of Directive 2000/78 prohibiting *inter alia* age discrimination, the criteria laid down in Article 6(1) might not be satisfied by section 13(2). Article 6(1) is a derogation from the principle of equal treatment and so should be narrowly construed (cf Case C-236/09 *Van Vugt* [2011] ECR I-000). It provides that (i) *Member States may provide* that differences of treatment on grounds of age shall not constitute discrimination, if, (ii) *within the context of national law*, (iii) they are objectively and reasonably justified by a legitimate aim, including *legitimate employment policy*, *labour market and vocational training objectives*, and (iv) if the measures are proportionate. The statutory DRA of 65 appeared to satisfy this test, as the CJEU indicated in Case C-388/07 *Heyday* [2009] ECR I-000. However, with the repeal of the DRA and the related legislation by SI 2011/1069, are criteria (i) and (ii) still satisfied? More generally, are "legitimate employment policy" objectives (criteria (iii)) something that an *employer* (as opposed to the state) can invoke?

Now it may well be that the repeated references by the UK government to an EJRA in the July 2010 consultation paper, the impact assessment and ACAS's Guide are enough to satisfy criteria (i) and (ii), providing the "general context" of the EJRA (Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, para. 57 although *cf*. AG Mazak who thought some national legislation was actually needed, para. 82). For many employers, it is crucial that this argument works. Take, for example, the university environment. Budgetary cuts and a recruitment freeze have meant that departments do not enjoy the luxury of one out, one in. Rather, it is a case of one out and two or three years later another one in. In the absence of an EJRA, there will be even fewer "out" and so even fewer "in" (as in the US where at Harvard, for example, faculty over 60 outnumber those under 50). For those not wishing to retire voluntarily, performance management would be the only solution in order to secure renewal of the academic population; and this would be both resource-intensive and unpopular. It might also contravene notions of academic freedom. An EJRA, combined with a more flexible "duty to consider" procedure, seems the only solution, at least in the short to medium term, while employers have a chance to adapt their systems to the demands of the new, hastily introduced, legal order. The Court of Appeal's decision in *Seldon* is therefore crucial in facilitating this transition.

CATHERINE BARNARD

IT IS TIME, CHARTER, RISE AND SHINE

MORE than ten years ago, the European Council set the task of endowing the Union with a written bill of rights in order to make these

https://doi.org/10.1017/S0008197311000468 Published online by Cambridge University Press

rights more visible to the Union's citizens. The EU Charter of Fundamental Rights was proclaimed by the institutions in 2000 as a solemn political declaration. It brings together in a single document a number of civil, political, and socio-economic rights, most of which were already recognised and protected in the EU through the case law of the Luxembourg Courts. One of the major reforms introduced by the Treaty of Lisbon was to grant the Charter full legal force. Under new Article 6(1) TEU, it now enjoys the same legal value as the Treaties. But what is the significance of upgrading the Charter to a binding legal instrument? The long-awaited answer of the Court of Justice of the EU came with the joined Cases of *Volker* (C-92/09) and *Eifert* (C-93/09) (Judgment of 9 November 2010, not yet reported).

The cases arose out of the rules governing the financing of expenditure falling under the Common Agricultural Policy (CAP). The applicants in the main proceedings objected to the publication of their personal data on the internet as recipients of funds under the CAP. At the centre of the dispute was the validity of Articles 42 and 44a of Council Regulation No. 1290/2005 (O.J. 2005 L209) as amended by Council Regulation No 1437/2007 (O.J. 2007 L 322) and Commission Regulation No 259/2008 (O.J. 2008 L 76) requiring Member States to publish on the internet the details of all beneficiaries of agricultural funds, including their name and address and the amount awarded to them under the relevant funds.

The Court of Justice took Article 6(1) TEU as its starting point. In those circumstances, it concluded, the validity of the legislation "must be assessed in light of the provisions of the Charter" [at para. 46]. Applying those provisions, it found that the legislation breached Article 8(1) of the Charter on the right to protection of personal data and Article 7 on the right to respect for private life. The measures under challenge were provided for by law and pursued an objective of general interest, namely transparency in the use of public funds. They failed, however, the proportionality test. The Court conceded that such publication increased transparency (the suitability test). But even if important economic interests were at stake, this objective could not take automatic priority over the right to protection of personal data. Instead, the institutions had to find an adequate balance between the two. On the facts of the case, there was no evidence that such a balancing exercise had been performed. Nor had the institutions showed that less restrictive measures could not have been envisaged (the necessity test). Going even further, the Court found that the institutions failed to draw appropriate distinctions between beneficiaries using criteria such as the duration, frequency or nature and amount of aid received. The measures were however annulled only with regard to their application to natural persons. In relation to legal persons, the

https://doi.org/10.1017/S0008197311000468 Published online by Cambridge University Press

general publication of data did not go beyond the limits imposed by the principle of proportionality.

