

SUMMARY

2011/40 Is 37 too old to become a judge? (GR)

<p>The provision of Greek law that candidates for a position as a judge must be aged under 35 (County Courts) or 40 (all other courts) is age discriminatory but objectively justified.</p>

Summary

The provision of Greek law that candidates for a position as a judge must be aged under 35 (County Courts) or 40 (all other courts) is age discriminatory but objectively justified.

Facts

A ministerial decree known as Regulation of the Courts and Judicial Officers (the ‘Regulation’) sets an upper limit for judicial appointees. Applicants for the position of County Court judge may not be older than 35. Applicants for a position as a judge in any other court may not be older than 40.

The plaintiff in this case was aged 37 when he applied to become a County Court judge. Knowing that the Regulation stood in the way of an appointment, he asked the Council of State to annul the Regulation on the grounds that it is incompatible with Regulation 2000/78 and also with Articles 4(1), 5(1) and 25(1)(d) of the Constitution, which guarantee equality of citizens before the law, free access to public office (in the sense of free development of personality), and unimpeded access for everyone to social, financial and political life.

Seeing that it usually takes a while for the Council of State to reach a decision, the plaintiff simultaneously applied to the Council of State’s ‘Suspension Committee’ with an application for injunctive relief, consisting of a provisional suspension of the Regulation.

The Suspension Committee granted the provisional annulment as requested, following which the plaintiff was allowed to take part in the examinations held for access to the County Courts.

Judgment

The Council of State agreed with the plaintiff that an upper limit for appointments, such as provided in the Regulation, constitutes discrimination on the basis of age. The issue was whether this discrimination was objectively justified as provided in Article 6(1) of Directive 2000/78, which specifically allows ‘the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement’.

The Council of State noted that the age limits of 35 and 40 in the Regulation serve a legitimate aim, namely the public interest, because they ensure the efficient organisation and operation of the judiciary. Candidates for judicial roles need time to acquire experience, knowledge and skills for their demanding profession. Therefore they need to start their training in time.

Is setting an upper age limit of 35 for County Court judges an appropriate and necessary means to achieve the said legitimate aim? The debate on this question focused on (i) the compatibility of the Regulation with the provisions of Directive 2000/78, and (ii) on the reason for the difference in age limit for County Court judges (35) and other judges (40). The Council of State found this difference to be justified by three things. First, unlike judges in other courts, County Court judges do not receive pre-appointment training at the National School of Judicial Officers. Secondly, County Court judges sit alone. Finally, they usually work in villages far from city centres, where conditions tend to be adverse (i.e. heavy workload owing to the fact that the judges work alone: inadequate administrative staff: lack of materials and technical infrastructure; and distance from supervisor judges and councils).

For these reasons, the Council of State considered that the Regulation passed the proportionality test. The plaintiff, who had been provisionally allowed to participate in the examinations, was removed from the list of candidate judges after this judgment.

As for the constitution, no violation of the protected principles of equal treatment, free access to public office and/or proportionality was proclaimed. In fact, the upper age limit of 35 was judged to be not only appropriate, but also to be the most effective measure based on the intended purpose of proper administration of justice.

The Council of State’s judgment was a majority opinion. Seven judges were involved in the decision. Three expressed a dissenting opinion. They found the age discrimination to be disproportionate, arguing as follows. The set age requirement was not proved to be the most appropriate and efficient measure to be taken pursuant to the legitimate aim that was served. All Greek citizens have the constitutional right to enter any public service profession for which they are qualified, regardless of age. There is no objective evidence that raising the age

limit of 35 will affect the career structure (judges who start their training somewhat later will not lack efficiency or knowledge, solely for this reason) or the independence of judges. In fact, statistics reveal that increasing the upper age limit for judges has little effect on the career structure or on the independence of the judiciary. This was concluded from official data obtained from the procedures provided for access to the National School of Judicial Officers, where the upper age limit is 40. The dissenters found the distinction between the set age limits for access to the County Courts and the other Courts to constitute a lack of internal cohesion. In other words, the legislator has not adopted a single practice for similar cases, which proves the inner division that exists on the matter.

