlap, have been recognised in the context of direct age discrimination claims [these include] … (vi) cushioning the blow for long serving employees who may find it hard to find new employment if dismissed …**
>
> **(5) … However the measure in question must be both appropriate to achieve its legitimate aim or aims and necessary in order to do so …**
>
> **(6) The gravity of the effect upon the employees discriminated against has to be weighed against the importance of the legitimate aims in assessing the necessity of the particular measure chosen (*Fuchs*).**
>
> **(7) The scope of the test for justifying indirect discrimination under article 2(2)(b) and for justifying any age discrimination under 6(1) is not identical. It is for the Member States rather than the individual employer to establish the legitimacy of the aim pursued (*Age Concern*)."**

126. Baroness Hale then said at paragraph 51:

> **"not surprisingly, in the view of the way in which regulation 3 is constructed, the Employment Tribunal…approached the task of justifying direct age discrimination in the way that was familiar to them in the context of indirect discrimination on other grounds … They did not of course have the benefit of any of the subsequent jurisprudence either in Luxembourg or the UK. It now seems clear that the approach to justifying direct age discrimination cannot be identical to the approach to justifying indirect discrimination and that regulation 3 of the 2006 Age Regulations … and its equivalent in section 13(2) of the Equality Act 2010 must be read accordingly."**

127. At paragraph 55:

> **"It seems, therefore, that the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (i) these objectives can count as legitimate objectives of a public interest nature within the meaning of the Directive and (ii) are consistent with the social policy aims of the state and (iii) the means used are proportionate, that is both appropriate to the aim and (reasonably) necessary to achieve it."**

128. She then identified that two different kinds of legitimate objective have been identified by the ECJ: intergenerational fairness and dignity.

129. At paragraph 59 she said:

> **"The fact that a particular aim is capable of being a legitimate aim under the Directive (and therefore the domestic legislation) is only the beginning of the story. It is still necessary to inquire whether it is in fact the aim being pursued … the aim need not have been articulated or even realised at the time … It can be an ex post facto rationalisation."**

130. At paragraph 61 she said:

> **"61. Once an aim has been identified, it has still to be asked whether it is legitimate in the particular circumstances of the employment concerned. For example, improving the recruitment of young people … to achieve a balanced and diverse workforce, is in principle a legitimate aim. But if there is in fact no problem in recruiting the young and the problem is in retaining the older … workers then it may not be a legitimate aim for the business concerned …**
>
> **62. … of course, the means chosen have to be both appropriate and necessary … The means have to be carefully scrutinised in the context of the particular business concerned in order to see whether they do meet the objective and there are not other, less discriminatory, measures which would do so."**

131. In **Lockwood v DWP** [2014] ICR 1257 the Court of Appeal, after **Seldon**, considered a direct age discrimination claim and whether there was objective justification for the less favourable treatment. The contention for the Appellant was that the Tribunal had not scrutinised the claimed justification with sufficient rigour. **West Yorkshire Police v Homer** required justification to be considered in a structured way. The Court of Appeal, at paragraph 46, said as follows:

> **"As regards the applicable test, the heart of the question is whether the discriminatory scheme is a proportionate means of achieving a legitimate aim … and the judgment of the EAT … in *McCulloch* … provides comprehensive guidance as to the application of that test and the**

> **rigour with which tribunals must apply it. The Employment Tribunal was referred to *McCulloch* and correctly summarised its essence … It was also referred to … *Loxley* … in particular [where] Elias J referred to the fact that an agreement made with Trade Unions is potentially a relevant consideration …"**

132. The conclusion of the Court of Appeal was that there was no substance to the challenge to the Employment Tribunal's reasoning upholding the Respondent's objective justification case. The Employment Tribunal understood the applicable test and applied it. At paragraph 53 Lord Justice Rimer said:

> **"The ET's task was carefully to assess, or scrutinise, the evidence before it in the course of deciding whether the employer had discharged the burden of showing … a proportionate means of achieving the aim underlying the CSCS. It carried out that exercise and held that it was … there is no justifiable basis for any conclusion other than that it was entitled to be so satisfied."**

