

Older Age, Employment and Equality in Legislation: A “Progressive” Estonian Approach?

By Vadim Poleshchuk¹

This article sheds some light on the Estonian case law related to older age² inequality and discrimination. The combination of liberal social policies and the high percentage of the aged population motivated the Estonian judiciary to take a “progressive” approach in this area which could also be transferred to other jurisdictions. In the article, the peculiarities of the situation of Estonian elderly people are explained in sections I (a statistical overview) and II (political and social context). Section III provides information on Estonian anti-discrimination law. Two important court cases are presented in sections IV and V. They explain how the Estonian Supreme Court has outlawed some patterns of older age inequality and discrimination in employment using two different tests: the “arbitrary decisions’ test” and the “proportionality test”. Conclusions follow in section VI.

1. Estonian Elderly: A Statistical Overview

Estonia’s population is ageing at one of the fastest rates in Europe and it has one of the largest proportions of elderly population in the European Union (EU). Changes marking the dawn of demographic transition have been observed in Estonia after the mid-1800s. At the end of the 1920s there was the first decline in fertility below the “replacement level”, that is to say that this was the

first time at which population numbers were not maintained or increased. A temporary rejuvenation of the population was primarily caused by mass immigration to Estonia after the end of World War II, during the years of Soviet dominance. As an independent country, in the early 1990s, Estonia faced an abrupt acceleration of population ageing and, during this time, it was among the highest in Europe.² Thus, in 1991–2013, the proportion of the elderly (age 65+) grew from 11.7% to 18.1% (i.e. an increase of more than 50%).³ This process was much more rapid among people of foreign origin. Provided the fertility rate remains the same, the proportion of the elderly (age 65+) will reach 26% in Estonia by 2050.⁴

The total number of old-age pensioners reached 297,413 in 2012.⁵ Early retirement is quite unpopular in Estonia because those who retire early have a reduced pension entitlement. In 2012, early-retirement pensioners made up as few as 7% of the country’s old-age pensioners.⁶

Before and soon after the end of the Soviet period, the retirement age was 60 for men and 55 for women. Today, the State Pension Insurance Act (Article 7) provides a right to receive an old-age pension for both men and women who have attained 63 years of age and have accrued 15 years of pension-

able service in Estonia. From January 2017, the pensionable age will be set at 65 years. A transitional period was established for those born in 1944-1960 with a gradual increase of the retirement age depending on the year of birth.

A well known attribute of the Soviet economy of the 1980s was a very high labour force participation rate for older workers: the percentage of working old-age pensioners was very high and there was almost no unemployment. In 1989, in Estonia, 52.3% of persons aged 60-64 and 40.1% of persons aged 65-69 were participating in the labour force.⁷ Drastic changes have occurred in the Estonian economy since the beginning of social and economic reforms. As Siim Krusell summarised in an overview of the early 1990s:

“[E]conomic and social restructuring in Estonia has resulted, among other things, in younger people achieving rather good positions on the labour market, since they were preferred to older workers. Transition to the market economy came with risen importance of human capital and education. However, employers considered the quality of education acquired at the end of the 1980s and at the beginning of the 1990s to be better than the one acquired earlier than that. Economy saw whole new fields/sectors emerge or old ones expand, which opened an expressway for the fresh-out-of-college to acquire managing positions.”⁸

By the late 1990s, older generations managed to partially restore their position in the labour market. Their labour force participation rate has been increasing since then, due in part to changes in pensionable age. Nevertheless, there has not been a return to the Soviet-era labour force participation rate amongst the older population. In 2012, the respective figures were

50.4% of those aged 60-64 and only 27.7% of those aged 65-69.⁹

People who are very close to the age at which they gain the right to claim a pension and people of pensionable age are overrepresented among the poor and are considerably underrepresented among the rich. In 2012, 24.1% of people aged 55-64 and 28.5% of those aged 65+ belonged to the lowest income quintile and these percentages were higher than for any other age groups. By contrast, their percentage in the highest income quintile was the lowest (16.4% in age group 55-64 and 5.6% in age group 65+). Furthermore, in 2012, the at-risk-of-poverty rate was relatively high for people aged 65 and older (24.4%) and those aged 50-64 (21.0%). The average for the age group 25-49 was only 14.1%.¹⁰

According to findings by Mai Luuk, in 2001-2008, the average old-age pension increased almost three-fold due to annual indexation. However, rapid increases in necessary expenditure (food and housing) have undermined the economic subsistence of pensioners. Older people remain in employment up to the pensionable age, or even longer, because they can benefit both from earning wages and from disbursements of old-age pensions.¹¹ In 2012, the average old-age pension was equal to Euro 313; average gross wages were Euro 887.¹²

Seniority-based pay systems are not widespread in Estonia. Calculations on the basis of the Labour Force Survey 2009 show that a person's age is an important factor when it comes to influencing pay regardless of his or her education, occupation, gender and ethnic origin.¹³ Understandably, small pensions (and, in general, low income) motivate people to continue to work after reaching retirement age.

