

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

**C.I.C.A. No.7 of 2018
G.C. Cause No. G 4 of 2016**

BETWEEN:

**(1) THE ROYAL CAYMAN ISLANDS POLICE ASSOCIATION
(2) DANE PINNOCK
(3) CLAIRE PINNOCK JACKSON
(4)-(11) THE PLAINTIFFS LISTED IN THE SCHEDULE TO THE PETITION OF
11 JANUARY 2016**

Plaintiffs /Appellants

AND

**(1) THE COMMISSIONER OF THE ROYAL CAYMAN ISLANDS POLICE
SERVICE
(2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS**

Defendants/Respondents

Before: **The Rt. Hon Sir Bernard Rix, Justice of Appeal
The Hon. John Martin, QC, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal**

Appearances: **Mr. Jeffrey Jupp instructed by Mr. Guy Dilliway-Parry of Priestleys
on behalf of the Appellants
Ms. Reshma Sharma and Ms. Claire Allen of the Attorney General's
Chambers on behalf of the Respondents**

Date Heard: **13 and 14 November 2018**

Date Delivered: **6 February 2019**



RULING

MOSES, JA

1. Before 22 November 2010 police officers below the rank of Chief Inspector, known as “non-gazetted officers” serving in the Royal Cayman Islands Police Service were automatically retired at the age of 55, although, if they chose, they could be re-engaged

but only at the rank of Constable. The Commissioner could refuse to re-engage, should the officer not be suitable for continuing service. No complaint is made as to that previous, long standing, retirement policy. On 22 November 2010, Section 21 of the Police Law, 2010 raised the age of retirement to 60. But that change did not apply to non-gazetted officers already in service at that date. They were still required to retire at 55, even though those appointed after November 2010 were not required to do so. The re-engagement policy, the flexibility of which is in dispute, was continued: all non-gazetted officers who reached retirement age, whether 55 or 60 were only offered re-engagement as a Constable.

2. Officers recruited by the Commissioner from the United Kingdom were not required to retire at 55, whenever they were appointed and were never demoted as a condition of remaining beyond 55.
3. On 9 September 2016 the Public Service Management (Amendment) Law, 2016 removed the imposition of a compulsory retirement age of 55 on those serving before 22 November 2010. After 9 September 2016, all non-gazetted officers could choose to stay on after 55, whatever their date of appointment, and were permitted to remain until 65, subject to medical and physical tests.
4. The 2nd to 11th Plaintiffs (the claims by the 4th and 7th Plaintiffs were discontinued) were all officers forced to retire at 55 after the retirement age was raised to 60 on 22 November 2010, even though fellow officers, appointed after that date, were not required to do so.
5. The nub of the Plaintiffs' case is that they were discriminated against on the grounds of age because they were required to retire at 55 whereas colleagues appointed after 22 November 2010 were not, and that there was no justification for that discrimination:

those appointed before that date ought to have been given a choice to remain until they reached 60.

6. Further, they contend that they were discriminated against on the grounds of nationality since neither the mandatory retirement age nor the re-engagement policy applied to the United Kingdom officers at any stage.
7. These arguments turned on whether the Plaintiffs could establish that mandatory retirement on the grounds of age fell within the ambit of Section 9 of the Cayman Islands Constitution Order 2009, Part 1 the Bill of Rights, and thus came within the prohibition against unjustified discrimination under Section 16.
8. They also contended that the re-engagement policy was unlawful, irrational and disproportionate contrary to Section 19. This was said to be a free-standing point which did not depend on the court's conclusions on discrimination.
9. On 15 March 2018, after a trial lasting five days in June 2017, Hall JA decided that the imposition of a mandatory retirement age did not fall within the ambit of Section 9 and that there had been no discrimination on the grounds of nationality. Thus she did not consider the Respondents' arguments on justification. She held that the re-engagement policy would have been unlawful but for the fact that it was subject to exceptions, demonstrated by the retention of one officer at a higher rank than constable.

Legislation

10. Nothing turns on the wording of the relevant Police Laws. Until the mandatory retirement age was raised in 2010, the requirement to retire at 50 was contained in section 20 of the Police Law (2006 Revision):

“(1) Non-gazetted officers who have attained the age of fifty-five years, shall be retired without prejudice to their being accepted for such further period or periods of service as may be fixed by contract”.