Discussion and Conclusions on the Level of Scrutiny Issue

133. In my judgment the crucial authority informing consideration of this issue, is **Seldon** in the Supreme Court. The court was faced with submissions that the domestic provisions (then Regulation 3, now section 13(2)) added to the level of scrutiny provided for by Article 6 of the Directive. Article 6, it was common ground, contemplated that the justification for direct age discrimination must be broad social and economic policy objectives of the State, in respect of which only the State or social partner can make the choice between possibly conflicting aims so that the State had the benefit of a margin of discretion when a Tribunal assessed justification under Article 6. The domestic provisions, by contrast, it was said, focus on the individual needs of particular employers or partnerships where justification was a decision properly to be made by the domestic Tribunal thereby enhancing the level of scrutiny to be applied on the issue of justification. The Secretary of State had contended that section 13(2) went no further than Article 6. Only certain kinds of aim were capable of justifying direct age discrimination and the apparently broad terms of Regulation 3 (section 13(2)) must be read down accordingly. The distinction drawn in the ECJ/CJEU cases was said by the Secretary of State to be between aims

relating to "employment policy, the labour market or vocational training," which were legitimate, and purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, which, in general, were not.

134. The Supreme Court, in particular, in the judgment of Baroness Hale reconciled these two approaches. She concluded that the ambit of justification under Article 6(1) was limited to cases where the aims of the measure were social policy objectives such as employment policy, the labour market, or vocational training of a public interest nature. This was distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness. However, the measure must both be appropriate to achieve its legitimate aim or aims, and necessary in order to do so. As part of the assessment whether the measure satisfied both conditions for justification it was necessary for the gravity of the effect upon employees discriminated against to be weighed against the importance of the legitimate aims in assessing whether the particular measure chosen was justified.

135. Baroness Hale concluded that the approach to justifying direct age discrimination was not identical to the approach to justifying indirect discrimination, and that section 13(2) had to be read accordingly.

136. In practical terms the United Kingdom has chosen to give employers and partnerships the flexibility to choose which objectives to pursue, provided always that (1) these objectives can count as legitimate objectives of a public interest nature within the meaning of the directive; (2) are consistent with the social policy aims of the State; and (3) the means used are proportionate.

137. However, and most importantly for this litigation, Baroness Hale at paragraph 59, pointed out that the fact that a particular aim was capable of being a legitimate aim under the Directive was only the beginning of the story. It was still necessary to enquire whether it was in fact the aim being pursued, even though by ex post facto rationalisation. Once an aim had been identified which was legitimate in principle, it still had to be asked whether it was legitimate in the particular circumstances of the employment concerned. That required that the aim and means to be carefully scrutinised, in the context of the particular business, in order to see whether they met the objective and whether there were other, less discriminatory measures which would do so.

138. The Court of Appeal in **Lockwood**, having had **Seldon** cited to them, gave effect to the reconciliation described by Baroness Hale by approving the Employment Tribunal's application of the approach described in **MacCulloch** and **Loxley**. In so doing, the Court of Appeal approved that approach where the Employment Tribunal was undertaking the task described by Baroness Hale at paragraph 62 in **Seldon**: undertaking careful scrutiny in the context of the particular business to see whether the means adopted met the objective and whether there were no other, less discriminatory, measures which would do so.

139. I now consider the approach taken by the EJ to this issue. At paragraphs 78 to 79 the EJ described, in the context, the aim of the Appellant to establish public service pension arrangements in accordance with the terms of reference of the Hutton Commission. He correctly noted that it was for the Government to define its policy objectives, its priorities and the resources to be allocated and that this was not the proper purview for the Tribunal. The Tribunal was solely concerned with whether the Appellant could justify the disparate impact of the transitional provisions.

A

140. He properly directed himself on the law, referring to the cases of **Age Concern**, **Seldon**, **Specht**, **Unland** and similar cases. He correctly identified the limitations on the broad discretion enjoyed by Member States when choosing means capable of achieving their social policy objectives. He referred to **Age Concern** where it was said:

B

> **"Mere generalisations concerning the capacity of a specific measure to contribute to employment policy, labour market or vocational training objectives are not enough … and do not constitute evidence on the basis of which it could reasonably be considered that the means chosen are suitable for achieving that aim."**

C

141. He also (correctly in my judgment) regarded **MacCulloch** and **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704 as relevant authorities.