To summarise, in Estonia the starting point (pre-transition) was a situation of full employment, which was characterised by the high prevalence of stable employment for older people. The rapid shrinking of the labour market in the early 1990s pushed out vulnerable groups, including older people. The active promotion of early retirement was subsequently substituted with more inclusive policies in the employment sphere, against the background of the now higher retirement age and low public pensions. In this regard, the Estonian situation is similar to many other countries of “New” Europe.

2. Political and Social Context

Using the gradation set out by Gøsta Esping-Andersen (three worlds of welfare capitalism),¹⁴ Estonia seems to be a typical liberal regime with rather modest social assistance provided from public funds to people in need. In 2011, social protection expenditure as a percentage of Estonian gross domestic product (GDP) was 16.1% (the average amongst the 28 surveyed EU member states was 29.1%).¹⁵ After 1991, right-wing political parties dominated the national political landscape. In Estonia, issues of social, including intergenerational, solidarity are often seen through a prism of traditional (“Protestant”) values. In practice, this means that older people are supposed to be proactive in social and economic life rather than to seek public support.

The issue of pension reform was the subject of heated debate in Estonia around 2010. However, relevant civil society organisation proved to be quite weak and unable to significantly influence public opinion and political decision-making. Trade unions and organisations representing employers were also involved in the discussion. For instance, in 2010, the *Eesti Tööandjate Kes-*

kliit (Estonian Employers’ Confederation), adopted “The Employers’ Manifesto 2011-2015”,¹⁶ which included a separate section V on society’s ageing. Among other things, the Manifesto advocated an increase in the pensionable age to at least 67 and questioned whether it is justified to pay a working pensioner a full state pension while they are working.¹⁷ The *Eesti Ametiühingute Kes-*
kliit (Estonian Trade Union Confederation), an umbrella association uniting 19 branch trade unions, in its 2010 memorandum to parliamentary groups, questioned whether the state of health of older people in Estonia enabled them to work longer.¹⁸ According to the Flash Eurobarometer Intergenerational solidarity poll of 2009, Estonian respondents were divided regarding the need for major pension reforms to ease the financial burden on working-age people.¹⁹ In any case, the parliament extended the pensionable age to 65 (this was the second decision on an increase during the first decade of the century). The right of working pensioners to full public pensions remained untouched, however. These changes were controversial to many trade unions but there were no large-scale protests.

In 2012, Eurobarometer studied public opinion on the subject of discrimination in the European Union. In Estonia, 55% of respondents believed that discrimination on the ground of older age (age 55+) is very or fairly widespread in their country (the average amongst the 27 surveyed EU Member States – EU27 – was 45%). No other prohibited ground of discrimination was mentioned more often. Older age was also mentioned most often by Estonian respondents as a disadvantage in the eyes of a company that wants to make a choice between two candidates with equal skills and qualifications. This result was identical with the EU27 average (54%).²⁰

In 2007, a comprehensive anti-discrimination study was commissioned by the Ministry of Social Affairs. The study identified and considered individuals' personal experiences of discrimination within the last three years. The oldest generations (age 60+) referred to unequal treatment first of all in access to employment. Scholars believe that the elderly face challenges in the labour market if they lose a job just before reaching a pensionable age; therefore, it is quite probable that they experienced unequal treatment while looking for a new workplace.²¹

It should be mentioned, however, that in the 2012 Eurobarometer study, only 6% of older respondents (aged 50-74) stated they had personal experience of discrimination in employment (in their current workplace).²² Older people are still loath to interpret their own or their group's negative experience in terms of age discrimination. Furthermore, both national authorities and civil society also rarely address the problems of older people in a context of age discrimination.