11. It should be noted that the policy requiring officers to be re-engaged only at the rank of constable was not a requirement contained within that section which merely conferred on the Commissioner the power to re-engage. The power to enlist non-gazetted officers from outside the Islands was contained in section 19:

“Notwithstanding this Part, the Commissioner may enlist such non-gazetted officers from outside the Islands upon such contractual terms as may to him appear expedient”.

12. The mandatory retirement age was raised to 60 by Section 21 of the Police Law, 2010:

“21. (1) A police officer who has attained the age of sixty years, shall be retired without prejudice and may, in special circumstances and for such temporary periods, be accepted for such service as may be fixed by contract.”

13. Section 21(7) maintained the compulsory retirement age of 55 for those appointed before the 2010 law came into effect on 22 November 2010.

“(7) The provisions of this section shall not apply to a police officer appointed prior to the date of commencement of this Law but, on and after that date, the provisions of section 20 of the Police Law (2006 Revision) shall continue to apply to him as if this section had not come into force.”

These provisions were preserved in the Police Law (2014 Revision).

14. Section 8 of the Public Service Management (Amendment) Law, 2016 raised the mandatory retirement age to 65 and also removed the imposition of a mandatory retirement age of 55 for those in service prior to November 2010 by replacing subsections (1) and (7) of Section 21 of the Police Law (2014 Revision) so that they read as follows:

“(1) A police officer who has attained the age of 65 years shall be retired without prejudice and may, in special circumstances and for such temporary periods, be accepted in such service as may be fixed by contract: however a police officer of the rank of Inspector or below who has attained the age of sixty years, shall be retired without prejudice unless the officer completes a fitness and medical test immediately prior to attaining that age,

(7) The provisions of this section shall not apply to a police officer appointed prior to the date of commencement of this Law, unless the officer elects to have those provisions apply, and if the officer does not so elect, on and after that date, the provisions of s.20 of the Police Law (2006 revision) shall continue to apply to that officer as if this section had not come into force”

The Bill of Rights

15. Section 9 provides:

“(1) Government shall respect every person’s private and family life, his or her home and his or her private correspondence.

(3) *Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society-*

(i) *in the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilisation of any other property in such a manner as to promote the public benefit;*

(ii) *For the purpose of protecting the rights and freedoms of other persons;”*

16. Section 16 provides:

“(1) Subject to subsections (3)(4)(5) and (6) government shall not treat any person in a discriminatory manner in respect of the rights under this part of the Constitution.

(2) In this section, “discriminatory” means affording different and unjustifiable treatment to different persons on any ground such as sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.

(3) No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is reasonably proportionate in its aim in the interests of defence, public safety, public order, public morality or public health.

(4) Subsection (1) shall not apply to any law so far as that law makes provision-

(d) whereby persons of any such description of grounds as is mentioned in subsection (2) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other description, is objectively and reasonably justifiable in a democratic society and there is reasonable proportionality

between the means employed and the purpose sought to be realised.”

Does mandatory retirement at 55 fall within the ambit of Section 9?

17. It was not disputed that the sources of Section 9 and Section 16 of the Bill of Rights were Article 8 and Article 14 of the European Convention on Human Rights within the Constitution of the Cayman Islands. It was accepted that this court should, in applying those provisions, deploy both Strasbourg and United Kingdom jurisprudence, following the approach of the Privy Council to the Constitution of Gibraltar which is framed in a similar way to that of the Cayman Islands (*Rodriguez v Minister of Housing of the Government and Another* [2009] UKPC 52). If the Appellants are unable to bring the mandatory retirement provision within Section 9 they cannot rely on Section 16, and the retirement provisions were not unlawfully discriminatory.

18. The right to respect for private life and the protection of personal identity and dignity, enshrined in Section 9 and Article 8 of the European Convention can be invoked within the context of working life and working relationships. The European Court of Human Rights has often said that “*the notion of “private life” does not exclude in principle activities of a professional or business nature*” (see e.g. *Volkov v Ukraine* (2013) 57 EHRR 1, at para.165 and *Denisov v Ukraine* (No 76639/11 25 September 2018) at para 100). Cases such as the ban on employment of a former KGB tax inspector and prosecutor in *Sidabras and Džiautas v Lithuania* (2006) 42 EHRR6, the dismissal of a judge for breach of his oath in *Volkov* and the dismissal of the security officer on the grounds of her gender in *Boyras v Turkey* (2015) 60 EHRR 30 at para 100 are examples of breaches of Article 8. If what is under consideration is the scope but not necessarily a breach of Article 8 it must follow that rights enshrined under that article may require protection against discrimination in the context of working life.