The use of the Charter to test the validity of secondary legislation marks a turning point in the case law of the Court. Prior to Lisbon, the Charter was cited occasionally by the EU judiciary, but it never served as a ground for judicial review. Most significantly, the judgment implies that from now on, the Charter is to be used as the primary source of fundamental rights protection in the EU. In her opinion, Advocate General Sharpston made parallel use of the ECHR and the Charter, using the latter to supplement her findings. By focusing solely on the Charter, the Court appears to have rejected this approach. The Court acknowledged that, in cases of overlap between the Charter and the ECHR, Articles 52(3) of the Charter requires Charter rights be given the same meaning and scope as corresponding Convention rights. But beyond this substantive "cross-fertilisation", the Charter, not the ECHR, was used as the main reference point.

The annulment of secondary legislation for breach of the Charter is equally remarkable and suggests that when human rights are at stake, the Charter may have some subtle effects on the balance of powers in the EU to the benefit of the Courts. The EU judicature usually adopts a deferential approach to the institutions' exercise of discretionary powers and has been traditionally reluctant to invalidate legislation. By contrast, in *Volker* and *Eifer*, the Court not only applied an intensive standard of review – it was actually prepared to substitute its own judgement for that of the political institutions regarding the appropriate balance to be struck between the requirements of transparency and fundamental rights.

With the EU's accession to the Convention drawing nearer, the Court is perhaps anxious to ensure a high level of fundamental rights protection while safeguarding the EU legal order as an independent source of rights and its own autonomy vis-à-vis the Strasbourg Court. But the Court's approach is not unproblematic. Article 6(1) does not place the Charter above other sources of fundamental rights in the EU. On the contrary, Article 6(3) preserves the parallel existence of fundamental rights, including Convention rights, as general principles of EU law. In addition, the Charter is not meant to create new rights or extend the powers of the Courts under the Treaties. In that regard, the UK Protocol may not be entirely worthless after all: it will prevent an over-expansionist application of the Charter from being extended to the UK.

Volker and *Eifert* remains however a significant ruling. For the first time, the Charter has been used to review, and annul, secondary legislation. The Court can start unveiling the full implications of a legally binding Charter. And clearly, it is only the beginning. In a case which is

https://doi.org/10.1017/S0008197311000468 Published online by Cambridge University Press

bound to have profound consequences for the insurance industry (Case C-236/09, judgment of 1 March 2011, not yet reported), the Charter provisions on the principle of equal treatment between men and women caught in their fatal net Article 5(2) of Council Directive 2004/113/EC (OJ 2004 L 373) which allowed Member States to maintain gender based differences in the calculation of premiums and benefits in insurance contracts. The Charter's time has definitely come. After ten years in a semi-lethargic state, it can now rise and shine.

EVA NANOPOULOS

EXTENDING CITIZENSHIP AND THE SCOPE OF EU LAW

THE Court of Justice of the EU has delivered in *Ruiz Zambrano* (Case C-34/09, not yet reported) an important decision on citizenship of the Union and the scope of EU law.

Mr. Ruiz Zambrano and his wife are Colombian nationals; together with their first child, they arrived in Belgium in 1999 and applied for asylum. Their requests were rejected, but the family was not sent back to Colombia due to the critical situation there. Instead, their presence was temporarily tolerated in Belgium. For many years, they tried to regularise their situation by applying for residence permits, but their applications were rejected. Since 2001, and although he did not have the necessary work permit, Mr. Ruiz Zambrano worked full time and contributed to the social security system. In the meantime, Mr. Ruiz Zambrano and his wife had two more children, both born in Belgium and thus of Belgian nationality. When the authorities found out that Mr. Ruiz Zambrano was working without a work permit, he had to stop. He was also unable to get unemployment benefits. According to the Belgian authorities, Mr. Ruiz Zambrano had no right of residence and, accordingly, no right to work or to related benefits.

Mr. Ruiz Zambrano argued before the national court, first, that he should have a right of residence in Belgium because his two younger children, who are Belgian and have never left the country, are EU citizens; and secondly, that he should be able to work legally in Belgium for the same reason – otherwise, the whole family (including the two children who are EU citizens) would have to leave the country.

This case concerns the proper definition of the scope of EU law: when are economically inactive citizens within the scope of EU law, and thus able to derive rights from it? Due to the division of competences between Member States and the Union, the reach of EU law is limited and a situation needs to fall within the scope of the Treaties for EU law to apply, or be "triggered". According to the orthodoxy, the

https://doi.org/10.1017/S0008197311000468 Published online by Cambridge University Press