Commentary

The Council of State has hereby resolved a matter that is important, not only because of the sensitive nature of the subject (age limits), but also because of the distinction between the legal framework and changes in the social and political environment. For example, the financial crisis in Greece is deepening day by day and unemployment levels are unprecedented. In those circumstances, limitations on access to professions must be treated with extreme caution.

The Council of State's assessment focused primarily on whether the national legislator's discretionary right was in line with (legal) interests protected by the Constitution, i.e. was the maximum age limit set for access to judicial posts legitimate in view of the scope of the national law transposing Directive 2000/78 into Greek law? After transposition, the provisions have direct effect. Although one might have expected the Court to have referred the matter to the ECJ, this did not happen because the majority of judges thought the case to be clear and a referral was therefore considered unnecessary. According to a literal interpretation of Article 267 TFEU, courts whose decisions cannot be challenged (i.e. the highest courts) must refer a preliminary question to the ECJ where a matter of interpretation of EU law arises. However, whether or not such a matter arises is for the national courts to decide.

It could be argued that in this case the Council of State should not have limited itself to reviewing whether national law (which set an upper age limit for access to the County Courts) was compatible with Article 6(1) of Directive 2000/78. Instead the inquiry should have been focused on other legal areas as well, such as whether there was a potential breach of the constitutional principle of equal treatment (Article 4 (1)). This was raised as an issue because of the different and more favourable treatment provided to judges working other than in the County Courts. The majority did not take into account the special circumstances under which County Court judges exercise their judicial duties. On the contrary, they focused arbitrarily on the 'rough' similarities between judges of all courts.

The issue raised in this case has been dealt with before in Greece, when another applicant judge protested against the age limit of 40 set for access to other courts than the County Court. In that case, the Council of State judged that the aim of proper administration of justice constitutes a legitimate goal and that therefore the maximum age requirement is not only appropriate but necessary. In that decision the Council had concluded that the national legislator was entirely free to select the qualifications it requires from applicants in order to ensure the proper recruitment of court officers, as this is within its discretion to evaluate the needs to be fulfilled by judicial post-holders. Even the alteration of access terms in prospective contests was considered fully justified and not discriminatory against applicant judges.

Both national and EU case law seem to agree on the ad hoc setting of age restrictions, with a view to well balanced social, professional and other criteria. We believe that the age limit of 35, if justified, could have been better explained by evidence to show that it is indispensable for the proper exercise of the demanding duties of County Court judges.

Comments from other jurisdictions

Austria (Andreas Tinhofer): In my view an age-limit of 35 or 40 years for the appointment of judges seems difficult to justify. It would be interesting to know how many years Greek judges are trained before they can sit in a court assuming full judicial powers. There might, for example, be applicants who have acquired a great deal of the necessary qualifications by working as lawyers litigating before the courts.

Cyprus (Natasa Aplikiotou): In contrast to the Greek process for becoming a judge, in Cyprus any person who wishes to become a judge must (a) hold a recognised university law degree, (b) be a qualified lawyer in Cyprus, registered with the Cyprus Bar Association, (c) have practiced law for six years, and (d) be of high moral character. Applications for available posts must contain evidence to support the above criteria. Candidates must also be successful at interview before the 13 judges of the Supreme Court of Cyprus who make up the Judicial Council and the Council's final decision will be by vote. Further, in order for a person to be appointed as a Senior District Judge or President of the District Court he or she must have practiced law for at least ten years (including permanent positions in legal services) in addition to the aforementioned criteria. With regards to judicial posts within first instance courts exercising special jurisdiction (e.g. the Family Court and the Employment Tribunal), recruitment follows the same procedure as explained above but the required qualifications are contained in the separate laws establishing each Court.