D

142. Having reminded himself that the distinction between means and aims is not always easy (see **HM Land Registry v Benson** [2012] ICR 627) he first applied these tests to the facts in respect of legitimate aim. I will return to the conclusions he drew as a matter of substance, but it is clear that his approach on the legitimacy of the aims was consistent with a Judge adopting the approach identified in the ECJ/CJEU line of authorities. His focus, to which I will return, was whether the Appellants had demonstrated legitimate aims beyond the level of "mere generalisation" and he criticised the adoption of the particular aims against a standard of rationality, of avoiding capriciousness or arbitrariness. He cannot be criticised in his consideration of legitimate aims for adopting an unduly strict level of scrutiny or demanding a higher level of evidence than was consistent with the proper approach identified by the CJEU and recognised by the Supreme Court in **Seldon**.

E

F

G

143. In the course of so doing he foreshadowed the approach he would take when he came to consider proportionate means. At paragraph 80(5), having rehearsed the European authorities describing the operation of the margin of discretion, he said "I see no basis for saying that the

H

Government's acknowledged broad discretion in matters of social policy extends beyond that public arena into the arena of private relations between employer and employee". It is this passage which the Appellants criticise as foreshadowing an erroneous approach when considering the issue of the proportionality of the means chosen and, in particular, in considering the balance between the reasonable need of the Government to achieve its policy aim of establishing consistent transitional provisions in public service pension schemes against the extremely severe disparate impact the provisions have on the Claimants. It foreshadows his conclusion in paragraph 114 that the reasonable need of the Government fell far short of outweighing the very significant derogation from the principle of equal treatment arising from its application in this case. The Claimants accept that the EJ was not applying any margin of discretion but, consistent with the domestic authorities, was making his own decisions on the evidence presented on these issues.

144. In my judgment, the exercise being undertaken here by the EJ was consistent with that described by Baroness Hale at paragraph 62 of her judgment in **Seldon**, and undertaken by the ET and approved by the Court of Appeal in **Lockwood**.

145. In my judgment, on the authority of **Seldon** as applied in **Lockwood** the Appellant has not succeeded in demonstrating that, in this respect, the EJ misdirected himself in law.

The Three Issues Raised by the Appellants on the Question of Legitimate Aim

146. The first issue is one of semantics. From the outset the aim was described in terms that "it is right that we protect those public service workers who as of 1 April 2012 have ten years or less to their pension age. It is my objective that these people see no change in when they can retire, nor any decrease in the amount of pension they receive at their current normal pension

age". The EJ concluded that this could not be a legitimate aim because all it did was describe the fact of age discrimination and did not provide an answer to the question "why". The Appellants contend that the EJ misunderstood or misapplied the facts and/or misdirected himself in so concluding.

147. Second, the Appellants criticise the EJ for unduly restricting his consideration of the reasons why the Appellants had pursued their stated aims by focussing exclusively on whether there was any evidence of disadvantage suffered by the protected groups which called for redress, whereas it was common ground that the protected groups were less severely disadvantaged than the unprotected groups. The Appellants say that, by focussing unduly on this issue, the EJ misunderstood the facts and/or misdirected himself by ignoring the voluminous evidence, upon which he had not made findings, which revealed why it was that the Government adopted these transitional provisions.

148. Third, the Appellants criticise the EJ for characterising the evidence, on the basis of which the policy was adopted, as amounting to mere generalisations and criticising the Appellants for failing to have hard evidence to support their aims. The Appellants had argued before the EJ that the aims were of a type which the courts have recognised may not be capable of being supported by hard evidence, but were, nonetheless, a legitimate aim and ought to have been found so by the EJ.

149. The Appellants have referred me to the ways in which, during the decision-taking process and in the course of the litigation, the legitimacy of the aim had been sought to be justified. From the outset it was couched as a moral judgment allied to a process which was highly political.