3. National Anti-discrimination Law

While talking about the fight against inequality and discrimination, we need to have an overview of relevant provisions of the Estonian Constitution (1992) as well as an understanding of the historical background. This section explores the constitutional provisions and historical background to general anti-discrimination and equality provisions before focussing on the background to laws relating to the involuntary retirement of older workers.

According to Estonian legal doctrine and court practice, all constitutional provisions related to fundamental rights, including the rights to equality and non-discrimination, are directly applicable in both the public and private

spheres.²³ Article 12(1) of the Constitution establishes an explicit ban on discrimination:

“Everyone is equal before the law. No one shall be discriminated against on the basis of ethnic origin, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds”.

Katri Lõhmus has explained that:

“Article 12 of the Constitution does ban unequal treatment in all spheres of activities which are regulated and protected by the State. Legislative, executive and judicial powers should observe the principle of equal treatment. (...) [T]he principle of equal treatment is valid for all laws regardless of their scope of application.”²⁴

Thus, the general principle of equality is applicable to “all spheres of life” (an interpretation which is corroborated by the Supreme Court).²⁵ Discrimination is banned on any “other” ground. This includes for instance, age, which is not explicitly included in the text of the Constitution (see the examples of relevant court cases at sections IV and V below). However, in the Estonian Constitution neither the general right to equality nor the right to non-discrimination are absolute and they may be limited in accordance with Article 11. This Article stipulates that constitutional rights or freedoms may be restricted only in accordance with the Constitution (first of all, following proper legal procedure). However, such restrictions must be “necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted”.

In recent years, the Supreme Court has assessed whether or not there has been a violation of the right to equality with ref-

erence to two types of test. First, in some judgments, the Court analyses whether the unequal treatment was arbitrary, that is to say, whether there were no reasonable grounds for the decision (a concept which has not been defined by the court in any detail). Second, in some other judgments, the Court uses the so-called proportionality control test. Both tests have been used by the Supreme Court in cases relating to older age equality and non-discrimination. These tests will be explored below in the discussion of exemplary court cases at sections IV and V.

The text of the Constitution explicitly refers to the elderly only in the context of the right to state assistance (Article 28(2)), which is hardly relevant in the context of equality law.

It is worth mentioning that the first provisions on prohibition of discrimination in the employment sphere are in law originating from the Soviet period. The Code of Labour Laws 1972²⁶ banned the somewhat vague concept of direct or indirect infringement of rights or direct or indirect preferences in access to employment on the grounds of sex, race, ethnic origin or attitude to religion, but not age (Article 18(2)). When Estonia regained independence, parliament substituted the Code with the new Employment Contracts Act 1992 which used the same vague concept of prohibiting the direct or indirect infringement of rights or direct or indirect preferences in access to employment as the 1972 Act. The 1992 Act did, however, stipulate more protected grounds. Regrettably, age was not added to this new closed list of grounds (Article 10). Therefore, for many years in Estonia, protection against age discrimination in employment could be based only on the general equality and anti-discrimination provisions of the Constitution (Article 12).

Estonia became an EU member state on 1 May 2004. On the same day, the Employment Contracts Act 1992 was radically amended to transpose the EU Equality Directives. In labour law, age finally became a protected ground explicitly mentioned in the law and detailed definitions of discrimination were added to the text of the Employment Contracts Act. Since January 2009, the main set of anti-discrimination provisions (including those applying to the field of employment) have been found in a separate legal instrument – the Equal Treatment Act 2008. Neither the new Employment Contracts Act 2008 nor the new Public Service Act 2012 include any detailed anti-discrimination provisions.

Estonian employment law initially preserved several controversial issues related to older workers, including those relating to involuntary retirement. In the late 1980s, the federal Soviet legislation had been amended to enable employers to dismiss employees who had attained the age of 65 and who had a right to full old-age pension. The decision had been taken against the background of a baby boom and heated debates as to a perceived necessity to enhance efficiency of the Soviet economic model.²⁷ The amendment was transferred to labour laws of Union Republics, including Estonia. It could also be found in the Employment Contracts Act (Articles 86(10) and 108). Similar provisions were added to the Public Service Act 1995 regulating the employment of public officials (Article 120).