Therefore, great differences exist between the procedures in Greece and Cyprus for becoming a judge. Firstly, in contrast to Greece, in Cyprus there is no School of Judicial Officers. The only requirements for becoming a judge are the fulfillment of the above-mentioned criteria. Secondly, there are no age restrictions in Cyprus with regard to the appointment of judges in any Court.

Based on the above analysis, it seems clear that a 37 year old Greek candidate such as the one in the case described would have been eligible to apply for and participate in the Cypriot procedure for becoming a judge.

Germany (Elisabeth Höller): In Germany there is no specific regulation of age for judicial roles. However, there are general civil service regulations by which access to public services as an official is closed to those above a certain age limit. On 19 February 2009 the Federal Administrative Court ruled that the fixing of age limits requires a normative regulation and cannot be decided by the (federal or local) government. Now, most German federal states operate age limits for officials in public services by means of their Civil Service Law. The age limits vary among the federal states from 35 to 45. In addition, each federal state has regulations for certain career groups (e. g. the police and fire service) that allow for derogations and exceptions.

Since the implementation of Directive 2000/78/EG by the German Equal Treatment Act (the 'AGG') the age limits in the various Civil Service Laws have become more problematic. According to the AGG, discrimination on grounds of age is generally forbidden and several courts have been occupied with the question of whether a given age limit for officials is still justified. In most cases the courts have ruled in favour of the state, usually arguing that in the case of a relatively short period of service the pension costs for the official, to which the official is entitled under the German Civil Service Law, are too high. It seems that the temporal relationship between education, work and pension must be adequate. Further possible aims could be a balanced age structure, a degree of continuity and permanence and good financial management.

United Kingdom (Duran Ross): As in Greece, UK law permits what would otherwise be direct age discrimination in situations where it can be objectively justified. More specifically, the less favourable treatment on grounds of age must be 'a proportionate means of achieving a legitimate aim'. Case law has built up in the UK considering this requirement. The Court of Appeal in *Seldon v Clarkson Wright & Jakes (a partnership)* [2010] IRLR 865 held that whilst employers seeking to justify discriminatory practices do not have to specify social or labour policy aims, a Member State does need to do so. This would include, by extension, the UK's Judicial Appointments Commission. So, in a comparable case in the UK, an age cap for entry to

the judiciary should have a social policy aim. (Seldon is currently being appealed to the Supreme Court, which may give further guidance.)

The minority opinion expressed in the Council of State's judgment would most likely have been supported by a UK court or tribunal. In *Baker v National Air Traffic Services Ltd* (ET/2203501/07), a rule that individuals aged 36 or over could not apply to become air traffic controllers was held to be discriminatory for three main reasons. It was set with the afterthought of collating evidence to support it, in light of new age discrimination legislation. No correlation between the age bar and the aim of providing sufficiently well-trained air traffic controllers was found to exist. Lastly, other less discriminatory methods could have been adopted to achieve the same end (i.e. the blanket age bar was not proportionate).

The Greek decision does not seem to enquire in detail whether the age bar would in fact meet its intended aim and whether, if it did, it was proportionate. Neither does it discuss whether or not there were other less discriminatory methods of securing the same aim. If the legitimate aim relied upon is based on 'the training requirements for the post or the need for a reasonable period in employment before retirement', it is not clear why there should be a difference between County Court and other judges. The reasons given for the different treatment of County Court judges do not seem to relate to that particular aim. On the other hand, if the relevant aim is to ensure the 'proper administration of justice', it is not clear how the age limit assists with that.

Subject: Age discrimination

Parties: Candidate judge - v - Minister for Justice, Transparency and Human Rights

Court: Council of State

Date: 17 March 2011

Case Number: 851/2011

Hard copy publication: Not available

Internet publication: <http://lawdb.intrasoftnet.com/nomos/3nomoloqiarssubprs.php>

Creator: Council of State

Verdict at: 2011-03-17

Case number: 851/2011