150. In his foreword to the Green Paper in November 2011 the Chief Secretary to the Treasury had said "I believe it is right…". In the ET3 the aim was described in the following terms:

> **"… for the Government to recognise that scheme members closest to retirement have less time to make the necessary lifestyle and financial adjustments and concluded it was appropriate to provide protection from the effect of the reforms for these members."**

151. In their closing argument before the EJ, at paragraph 24(e), the Appellants submitted:

> **"The documents also make clear that an important part of the aim of the TPs was the ability to give a clear message that would be easily communicated and understood … In other words there was value in being able to make a clear commitment for a clearly defined category of persons close to retirement that they would receive at retirement exactly what they had expected to receive. The aim of providing a simple commitment that can be clearly communicated and understood is often an objective of Government policy. It is proper and permissible that it should be so."**

The Appellants argue that their case before the EJ was not exclusively focussed on whether the protected groups suffered any particular material disadvantage but was couched in moral terms reflecting the perceived rightness of the decision and fulfilling legitimate expectation. This was the subject of oral submission in closing (Transcript, 22 November 2016 pg.16 ln.17-25, pg.17 ln.1-3 and pg.19 ln.2-25 and pg.20 ln.1-10).

152. The Appellants point out that the EJ was referred to a large amount of documentary evidence covering the period between the publication of the Hutton report and the announcement of the policy in Parliament and the Green Paper during which the policy was being formulated and developed. This included internal documentation within and between the relevant departments, correspondence between the relevant departments and the TUC and other trade unions, correspondence between the Lord Chancellor and the Lord Chief Justice as well as correspondence between ministers. Against that evidential background the EJ felt able to come to conclusions of fact (in some respects with which the Appellants disagree) which he expressed in the following summary terms:

> **"56. Based on this evidence I consider it proper to find that the Government decided to incorporate the transitional provisions into the JPS for no reasons specific to the judiciary but rather because similar provisions had been agreed with trade unions for other workforces and the Government's preference was for a consistent scheme and, to a lesser extent, because the state pension age consultation had led to the view that a period of ten years' notice was appropriate in that case. I found the further arguments based on those nearing retirement having less time to prepare for the effects of reform and having fixed retirement plans lacked cogency for the reasons set out above."**

153. The reference to the outcome of the State Pension Age consultation is mirrored in the Appellants' closing written submissions at paragraph 22(a):

> **"The majority of respondents, both individuals and organisations including Age UK, the ABI and NAPF and Saga told us that they thought that a 10 year notice period would be appropriate for any future change to State Pension age.**
>
> **Evidence from the National Association of Pension Funds was that:**
>
> > **'Generally, lifestyle funds tend to start adjusting investment strategies between 3 to 15 years before retirement. We therefore recommend that the notice period for changes in SPA be set to reflect this trend in private sector pensions and therefore recommend that the notice period be set around ten years'.**
>
> **In other words, the behavioural evidence showed that, as people approach retirement, they move their savings into less risky investments so that they can be more certain about the level of income they will obtain in retirement. This showed that, in the run-up to retirement, certainty about retirement income becomes increasingly important."**

And at paragraph 25(c):

> **"The SPA consultation provided a proper evidential basis for the view that, at a particular distance from retirement, people's behaviour changes so as to seek certainty as to their financial position in retirement. That evidence could properly be applied to a change that would reduce the benefits payable to public service pensioners, just as it could be applied to a change that would delay SPA."**

154. The reference to discussions with the trade unions and their attitude towards transitional provisions was also referred to in the written closing argument in the following terms at part of 24(c):

> **"Nothing in the documents, or in the cross-examination, casts doubt on what the CST said, namely that he had '*accepted the argument*' that there was a category of individuals - those closest to retirement - who should suffer <u>no detriment at all</u>. There is nothing implausible, let alone sinister or improper, about a discussion between union leaders and Ministers, in which the union leaders persuade the Minister to adopt a policy that others (including Lord Hutton and officials) considered unnecessary."**

155. The EJ had noted, at paragraphs 43 to 45, the Government officials' perceptions of the attitude of parts of the trade union movement to the question of transitional provision.

156. The Appellants refer to C159/10 **Fuchs v Land Hessen** [2012] I.C.R 93, a claim of direct age discrimination in respect of a compulsory retirement age which was sought to be justified. The CJEU stated (paragraphs 61 to 62) that whilst Member States enjoyed broad discretion in respect of social policy aims they may not frustrate the provision of discrimination on grounds of age, and (at paragraph 65) that the definition of social policy can be "on the basis of political, economic, social, demographic and/or budgetary considerations".