This limitation of the employment rights of older people was repeatedly criticised by legal experts and civil society. The relevant provisions of the Employment Contracts Act were eventually abolished by parliament on 8 February 2006, following a report drafted by the Chancellor of Justice (an ombudsman-

like, constitutionality control institution). In his report, the Chancellor claimed that the provisions of the Employment Contracts Act might conflict with the equality and non-discrimination principles of the Constitution and EU law and that there were seemingly no good reasons to justify such unequal treatment of older workers.²⁸ However, with respect to the rules regulating the employment of public officials, the policymakers were not similarly liberal and open-minded. As a result, public officials could be dismissed once they reached the age of 65 under Article 120 of the Public Service Act until the Supreme Court, on 1 October 2007, declared that it (and related provisions) violated Article 12(1) of the Constitution, which provided for equality before the law and banned discrimination on any ground.²⁹

With this background in mind, there are two cases of particular interest which have developed the law in this area. The rest of the article is dedicated to examining the cases in some detail.

4. Involuntary Retirement of Public Officials (Case I)

According to the Estonian Constitution, the court shall not apply any law or other legislation that is in conflict with the Constitution and the Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution (Article 152). A request to review the constitutionality of legislation of general application may also be initiated by a court by delivering its judgment or ruling to the Supreme Court.³⁰ The case in question³¹ was initiated in June 2007 by the Tallinn Administrative Court which refused to recognise as constitutional Article 120 of the Public Service Act. It concerned two public officials working in the Citizenship and Mi-

gration Board who were released from service solely due to their age. Both filed actions with the Tallinn Administrative Court, which declared their release from service unlawful. The court did not apply Article 120 of the Public Service Act upon adjudicating the matter and transferred the judgment to the Supreme Court.

The Tallinn Administrative Court found that the fact that a person can no longer work in an office suitable to the person, solely because he or she has attained a certain age, constituted an intensive infringement of “free self-realisation”, established in Article 19 of the Constitution.³² Furthermore, Article 12 of the Constitution prohibits treating a person unequally in comparison to others solely on the ground of age without reasonable and proportional justification. The court stressed that, in addition to the Constitution, the International Labour Organisation Convention No. 111 and the provisions of the Council Directive 2000/78/EC both require equal treatment in employment and service relationships. If an official who has attained more than 65 years of age is unable, due to his or her advanced age, to properly perform his or her duties, it is lawful to dismiss such an official due to unsuitability for position. The court went on to state that Article 120 was also in conflict with the obligation assumed by Estonia upon accession to the European Social Charter (Revised), to guarantee that no one’s employment is terminated without a legal ground. Under the Charter, legal grounds for release are the capacity or conduct of the employee or the operational requirements of the undertaking, establishment or service (Part II, Article 24 a).

The Citizenship and Migration Board (the employer) was of the opinion that the relevant provisions were in line with the Constitution. They stressed that public and private

sectors are subject to different legal regulation. Both the Constitution and EU law allowed exceptions from the principle of equal treatment in certain justified cases. Thus, Article 6 of the Council Directive 2000/78/EC established that differences of treatment on grounds of age did not constitute discrimination, if, within the context of national law, they were objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim were appropriate and necessary. The Citizenship and Migration Board was supported in its position by the Constitutional Committee of parliament. The Committee argued that Article 120 of the Public Service Act was not imperative by nature as it gave discretion to the employer to decide on how to proceed in relation to an individual employee on a case-by-case basis. Article 120 did not discriminate against elderly officials but rather was to their benefit, enabling them as it did, to leave with dignity and receive compensation. The Minister of Justice claimed that the age limit was reasonably justified by the need to guarantee the sustainable development of an agency, amongst other things. In addition, the Minister submitted that retired officials were also provided with decent compensation and pensions. Furthermore, officials of general public service and special service were comparable groups and, for the latter, the release from service upon the attainment of 65 years was a general rule.

In its judgment of 1 October 2007, the Supreme Court ruled that Article 12(1) of the Constitution must be interpreted to require equality in legislation. The Court argued that laws must, in substance, treat in the same way all the persons who are in a similar situation and treat differently those who are not similarly situated. According to the Court, the starting position should be that equals must be treated equally and unequals un-

equally. However, the Court said, unequal treatment of equals is permissible – the right to equality is not absolute – where the unequal treatment is not arbitrary. With the reference to its previous practice, the Court reminded: “if there is a reasonable and appropriate ground, the unequal treatment by law is justified”.³³