19. Similarly, in the United Kingdom it is beyond doubt that Article 8 reaches to issues involving work. In *R (Wright & Ors) v SOS for Health & Anor* [2009] 2 WLR 267 the inclusion of care workers on a list of those unsuitable to work with vulnerable adults, without the opportunity to make representations, rendered the relevant legislation incompatible with both Articles 6 and 8. In *Turner v East Midlands Trains Ltd* [2012] EWCA Civ 1470, a dismissal for criminal conduct engaged Article 8.
20. But not every case concerning dismissal at work engages Article 8 or Section 9. Whether it will do so, will depend upon whether some protected personal characteristic formed the ground of the dismissal or on the severity of the consequences of that dismissal. In *Denisov* the court identified, in what it described as “*employment-related scenarios involving Article 8*”, these two different approaches:

“102. (in employment related scenarios), the Court applies the concept of private life on the basis of two different approaches:

- (a) identification of the “private life” issue as the reason for the dispute (reason based approach) and*
- (b) deriving the “private life” issue from the consequences of the impugned measure (consequence-based approach).*

103. Complaints concerning the exercise of professional functions have been found to fall within the ambit of “private life” when factors relating to private life were regarded as qualifying criteria for the function in question and when the impugned measure was based on reasons encroaching upon the individual’s freedom of choice in the sphere of private life.”

21. Before Hall JA, the Appellants had stressed the severity of the consequences of their having to retire at 55. In *Denisov*, the court identified the level of gravity of the consequences of dismissal which must be attained before Article 8 was engaged, giving

as examples of serious consequences, the loss of judicial office for breach of the judicial oath in *Volkov* and the far reaching ban on former KGB officers in *Sidabras* (para 108). These must be significantly serious, (in *Denisov* an attack on reputation was insufficiently significant (see paras 110 and 112)) and a claimant must adduce convincing evidence to demonstrate that level of severity (para 114).

22. In *Denisov* the Court rejected the President of the Court of Appeal's contentions as to the impact of a reduction to the ranks of a mere judge because his dismissal was due to managerial failings (para 120). A reduction in monthly remuneration did not seriously affect the "inner circle" of his private life (para 122) nor was there a substantial effect on his personal relationships or professional or social reputation (paras 125, 129 and 131).
23. Similarly, in the United Kingdom, the dismissal for redundancy of park workers in *Wandsworth London Borough Council v Vining and Others* [2016] ICR 427, even though it had the consequence of severing relationships with fellow-workers, was of insufficient severity to engage Article 8. Termination of employment is not sufficient, the severity of its consequences may be (see para 47). Sir Terence Etherton MR said:

"there is no Strasbourg or domestic case in which it has been held that the mere length of employment, or the inevitable effect of termination of employment on relationships with work colleagues, or the distress and anxiety arising from the fact of the termination and the need to find new employment, or the relative difficulty of finding new employment according to the age of the employee at the date of dismissal are always sufficient of themselves individually or collectively to engage article 8. Those are matters to a greater or lesser extent involved in every dismissal. They are inapposite as factors engaging Article 8 in the context of a collective redundancy, which involves no imputation of wrongful conduct on the part of the employee, carries no stigma, and would involve differential legal consequences according to the particular circumstances

or sensitivities of the individual employees who have been made redundant. there is no particular feature of the present case which takes the situation out of the general run of redundancies and their usual consequences” (paragraph 49).

