Judicial retirement age – putting the rationale on record

by Stephen Hardy

Recently the Chair of the Judicial Appointments Commission, Lord Kakkar, has called on Parliament to "revisit" the statutory retirement age for judges, currently set at 70 years old. However, he added:

> *This needs to be done in a rational way, it needs proper debate but at the end of the day we need to secure and retain talent in the judiciary, to get good people coming in, develop them along the way so they are stimulated in the job they do, and serve for as long as possible (https://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news-parliament-2015/lord-kakkar-jac-march2017/).*

This adds to the recent comments of the retired, Lord Neuberger, formerly President of the Supreme Court, who is in favour of changing the retirement rules, given that in his view "…the retirement age has resulted in a huge loss of experience and talent" (https://www.theguardian.com/law/2017/mar/29/allow-judiciary-to-work-until-75-says-britains-most-senior-judge).

Notwithstanding these high profile pleas for change, it appears that we have forgotten the existing rule's rationale. The Judicial Pensions and Retirement Act 1993, in force since 29 March 1993, sought to strengthen the mandatory retirement provisions previously instituted by the Judicial Pensions Act 1959 for members of the British judiciary. While the 1959 Act forbade service past age 75 by any judges appointed thereafter, the 1993 Act made the ordinary retirement age 70, expressly forbidding persons aged over 75 to hold any judicial post whatsoever – the only exception being the post of Lord Chancellor.

RATIONALE FOR THE JUDICIAL RETIREMENT AGE

Parliament's reasoning in 1993 was that judges should not sit beyond 70 years of age in order to produce a consistency to the judicial retirement system (https://publications.parliament.uk/pa/cm199293/cmhansrd/1992-12-03/Debate-7.html). In fact, the age of 70 was settled on by the government of the day following consultations between the then Lord Chancellor and senior members of the judiciary. However, this new retirement age only applied to judges first appointed to office after the commencement of the relevant provisions (ie 31 March 1995). As such, any judge first appointed to judicial office prior to 31 March 1995 is not required to retire until reaching 75.

Yet, this reasoning was questioned in 2012 by Parliament's Constitution Committee (https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27210.htm), when it was declared that the judicial retirement age has a direct impact on appointments as it affects the frequency by which posts become available and the age at which individuals may be appointed to new posts. It considered a general judicial retirement age of 70 as "a blunt tool by which to assess whether someone is no longer fully capable of performing their job"

IS THE CURRENT POLICY DISCRIMINATORY?

In light of the Equality Act 2010 arguably there is a case to be made for having no set retirement age at all. However, the principle of judicial independence necessarily makes it very difficult to force a judge to retire on the grounds of declining capacity to act.

However, should retiring judges consider bringing age discrimination claims they face the hurdle of the exception to age discrimination found in section 191 and Schedule 22 of the Equality Act 2010. This provides that an employer will not contravene an age discrimination provision if it does anything it must do pursuant to a requirement of an enactment. By virtue of section 212 EA 2010, this includes an Act of Parliament. The specific applicable requirement relied on would be section 26 of Judicial Pensions and Retirement Act 1993.

Whilst prospective judicial age discrimination claimants might arguably assert that section 26 of the 1993 Act does not amount to a requirement for the purposes of Schedule 22 because it is not absolute, as exceptions may be made and that section 26 of the 1993 Act conflicts with the Equal Treatment Framework Directive 2000/78/EC, the enforcement of a retirement age of 70 cannot be justified so section 26 JUPRA must be dis-applied. These arguments have been litigated before and lost. Essentially, section 26 of the 1993 Act is undoubtedly a requirement for the purposes of Schedule 22 of the 2010 Equality Act. Alternatively, in terms of objective justification, the policy considerations for the compulsory retirement age apply. Accordingly, for the purposes of Article 6(1) of the Directive, as settled by Baroness Hale in Seldon v Clarkson Wright & Jakes [2012] UKSC 16 the objective

justification is met by:

(i) promoting and preserving judicial independence by having a single retirement age rather than individual decisions in each case;

(ii) maintaining public confidence in the capacity and health in the judiciary; and,

(iii) workforce planning, namely ensuring that there is an appropriate number of judges at the necessary levels of seniority.

These justifications remain intact, post the recent Supreme Court ruling and reference to the Court of Justice of the EU in in O'Brien v MOJ [2017] UKSC 46. [2013].

NO NEED TO REVISIT THE RETIREMENT RULES

Much of the problem of determining the most appropriate age for retirement is a result of the current requirement for a uniform retirement age. Despite the clear need to introduce some consistency across the judiciary which was recognised in 1993, different considerations might apply to the senior appellate courts than to the lower level courts and tribunals. The public perception of this dilemma is critical. For instance, is it in the public interest for judges to serve beyond the age of 70, given that the normal retirement age was set at 67? For some other professions – such the police and pilots – traditionally it may be less. So, why should the judiciary be any different?

Although, as Lords Kakkar and Neuberger intimate, an increased retirement age could be viewed as particularly beneficial to those who started on their judicial career later in life. This argument again applies more to the senior judiciary: it is simply not possible for some individuals to reach the highest levels of the judiciary, however talented or experienced they might be, because their career paths have taken too long. Yet, the latter problem might be redressed by new diverse recruitment strategies, as currently being deployed by the Judicial Appointments Commission. Notably, Lord Collins was required to retire from the Supreme Court in May 2011 having served as a member of the highest court for only over two years. Whilst this is an acknowledged loss of talent in the senior judiciary, new recruitment strategies would resolve that problem. After all, extending the service of the senior judiciary could result in judicial "job blocking" and/or lack of succession planning could indirectly cause harm to an independent judiciary, as identified as long ago as 2007 (https://publications.parliament.uk/pa/cm200607/cmbills/065/en/07065x-c.htm).

Plainly, it is in the public interest that senior judges of proven judicial quality are appointed and retained in the appellate courts. Moreover, a diverse judiciary through a more progressive appointments policy alongside more judicial career development and/or succession planning would certainly resolve the current concerns.

That is the rationale behind the current retirement age. Therefore, to that end, there would seem no need to revisit the judicial retirement rules.

Professor Stephen Hardy

Coventry University Law School