The Supreme Court concluded that there could be no reasonable justification for Article 120 in so far as it resulted in a situation where it was possible for an employer to keep on one employer over 65 whilst releasing another from service solely on the basis of age. Good reasons for the unequal treatment of officials who have attained 65 years of age could not be found in the explanatory note attached to the Public Service Act. The opinions of the Constitutional Committee of parliament and the Minister of Justice could not be accepted as a reasonable justification. Their claims that it was easier for an elderly person to cope with release from service due to age rather than due to unsuitability for office did not convince the Supreme Court. Instead, the Court held that, in order to avoid arbitrary unequal treatment, the motives for release from service must be transparent and reflect the actual situation. The Court concluded that the infringement of the “general right to equality” was not reasonably or appropriately justified and amounted to arbitrary unequal treatment. Accordingly, Article 120(1) of the Public Service Act and the related norms were in conflict with Article 12(1) of the Constitution.

It is interesting that the Constitutional Court of Belarus came to a completely different conclusion in a very similar case. In Belarus there were the same legal provisions that had essentially been inherited from the late-Soviet regulation which permitted employers to dismiss employees on the sole basis that

they had reached the age of 65. The Belarusian Constitution (1994) provides for equality before the law and prohibits discrimination on any ground (Article 22). In relation to ordinary employment in the private sphere, the provisions permitting the dismissal of a person solely due to his or her age were declared to be unconstitutional in 1994.³⁴ However, in 2001, the Constitutional Court came to the conclusion that similar age limits for public officials are justified and the latter are not in a comparable situation with ordinary employees.³⁵ It found that age limits were established in the interests of the sustainable work of governmental agencies and that this was a valid and solid justification. The court noted that public officials enjoyed various privileges that may compensate them for the infringement of some of their rights.

In other words, in its analysis, the Belarusian Court compared public officials with ordinary employees and found that they were not in a similar situation and the differences in their situations justified differential treatment. The Estonian Court, however, looked at the case from a different perspective and found no good justification for the unequal treatment of public officials who belong to the same age group (age 65+). The Estonian law permitted arbitrary unequal treatment of public officials since, in the same office, it was possible to fire one older person and to allow another older person to stay in the service. There were no good reasons to maintain this regulation while any public official might be released from the service due to unsuitability for position.

5. Access to Work-related Benefits (Case II)

As was explained above, the Estonian Supreme Court declared that the legal provisions that permitted the firing of public officials solely due to older age were un-

constitutional. In what follows, we will provide an overview of another judgment, of 7 June 2011,³⁶ in which Estonia's court of highest instance outlawed the unequal treatment, on an age discriminatory basis, of working older people in access to certain important benefits.

In this case, a working 67 year old pensioner was not provided with sickness benefits on an equal footing with younger persons. According to Article 5(2)(1) of the Health Insurance Act 2002, insured persons are those who work on the basis of a contract of employment and for whom the employer is required to pay social tax. Article 57(5) of the Act provides that an insured person has the right to receive sickness benefit for a maximum of 250 calendar days per calendar year. However, the maximum number of calendar days is much smaller for insured persons aged 65 years and older. They may receive sickness benefit in the event of an illness and injury for up to 60 consecutive calendar days for one illness but not for more than a total of 90 calendar days per calendar year (Article 57(6)). Due to these provisions, the applicant did not receive his sickness benefit in full and filed action with the court. A constitutionality control procedure was initiated by the Tartu Circuit Court (court of second instance).

The Tartu Circuit Court did not apply Article 57(6) of the Health Insurance Act, due to its unconstitutionality (as regards limitations for people who are at least 65 years of age). The final judgment was given by the Supreme Court *en banc* (i.e. a chamber comprised of all justices of the Supreme Court). The Court came to the conclusion that special provisions regarding sickness benefits for people aged 65 and older violated Article 12(1) of the Constitution, which provided for equality before the law and banned discrimination on any ground.

In this case, the Supreme Court used a proportionality test (which has been largely borrowed from Germany by the Estonian courts), as it considers itself permitted to do under the general provisions of Article 11 of the Constitution, relating to the restriction of rights. Similarly to the approach to proportionality assessments widely recognised in other jurisdictions' interpretations of their own non-discrimination provisions, the Court reviewed the conformity of the restriction to the proportionality principle through the three characteristics thereof – suitability, necessity and proportionality in the narrowest sense.³⁷

The Court rejected the argument that the relevant limitations were established in the interests of the health protection of those aged 65 and over: it was impossible to make this argument because there was no way the limitations could foster the achievement of this goal. The Court agreed, however, that the goal of the state to ensure a reasonable use of the health insurance fund (a semi-independent public institution which receives money from social taxes to pay medical services) and to save its money by paying less benefits whenever possible, was both suitable and necessary. The Court argued that it was not possible to achieve this goal by some other measures which were less burdensome on a person but which were at least as effective as the former. At the next stage of the proportionality test, the Supreme Court analysed the extent and intensity of the interference with the fundamental right to equality on the grounds of age, on the one hand, and the importance of the objective of saving the health insurance funds, on the other hand. In other words, the Court had to decide on proportionality of a measure *sensu stricto*.