24. In the instant case, the judge heard the evidence of the 2nd and 3rd Claimants (whose evidence was taken as representative of all of the claimants) as to the consequences they had suffered, but rejected the suggestion that there was any stigma or reputational damage which flowed from mandatory retirement at the age of 55 (see judgment para 233).
25. The Appellants sought, however, to overcome the unchallengeable findings as to the lack of severity of the consequences, by contending that it was enough to show that the reason for dismissal was the age of the officers. Age, it was contended, was a protected personal characteristic which went to the core of a person’s identity. Once it was shown that it was that which led to the Claimants’ dismissal, their cases were said inevitably to engage Section 9 and to require consideration under Section 16, which makes specific reference to discrimination on the grounds of age. Mr. Jupp, for the Appellants, did not flinch from the proposition that, if he was right, every case of mandatory retirement on the grounds of age fell within the scope of Article 8 and Section 9 and required justification, though in many cases, he accepted, such justification would not be difficult to establish for social and economic reasons.
26. In *Denisov* the court amplified what it meant by the reason-based approach, giving as examples dismissal by reason of sexual orientation (104) from the armed forces (*Smith and Grady v UK* ECHR 1999-VI) and concluded:

“106. As can be seen from these examples, the underlying reasons for the impugned measure affecting professional life may be linked to the

individual's private life and these reasons themselves may render article 8 applicable”.

27. It was essential to Mr. Jupp’s argument that age could be likened to gender or sexual orientation. In *Boyratz v Turkey* (2015) 60 E.H.R.R.30 a woman was dismissed from her position as a security officer in the Batman branch on the basis of her gender:

“... a measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person’s identity, self-perception and self-respect and, as a result, his or her private life. The Court therefore considers that the applicant’s dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life (see, mutatis mutandis, Smith and Grady v the United Kingdom, nos. 33985/96 and 33986/96, § 71, ECHR 1999-VI). Besides, the applicant’s dismissal had an impact on her “inner circle” as the loss of her job must have had tangible consequences for the material well-being of her and her family (see Volkov, cited above, § 166). The applicant must also have suffered distress and anxiety on account of the loss of her post. What is more, the applicant’s dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practise a profession which corresponded to her qualifications (see Sidabras and Džiautas, cited above, § 48; Volkov, cited above, § 166;). Thus, the Court considers that Art. 8 is applicable to the applicant’s complaint [44]”.

28. If the personal characteristic of age could be likened to the personal characteristic of gender, by analogy with *Boyratz*, Section 9 was engaged in the instant appeals. The submission, accordingly, turns on whether it is possible to view gender as analogous to

age or whether there is an important distinction between the two, if one or other of those personal characteristics led to dismissal from work.

29. It is well established that age is a personal characteristic which the courts place in a different category to such characteristics as gender or sexual orientation. Courts do not afford the same protection against age discrimination as they do against discrimination on the basis of, for example, race or gender. Race and gender are ‘suspect’ grounds; if there has been discrimination on such a basis courts have either taken the view that discrimination can never be justified or require a high degree of justification. Age is subject to a “*much more relaxed “rational basis”*” (Lord Hoffmann in *Matadeen v Pointu* [1999] 1 AC 98 at 110 E-F). Lord Hoffmann expanded his views in *R(Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37:

“[15] Characteristics such as race, caste, noble birth, membership of a political party and...gender are seldom, if ever, acceptable grounds for difference in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that art.14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that of the Fourteenth Amendment to the Constitution of the United States, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification Massachusetts Board of Retirement v Murgia (1976) 427 US 307

[16]. There are two important consequences of making this distinction. First discrimination in the first category cannot be justified merely on utilitarian grounds eg that it is rational to employ men rather than women because women more than men give up employment to

look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand differences in treatment in the second category (eg on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.

[17] *There may be borderline cases in which it is not easy to allocate the ground of discrimination to one category or the other and, as I have observed, there are shifts in the values of society on those matters. Ghaidan v Mendoza [2004] UKHL 30 recognised that discrimination on the grounds of sexual orientation was now firmly in the first category. Discrimination on grounds of old age may be a contemporary example of a borderline case. But there is usually no difficulty about deciding whether one is dealing with a case in which the right to respect for the individuality of a human being is at stake or merely a question of general social policy.”*

30. The question of age as a ground for discrimination was pursued by Lord Walker:

“[60] *Age is a personal characteristic, but it is different in kind from other personal characteristics. Every human being starts life as a tiny infant, and none of us can do anything to stop the passage of the years.There is nothing intrinsically demeaning about age.....In relation to normal retirement ages lines have to be drawn somewhere, as Massachusetts Board of Retirement v Murgia (1976) 427 US 307 explains.”*

31. In *Massachusetts Board of Retirement (supra)* the United States Supreme Court considered the compatibility of a statutory retirement age of 50 in the State Police with the Fourteenth Amendment which requires equal protection of the laws. The Supreme Court explained why age as a basis for discrimination is different to a “suspect ground” such as race or national origin:

“While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a “history of purposeful unequal treatment” or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life. But even old age does not define a ‘discrete and insular’ group...in need of “extraordinary protection from the majoritarian political process”. Instead it marks a stage each of us will reach if we live out our normal span.”