157. In that case the CJEU addressed the question what information must be produced to demonstrate appropriateness and necessity of the measure at issue and whether statistics or precise data must be supplied. At paragraphs 80 to 83 it said:

> **"80. In order to assess the degree of accuracy of the evidence required, it must be borne in mind that the member states enjoy broad discretion in the choice of measure they consider appropriate.**
>
> **81. That choice may therefore be based on economic, social, demographic and/or budgetary considerations which include existing and verifiable data but also forecasts which by their nature may prove to be inaccurate and are thus to some extent inherently uncertain. The measure in question may, moreover, be based on political considerations which will often involve a compromise between a number of possible solutions and, again, cannot with certainty lead to the expected result.**
>
> **82. It is for the national court to assess … the probative value of the evidence adduced which may, inter alia, include statistical evidence.**
>
> **83. Consequently the answer to the second question is that, in order for it to be demonstrated that the measure concerned is appropriate and necessary, the measure must not appear unreasonable in the light of the aim pursued and must be supported by evidence the probative value of which it is for the national court to assess."**

158. In **R (Lumsden and others) v Legal Services Board** [2016] AC 697, the Supreme Court considered proportionality in EU law and, in particular, national measures derogating from fundamental freedoms including the right to equal treatment or non-discrimination. In the

judgment of Lords Reed and Toulson, with which the other members of the court agreed, at paragraph 56 they said:

> **"The justification for the restriction tends to be examined in detail although much may depend on the nature of the justification and the extent to which it requires evidence to support it. For example, justifications based on moral or political considerations may not be capable of being established by evidence. The same may be true of justifications based on intuitive common sense. An economic or social justification, on the other hand, may well be expected to be supported by evidence."**

159. As indicated above, in paragraph 94, where the EJ set out his conclusions on legitimacy of aim, he limited his consideration of aim to the statement of the CST and characterised it as tautologous, providing no explanation for why a discriminatory measure had been adopted. He dealt with the evidence by focussing on the failure to adduce any evidence of disadvantage suffered by the protected groups, or any social policy objective served by treating these groups more favourably.

160. In my judgment the Appellants are correct in their contention that this narrow consideration of the material failed to take into account what the EJ had found to be a complex of moral and political judgments informed by a plethora of documentation from different sources. In my judgment, the EJ failed to have regard to that evidence and the complex of reasons which that evidence reveals. He failed to pay due regard to the cautionary words of the CJEU in **Fuchs**, and the Supreme Court in **Lumsden**, on the particular difficulty of producing evidence where moral or political considerations are to the fore. In my judgment, the EJ, in concluding that no legitimate aims had been shown, misunderstood and/or misapplied the facts and thereby misdirected himself.

Treating Consistency as a Separate Aim

161. The Appellants complain that the EJ erred in treating consistency as a separate aim rather than as an aid to other legitimate aims. In my judgment there is nothing in this

complaint. The EJ properly dealt with the argument around consistency separately from what was said to be substantive legitimate aims. I do, however, conclude that his characterisation of the evidence in respect of consistency, as no more than mere generalisations, was a misdirection and/or misunderstanding of or misapplication of the facts and evidence for the reasons I have just given.

The Issues on Appeal Concerning Proportionate Means

162. The grounds on which the Appellants criticise the conclusions of the EJ on this issue are:

a) He applied the wrong standard of scrutiny and he failed to accord the Respondent the appropriate margin of discretion and thereby misdirected himself in law,

b) He improperly considered alternative means that would have been directed towards achieving a different aim,

c) He focused on criticising the process adopted by the Appellant rather than considering the outcome,

d) His conclusion that the means adopted were disproportionate was perverse.

163. I have already considered the issue of whether the EJ erred in law by declining to apply the margin of discretion approach. In my judgment by doing so he did not err in law but adopted the approach described by Baroness Hale in **Seldon** and approved by the Court of Appeal in **Lockwood**. It was appropriate for the EJ to consider, with an enhanced level of scrutiny, whether the adoption of the transitional provisions in respect of judicial pensions had such an extreme discriminatory effect that it so outweighed the entitlement of the Government

to pursue social policy objectives that the Appellant was unable to justify its acknowledged direct age discriminatory effect in the cases of the Claimants.

164. It is to be observed that from its earliest enunciation on the 2nd November 2011 the transition provision policy envisaged that:

> **"… scheme specific discussions will need to determine the fairest way of achieving the subjective taking full account of the qualities impacts and legislation while ensuring that costs to the tax payer in each and every year do not exceed the office for budget responsibility forecasts of public service costs."**

Thus, the general policy required individual consideration of the application of the policy, or otherwise, to specific schemes.