Proportionality in the narrowest sense means the court is required to consider

whether the reasons given for the unequal treatment are reasonable. The Supreme Court studied various arguments provided by the parties. First, the Court found that unequal treatment on the grounds of a characteristic irrespective of a person's will (in this case: on the grounds of age, an immutable characteristic of a person at a certain point in time) must be justified by weighty reasons. The Court found that the age limit of 65 years could not be justified by the statistics presented in the case by the Minister of Social Affairs. The Court argued that a person's state of health did not necessarily deteriorate substantially upon reaching the age of 65. The statistics would probably be quite similar if, upon creating the age groups, one group consisted of persons who were, for example, either 63 or 67 years of age and older.

Second, there are many people significantly older than 65 years of age whose health and capacity for work is equal to that of younger people. Both younger and older people can fall ill for a longer period of time albeit with a temporary ailment (e.g. due to injury or illness without a permanent decrease in their capacity for work). While it could not be stated with certainty that precisely 65 years of age is a "bifurcation point", restricting the duration of the payment of sickness benefit on the grounds of age constituted a serious interference with the fundamental right to equality of older persons.

Third, the Supreme Court disagreed with one of the proposed arguments that the payment of two different benefits for the same purposes (pension and the benefit for temporary incapacity for work) may constitute non-economical use of public resources:

"[T]he state old-age pension is a financial benefit in the case of old age. However, the sickness benefit is financial com-

pensation paid by the health insurance fund to an insured person on the basis of a certificate for incapacity for work in cases where the person does not receive income subject to individually registered social tax due to temporary release from his or her duties or economic or professional activity (Article 50(1) and (3) of the Health Insurance Act). The objective of the benefit for temporary incapacity for work is to ensure income during the time the person is unable, due to temporary incapacity for work, to continue the work necessary for the receipt of their usual income. On the other hand, the state old-age pension is a state benefit in the case of old age for persons who have contributed their labours and whose wages have been subject to taxes for, in general, at least 15 years (see also Article 30(1) of the State Pension Insurance Act), including the state pension insurance subjected to individually registered social tax which the amount of the old-age pension depends on (Articles 11(1) and 12(2) of the State Pension Insurance Act). The receipt of a state old-age pension does not depend on the person's state of health or his or her ability to otherwise earn a living.”³⁸

Fourth, the Supreme Court also noted that not every person who is 65 years of age or older receives a state old-age pension and so that cannot be used as an argument. Furthermore, the discount for medicinal products and dental care enjoyed by old-age pensioners and insured persons who are at least 63 years of age does not make the distinction regarding the duration of the payment of sickness benefit “moderate”.

Consequently, the Court delivered the opinion that neither the worse-than-average state of health of the elderly, nor the receipt of an old-age pension, nor the saving of the money of the health insurance fund could justify the unequal treatment on grounds

of age in relation to the receipt of sickness benefit. Finally, the Supreme Court *en banc* declared that the wording “or insured persons who are at least 65 years of age” in Article 57(6) of the Health Insurance Act was unconstitutional and invalid.

It is evident that, in this judgment, the Supreme Court took an individual rights approach with due respect for the dignity and personal autonomy of older people on the labour market. The Court rejected token usage of statistics or hypocritical arguments that the infringement of their rights was actually in the interests of the older people (for the protection of their health). The Court emphasised that the right to receive a pension should not impact on the ability of a pensioner to make free decisions in the field of employment, namely in relation to whether or not to continue working.

Interestingly, in this judgment, the highest court of instance also reviewed its own practice and came to the conclusion that there are good reasons to apply the proportionality test to all cases related to Article 12(1) of the Constitution and that it is not necessary to use an “arbitrary decisions test”.³⁹ This decision is to be welcomed as the latter test is manifestly lacking the same level of clarity and scrutiny as the proportionality test.