32. In *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16, the Supreme Court adopted a similar approach to justification as that which the Court in the US had taken in considering a complaint against a compulsory retirement age of a solicitor partner contrary to the *Employment Equality (Age) Regulations 2006*:

“3. ...But it will be seen from recital 25 (of the Equality Directive 2000/78/EC) that the European legislators considered that age discrimination might be justified by factors which had nothing to do

with the characteristics of an individual but had to do with broader social and economic policy. These factors would not justify direct discrimination on the ground of any of the other protected characteristics, so why should age be different?

4. *The answer must be that age is different. As Ms Rose put it on behalf of the Secretary of State, age is not 'binary' in nature (man, woman, black or white, gay or straight) but a continuum which changes over time....This means that younger people will eventually benefit from a provision which favours older employees, such as an incremental pay scale; but older employees will already have benefitted from a provision which favours younger people, such as mandatory retirement age."*

33. These authorities establish, as *British Gurkha Welfare Society and Ors v UK* Appln. No. 4418/11 put it, that "*discrimination on grounds of age should not be equated with other "suspect" grounds of discrimination*" (paragraph 88). Compulsory retirement on the grounds of age is miles away from the dismissal on the grounds of gender in *Boyras*. Such retirement says nothing about the individual qualities of claimant officers; it does not have a bearing in any way on those personal characteristics which require particular protection, such as gender or sexual orientation. It is not even possible to equate mandatory retirement on the grounds of age with dismissal at all. A dismissal directed at a particular individual on the grounds of that person's age and on the grounds of consequential lack of capability may engage Article 8 but a blanket retirement policy does not. For those reasons, since there were no particular and serious individual consequences suffered, I conclude that Section 9 is not engaged and, accordingly the gateway to Section 16 has not been opened.

Nationality

34. Dismissal on grounds of nationality is, however, a different matter. The Appellants point to the undisputed fact that, until 9 September 2016, Caymanian non-gazetted officers appointed before 22 November 2010 had to retire at 55 and could only be re-appointed at the rank of constable, whereas United Kingdom officers who were recruited to serve in the Cayman Islands were not required to retire at 55 and were allowed to remain in service at their existing rank.
35. There can, in my view, be no doubt that to dismiss on the grounds of nationality would engage Section 9: nationality is plainly a “*suspect ground*” of discrimination and, adopting the *Denisov* categorization in relation to employment, to require an employee to cease work on the grounds of their nationality should be equated with dismissal on the grounds of gender or sexual orientation. In *Bigaeva v Greece* 26713/05, Article 8 was violated when a Russian national’s pupillage at the Greek Bar was terminated, after she was mistakenly allowed to enter pupillage (a prohibition on non-nationals becoming pupils was held not to violate Article 14 read with Article 8). Accordingly it seems to me clear that Section 9 is engaged. The essential issues, therefore, in relation to the distinction between Cayman non-gazetted officers and those recruited from the United Kingdom relate to discrimination and justification.
36. The Appellants submit that there is no material difference between the service they perform and the services undertaken by their British colleagues. Five British officers had been recruited prior to the coming into force of the 2010 law, all of whom were engaged on terms which permitted them to continue above the rank of constable beyond the age of 55.
37. Hall JA considered the position of all five: Bryan was recruited to the Criminal Investigation Department and reached the rank of Inspector; McLoughlin an Inspector was appointed to the Investigative Training department as a specialist in September 2009;

he undertook training and reviewed “cold cases”; Oliver and Walkington were recruited to a new Police Anti-Corruption Unit; and Brellisford, was a Firearms Training Inspector with 30 years’ experience. The finding of the judge was that not only did they have training and experience which was unique in the Islands but “*there had been no local candidates who could have been employed to undertake those roles*” (Judgment para 215).

38. Whilst the Appellants accept that these United Kingdom officers were recruited on special terms, they contend that their service was analogous to their own service; once recruited, they say that there was no reason not to apply the same rules as to retirement and re-engagement. They point to Caymanian officers, for example the third Plaintiff, a specialist firearms officer with specialist skills, who were not spared the disadvantages of the retirement and re-engagement policies.