165. At paragraph 95 the EJ reminded himself correctly of the three stage exercise involving the competing objectives - social policy objectives balanced against the discriminatory effect of the chosen means on the Claimants; whether the chosen means were appropriate and whether they were reasonably necessary to achieve the aim.

166. There was a substantial amount of evidence, which was not in dispute, about the unique nature of the Judiciary including: the age structure of the Judiciary; and the particular obligations and expectations of the Judiciary in respect of their entering a "one way street" when accepting a judicial appointment. There was ample evidence that the unprotected members of the Judiciary were particularly adversely affected because of the combination of the effect of the pension scheme changes and changes in taxation treatment of pension schemes where, as here, the new judicial pension scheme would be registered rather than unregistered. There was ample material demonstrating that the unprotected Claimants had undertaken their full time appointments relying on the Government's then stated firm and settled view that they

should not suffer any, let alone the type and scale of, detriment to which they were now exposed. There was ample evidence that the Appellants were well aware of all this and of the concerns expressed within Government and their ability rationally to explain a policy having this enhanced discriminatory effect in these circumstances.

167. I am satisfied that the conclusions of the EJ at paragraph 114, that the extremely severe impact of the transitional provisions on the Claimants far outweighed the public benefit of applying the policy consistently across the whole public service pension sector cannot be faulted and cannot be characterised as perverse.

168. I do not consider that the treatment by the EJ of the decisions in **Unison** and **Hungary**, which are the subject of criticism, was either wrong or in any way significant for this part of the argument. The EJ had regard, as he was entitled, to the unique position of the Judiciary and to the uniquely adverse impact of the pension scheme and tax changes on the unprotected, as opposed to the protected, members of the Judiciary and to come to a view on the issue which was open to him.

169. The EJ concluded that, in principle, transitional provisions were appropriate to achieve the aim because that is what they were designed to do (paragraph 112). In so doing he was assuming, contrary to his earlier finding, that the pursuit of the policy was a legitimate aim. His rider to that conclusion, in my judgment, was unnecessary but it does not constitute any error of law or misdirection but is a comment on the circularity of this element of the test.

170. In the light of his clear and sustainable finding on the question of balance, the EJ's conclusion on whether the means were reasonably necessary for the achievement of the aim followed as a matter of course.

171. The EJ went on at paragraphs 119 to 121 to consider what he described as non-discriminatory alternatives. It was unnecessary for him to have done so and Mr Short has not sought to defend this aspect of the judgment. In my judgment it was separate from his assessment of proportionate means and does not in any way infect his findings on that issue.

The Outcome of this Appeal

172. I have identified, in respect of the question of legitimate aims, a series of mis-directions by the EJ by reason of his misunderstanding of and/or misapplication of the facts and the evidence. However, when the EJ considered the question of proportionate means, he did so on the assumption that the Appellants had established legitimate aims. His approach to that issue was, in my judgment, correct in law and his decision, based on the largely undisputed evidence, cannot be faulted. As a result, his decision that the Appellants had failed to show their treatment of the Claimants to be a proportionate means of achieving a legitimate aim was correct and, accordingly, this appeal is dismissed.

The Claims of Indirect Discrimination and Equal Pay

173. The Judge dealt very briefly with these issues because it was common ground that the result would follow the outcome of his decision in respect of direct age discrimination.

174. The only issue raised by the Appellants is that the EJ failed to address the "material factor defence" pleaded and replied on by the Appellants in relation to the equal pay claim. The

parties were agreed that, in the event that the appeal succeeded and the matter were remitted to a differently constituted Tribunal for reconsideration, I might be invited to rule upon the effect of what was, undoubtedly, an omission by the EJ to deal with this issue. They were agreed, however, that in the event that the appeal was unsuccessful I would not be invited to deal with this point and I have not been addressed upon it.

175. I have, however, received substantive submissions on this issue in respect of the associated Firefighters' appeal and in that litigation I have reached a decision and given my reasons for it. If, at any stage, this sole issue becomes relevant in this litigation then my decision and reasoning in the Firefighters' litigation represents my view after argument in that case on this issue.