6. Conclusions

Estonians believe that older age discrimination is most widespread in their country, when compared with discrimination on any other protected ground. Estonian economic liberalism has important implications for older generations: they are expected to be proactive on the labour market and less dependent on public assistance. The main reason for the activity of older people on the labour market seems to be the small size of

pensions or other income. Therefore, the labour force participation rate for older people in Estonia is relatively high.

Csilla Kollonay-Lehoczky, who compared the case law of the European Court of Justice (ECJ) and the US courts with respect to the automatic retirement age, concluded that the ECJ has “a significantly more deferential attitude towards regulations in member states forcing employees to retire involuntarily”.⁴⁰ The difference in approach she attributed to the different backgrounds of the relevant legislation and to the fact that American lawmakers were motivated “by a strong respect for individual free choice and the intent to eradicate unfair stereotyping,”⁴¹ while the EU Framework Directive couples the anti-stereotyping intent with broader social and economic considerations as well as with reaction to labour market and budgetary complications and the problems of an “ageing society”.⁴²

As regards liberal social policies, Estonia is closer to the US than most EU member states. Estonian judges have to be quite open-minded when deciding age discrimination cases. If a country’s social and labour market policies are “minimalist”, national courts will hardly refer to such policies to justify limitations imposed on older (and younger) age groups on the labour market. Quite logically, if older people are expected to take care of themselves, they should rely on the same level of protection against discrimination in employment as all other generations. In other words, paradoxically, in the grim social environment, the Estonian elderly may benefit

from a comparatively advanced manner of application of equality and non-discrimination principles to their group. While a lack of proactive social policies is normally not good for the elderly, under such circumstances, courts feel free to deal with the concept of age-related inequality and discrimination in the same way as with discrimination on any other ground.

The two exemplary cases of the Estonian Supreme Court discussed in this article may prove a “progressive” approach of the Estonian judiciary. Actually, the logic and arguments of the Estonian court in both cases need not be country-specific and may be transferable and applicable to other European jurisdictions with proactive social policies.

In the case of involuntary retirement, the Supreme Court, using solid legal argumentation, was able to highlight the evident arbitrariness of release from service motivated solely by the age of a public official. The judgment in the case of access to sickness benefits is another good example. The Supreme Court was motivated by respect for a person’s autonomy to decide the matters related to his or her life without unnecessary external interference. The thorough analysis by the Court showed that extensive justifications provided by authorities in this case were actually ill-founded. This judgement made us believe that numerous age limitations in access to work-related benefits are dependent on political decisions and that these decisions often lack proportionality in its narrowest sense, i.e. they are unreasonable.

1 Vadim Poleshchuk, LL.M., is Legal Advisor-Analyst of the Legal Information Centre for Human Rights (Tallinn, Estonia). He is also a national expert in the European Network of Legal Experts in the Field of Non-Discrimination.