39. It does seem that the Commissioner himself objected to the requirement that Caymanian officers should retire at 55, whereas those recruited from overseas were not. In an internal e-mail, to the head of Human Relations, he gave his views as to the compulsory retirement age of 55:

“...Wes Howell...has been seeking an amendment to the legislation that currently requires that local officers on local contracts being required to retire at 55 yrs. of age. That makes no sense to me, yet it is the current law.

.....

Your application of a standard 55 age, therefore is discriminating and divisive to current practices. I would hope this anomaly in the law will be amended in the proposals...” (3/9/2013).

40. This seems to me, part of an attempt by the Commissioner to persuade the Executive to reform the law relating to Caymanian officers rather than any acceptance that those hired externally should be regarded as being in a similar situation to non-gazetted Caymanian officers. That the Commissioner regarded those recruited, normally from the United Kingdom, as falling within a distinct category, is demonstrated by his witness statement dated 10 August 2016. This describes four specialist officers recruited from the United Kingdom in circumstances where:

“there were no suitably qualified local candidates to fill a specific vacancy that had arisen within the force” (paragraph 19).

“Those officers were offered short fixed periods of service. When those special contracts expired, the question whether there was any local officer who had developed the necessary skills and training to take the externally recruited officer’s place was re-assessed” (paragraph 21).

41. Accordingly, there was ample evidence to support the judge’s conclusion that the reason why externally recruited officers were out with the retirement and re-engagement regime applicable to locally recruited officers, was not attributable to their nationality at all; it was because they fulfilled requirements which could not be satisfied by recruitment from within the Islands. These factual circumstances lead me to the conclusion that the category of non-gazetted Caymanian officers should be regarded as dissimilar to the category of those recruited to specialist positions from abroad; the two cases are not alike and to distinguish between them cannot be regarded as discriminatory.

42. Alternatively, if the two categories are to be regarded as similar, then there was ample justification for treating them in a dissimilar fashion because they provided services which could not at that time be provided by non-gazetted Cayman officers.

43. Often, in the field of discrimination it is difficult but unimportant to determine whether the case in issue is one of discrimination or justification, since the reasons for regarding the proposed comparator as dissimilar are often the same as the reasons for regarding the alleged discrimination as justified. In *AL (Serbia) v Home Secretary*[2008] 1 WLR 1434, Baroness Hale cited with approval Feldman in *Civil Liberties and Human Rights in England and Wales*:

“The way the court approaches it is not to look for identity of position between different cases but to ask whether the applicant and the people who are treated differently are in ‘analogous situations’. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with questions about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe.... ‘in most instances of the Strasbourg case law...the comparability test is glossed over, and the emphasis is (almost) completely on the justification test’” (paragraph 25).

Baroness Hale concludes:

“ unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification” (paragraph 25)

44. This is such a case. Specialist police were recruited from abroad where no such specialism could be found in the Cayman Islands; either that places them in a distinct category or it justified the difference in treatment.

Discrimination on the Grounds of Age

45. In light of my conclusion that the retirement policy did not engage Section 9, it is not essential to consider whether, if it did, there was discrimination contrary to Section 16 or whether, if there was, it was justified. The judge, in the light of her conclusions, made no determination of those matters. But it does seem to me I should venture some conclusions, should this matter go further.
46. The Respondents denied that they had been guilty of discrimination; they said that the treatment of those made to retire at 55 was not less favourable and that, in any event, every non-gazetted officer would, sooner or later, reach 55 and have to retire.
47. In my view, had Section 9 been engaged those who remained subject to the retirement and re-engagement policies after the effective date of 22 November 2010 were subject to discrimination which the Respondents would have had to justify.
48. Once the Law was amended to make a distinction between those appointed before 22 November 2010 and those after that date, who were permitted to remain in service until they were 60, it seems plain to me that there was a difference in treatment of those in an analogous situation based on the identifiable characteristic of age. In *Palacios De La Villa v Cortefiel Servicios SA* [2007] IRLR 989 the ECJ held a compulsory retirement age of 65 to be discriminatory and thus requiring justification, under the Equality Directive 2000/78. There was discrimination between workers who had reached 65 and the rest of the labour force although compulsory retirement at 65 was justified for the purposes of regulating the national labour market. The Court said:

“51 National legislation such as that at issue in the main proceedings, according to which the fact that a worker has reached retirement age laid down by that legislation leads to automatic termination of

his employment contract must be regarded as directly imposing less favourable treatment for workers who have reached that age as compared with all other persons in the labour force. Such legislation, therefore, establishes a difference in treatment directly based on age, as referred to in Article 2(1) and (2)(a) of Directive 2000/78”.

The Supreme Court followed this approach in *Seldon* (q.v.supra) and, on the basis that the partners’ retirement policy was discriminatory, directed its attention to the issue of justification. In the instant case, the retirement policy for non-gazetted officers, after 22 November 2010, discriminated against those who had attained the age of 55 but had been appointed before that date.

Justification

49. As I have already recorded, the judge reached no *obiter* conclusion as to justification. There was no dispute as to the approach to be adopted for determining whether the retirement policy was justified for the purposes of Section 16(4)(d) of the Bill of Rights. The Respondents accepted that the Court should provide a similar level of protection as that with which the European Convention cloaked the characteristic in issue (see *Rodriguez v Minister of Housing of Gibraltar* [2009] UKPC 52, Gibraltar’s constitution contains within its section 14(4)(e) a provision similar to Cayman’s Section 16(4)(d)).

50. This court would, therefore, have had to consider:

- “(i) *whether its objective is sufficiently important to justify the limitation of a fundamental right;*
- (ii) whether it is rationally connected to the objective;*
- (iii) whether a less intrusive measure could have been used;*

(iv) *whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community” (Bank Mellat v HM Treasury (No.2) [2014] AC 700 per Lord Sumption at [20].”*

It would also have had to bear in mind that age, not being a “suspect” characteristic, for the reasons already advanced, questions of social and economic policy might readily be deployed to justify the retirement policy (see *Palacios* at paragraph 52 and *Seldon* at paragraph 4).

51. It is instructive to see how closely, in the case of a solicitors’ partnership, the court analysed the justification for a retirement policy at 65 in *Seldon*, despite the recognition of the importance of a balanced and diverse workforce (paragraph 62). The court had to consider whether retirement at 65 was appropriate and necessary to achieve that legitimate aim (paragraph 62); the history of the rule was also relevant, whether a partner had benefitted from such a rule in the past and that rule had been considered to be fair, and whether it could be justified for the purpose of the business in question (paragraph 66). It is relevant to note that that case was remitted to consider whether it was proportionate to impose a retirement age of 65 as opposed to some other age (paragraph 68).
52. In the instant case, the Respondents advance a number of grounds of justification both in their written argument and, by a Respondents’ Notice, served during the course of the hearing at the invitation of the Court. The Respondents identify career progression, the need to ensure fitness for physically demanding tasks and the maintenance of an efficient force by incentivizing young officers. Additionally, the Respondents stress that once the retirement age of 60 was proposed the first respondent, the Royal Cayman Islands Police Association, was concerned to preserve the right of those appointed before the change in the Law to retire at 55. It was as a result of their representations that the right to retire at 55 was preserved (see 1st Respondent’s statement paras 7 and 8).

53. In my view these contentions fall wide of the mark; none of those grounds have force once the Law was changed and there was no compulsory retirement at 55 for those who were recruited after 22 November 2010. The reasons become even more difficult to justify when the Law was changed again in 2016. The Appellants accept, or at least do not seek to dispute justification for such a blanket policy when the retirement age of 55 applied to all non-gazetted officers. I am willing to speculate that, if detailed contemporary evidence had been produced justifying a gradual change, and a progressive introduction of a more advanced retirement age, it might have been possible to justify retaining the lower age for those who had been in service before November 2010. But that evidence would have had to disclose careful analysis of the numbers of officers involved and the forecasts as to effects of retention and recruitment and, doubtless, other considerations. No such evidence has been disclosed. The court is thus left with the stark fact that no justification has been advanced for refusing to allow those in service earlier to choose to remain longer, retaining their former rank. If it was the concern of the Commissioner to meet the request of the Police Association to preserve the rights of those who had expected to be allowed to retire at 55, no reason has been advanced why they could not have been given a choice.
54. For those reasons, had it been necessary to decide the issue, I would have concluded that the retention of compulsory retirement at 55, once those entering service later were allowed to retire at 60, was not justified.