- 2 For a detailed overview see Puur, A., Põldma, A., "Population Ageing in Demographic View", *Social Trends*, Vol. 5, 2010.
- 3 Statistics Estonia, Public database, available at: <http://pub.stat.ee> (last accessed 1 March 2014).
- 4 *Ibid.*, p. 27.
- 5 Social Insurance Board, Statistics for 2012, available at: <http://www.ensib.ee> (last accessed 1 March 2014).
- 6 *Ibid.*
- 7 See above, note 3.
- 8 Krusell, S., "Older People on the Labour Market", *Social Trends*, Vol. 5, 2010, p. 42.
- 9 See above, note 3.
- 10 *Ibid.*
- 11 Luuk, M., "Retirement of the Elderly from the Labour Market", *Quarterly Bulletin of Statistics Estonia*, No. 1, 2009, pp. 29-30.
- 12 See above, note 3.
- 13 See above, note 8, p. 46.
- 14 Esping-Andersen, G., *Three Worlds of Welfare Capitalism*, Princeton University Press, 1990.
- 15 Latvia is the only country in the EU where social protection expenditure was even lower (15.1%). See Eurostat, "Social protection. EU28 spent 29.1% of GDP on social protection in 2011", News release No. 174/2013, 21 November 2013.
- 16 Estonian Employers' Confederation, *The Employers' Manifesto 2011-2015*, p. 17, available at: <http://www.tooandjad.ee> (last accessed 1 March 2014).
- 17 Similar regulations existed in Estonia in the 1990s.
- 18 Eesti Ametiühingute Keskkliit, *Riikliku pensionikindlustuse seaduse ja sellega seonduvalt teiste seaduste muutmise seaduse eelnõu*, Written communication of 17 February 2010 no. 1-9/8, p. 1, available at: <http://www.eakl.ee> (last accessed 1 March 2014).
- 19 European Commission, *Flash Eurobarometer 269, Intergenerational Solidarity. Analytical Report*, 2009, p. 17.
- 20 European Commission, *Discrimination in the European Union in 2012: Eurobarometer 77.4. Results for Estonia*, 2012, pp. 1, 3.
- 21 Lagerspetz, M., Hinno, K., Joons, S., Rikmann, S., Sepp, M., Vallimäe, T., *Isiku tunnuste või sotsiaalse positsiooni tõttu aset leidev ebavõrdne kohtlemine: elanike hoiakud, kogemused ja teadlikkus*, Tallinn, 2007, p. 50.
- 22 Espenberg, K., Vahaste, S., Sammul, M., Haljasmäe, R., *Vanemaealised tööturul, Raport*, Tartu: RAKE, 2012, p. 43.
- 23 For a detailed analysis of the Estonian anti-discrimination law, see: Poleshchuk, V., *Report on Measures to Combat Discrimination. Directives 2000/43/EC and 2000/78/EC. Country Report 2012: ESTONIA. State of affairs up to 1st January 2013*, available at: <http://www.non-discrimination.net> (last accessed 1 March 2014). Direct applicability of these constitutional rights in the private sphere is common in many central and eastern European countries.
- 24 Lõhmus, K., "Võrdsusõiguse kontroll Riigikohtus ja Euroopa Inimõiguste Kohtus", *Juridica*, No.2, Vol. 11, 2003, p. 109.
- 25 Judgment of the Constitutional Review Chamber of the Supreme Court of 6 March 2002 in case 3-4-1-1-02, point 13, available at: <http://www.nc.ee/?id=434> (last accessed 1 March 2014).
- 26 *Kodeks zakonov o trude Estonskoi SSR. Oficialny tekst s izmeneniyami i dopolneniyami na 1 yanvarya 1985 goda*, Tallinn: Raamat, E., 1985.
- 27 Ukaz Prezidiuma Verkhovnogo Soveta SSSR ot 4 fevralya 1988 goda "O vnesenii v zakonodatel'stvo Soyuza SSR o trude izmeneniy i dopolneniy, svyazannykh s perestroykoy upravleniya ekonomikoy".
- 28 *Õiguskantsleri ettekanne Riigikogule nr 3 "Töölepingu seaduse probleemid"*, 12 October 2005, available at: <http://www.oiguskantsler.ee> (last accessed 1 March 2014).
- 29 Judgment of the Constitutional Review Chamber of the Supreme Court of 1 October 2007 in case 3-4-1-14-07, available at: <http://www.riigikohus.ee/?id=850> (last accessed 1 March 2014).

- 30 Article 4 of the Constitutional Review Court Procedure Act (2002).
- 31 See above, note 29.
- 32 This right does not appear in the same terms in international human rights law but may broadly be understood to be a right to fulfil one's potential.
- 33 It should be clarified that in the national context, these grounds were understood as those in line with the Constitution and good moral values.
- 34 Zaklyucheniye Konstitutsionnogo Suda Respubliki Belarus ot 23 sentyabrya 1994 goda № Z-1/94, available at: <http://www.kc.gov.by/main.aspx?guid=11893> (last accessed 1 March 2014).
- 35 Resheniye Konstitutsionnogo Suda Respubliki Belarus ot 18 iyulya 2001 goda № P-127/2001, available at: <http://www.kc.gov.by/main.aspx?guid=10653> (last accessed 1 March 2014).
- 36 Judgement of the Supreme Court *en banc* of 7 June 2011 in case 3-4-1-12-10, available on: <http://www.riigikohus.ee/?id=1301> (last accessed 1 March 2014).
- 37 On the test of proportionality see Grimm, D., "Proportionality in Canadian and German Constitutional Jurisprudence", *University of Toronto Law Journal*, Vol. 57, 2007.
- 38 See above, note 36, point 55.
- 39 *Ibid.*, points 34-35.
- 40 Kollonay Lehoczky, C., "Who, Whom, When, How? Questions and Emerging Answers on Age Discrimination", *The Equal Rights Review*, Vol. 11, 2013, p. 86.
- 41 *Ibid.*
- 42 *Ibid.*