Section 19 - The Re-Engagement Policy

55. With tactical astuteness, Mr. Jupp impugns the rationality of the re-engagement policy as a free-standing ground of complaint. Section 19 provides:

“(1) All decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair.”

56. The judge concluded that a blanket policy which only permitted the Commissioner of Police to re-engage non-gazetted officers at the rank of Constable would not be rational, *“it would not speak to the ability of the Commissioner of Police to determine the needs of the police force”* (Judgment 254):

“Such a policy with no room for exception would constitute a breach of s.19 of the Bill of Rights” (255).

But she found that there was no such blanket policy because an Officer Scott was contracted to work as a Sergeant after the age of 55 and that, accordingly, there was no *“across-the-board”* policy.

57. That one officer has been discovered who was allowed to retain his rank after retirement seems to me to be beside the point. The existence of a unique exception does not deny the existence of a policy, still less provide evidence of its rationality.
58. That there was a policy cannot be denied. The Commissioner himself accepted its existence and he confirms it in his written evidence and in the evidence he gave before the judge. In his first witness statement he says that officers re-engaged after retirement age were *“expected to return at the rank of constable or below”* (para 10). One exception was discovered and disclosed in the Commissioner’s second statement. PS Scott’s case was unique because he was the longest serving member of the RCIPS and his services were required to head a *“small, pro-active team”* (paragraphs 6 and 7). The judge records the Commissioner’s evidence that PS Scott was in a unique position (Judgment paragraph 99). Emails dated 20 September 2012 and 10 December 2012 confirm the policy and the Appellants were themselves told that they could only be re-appointed as constable *“as per the usual conditions”*.

59. No further evidence is needed to prove that there was a rigid policy: there was no suggestion that in each case the Commissioner exercised any discretion in respect of individual officers as to their appropriate rank on re-engagement. It was that very absence of the exercise of any judgment as to the qualities of the re-engaged and the needs of the force which led the judge to conclude that the policy was irrational. There is no suggestion that any officer was told they might be re-engaged at a higher rank, should they wish to seek re-engagement. To find one exception does not in any way demonstrate that, in general, the Commissioner did exercise any judgment in individual cases. On the contrary the Commissioner attempts to justify the rationality of the policy, not to dispute its existence.
60. In their written argument the Respondents argued that the re-engagement policy was an attempt to avoid undermining a mandatory retirement policy while minimizing its financial impact. This court invited a late Respondents' Notice, served after the oral argument was concluded. The Appellants objected, with justification, at so late an attempt to dispute the judge's conclusion and at being forced to file a response so late in the day, particularly when there have been no findings by the judge as to the relevant evidence in light of her conclusion.
61. I accept the Appellants' submission that it would be wrong for this court to dispute the judge's conclusion as to the rationality of the re-engagement policy on the basis of evidence as to which there have been no findings. If this was, as the Appellants contend, a free-standing point, I would not have hesitated to uphold the judge's conclusion.
62. But in my view it is far from being a free-standing point. The re-engagement policy ought not be considered separately from the mandatory retirement policy. It is a consequence of it and has no effect save to those subject to the mandatory retirement rule: it was merely designed to ameliorate its consequences. No-one could be subject to it unless made to retire on reaching 55 or, subsequently, 60.

63. For that reason, if a non-gazetted officer was lawfully forced to retire, as I would conclude, it is not possible to consider amelioration of that situation as unfair or irrational. It merely put officers in a better position, should they seek re-engagement, than that into which they had lawfully been placed. If the rule by which they had been retired had been unlawful because it was in breach of Section 16 of the Bill of Rights, then there would have been no need to invoke Section 19; re-engagement merely mitigated the loss. In short, the attempts by the Respondents to ameliorate the position of officers who would otherwise be cast from the Force, is not a distinct or free-standing issue.

64. I should mention that there were questions of standing raised by the Respondents in the cases of the Third and Eleventh Appellants' challenges to the re-engagement policy. In light of my conclusions nothing turns on the issue. If it had, I would have decided that Section 26 does require plaintiffs to be directly affected. I would also have concluded that neither were directly affected by the policy since, as the judge found, the Third Appellant would not have been re-engaged and the Eleventh had taken up different public service.

65. For those reasons, I would dismiss these appeals.

MARTIN, JA

I agree.

RIX, JA

I also agree.

