



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF FERRERO QUINTANA v. SPAIN

(Application no. 2669/19)

JUDGMENT

Art 1 P12 • General prohibition of discrimination • Age-limit of 35 years set for open competitive examination to recruit police officers of lowest rank • Operational and executive duties performed by such police officers requiring particularly high level of physical fitness, assessed in light of years of service remaining after recruitment • Difference in treatment on grounds of age appropriate to objective of ensuring operational capacity and proper functioning of police service concerned and not beyond what was necessary for achieving that objective • Wide margin of appreciation • Relevant and sufficient reasons

Prepared by the Registry. Does not bind the Court.

STRASBOURG

26 November 2024

FINAL

28/04/2025

*This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.*

In the case of Ferrero Quintana v. Spain,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georgios A. Serghides, *Acting President*,

Georges Ravarani,

María Elósegui,

Darian Pavli,

Peeter Roosma,

Andreas Zünd,

Frédéric Krenc, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 2669/19) against the Kingdom of Spain lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Spanish national, Mr Asier Ferrero Quintana (“the applicant”), on 24 December 2018;

the decision to give notice to the Spanish Government (“the Government”) of the application on 2 September 2019;

the parties’ observations;

Having deliberated in private on 2 November 2021 and 8 October 2024,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The case concerns the upper age-limit of 35 years set for an open competitive examination to fill several police officer posts in the police force of the Autonomous Community of the Basque Country. The applicant was authorised on a provisional basis to take part in that examination despite being above the age-limit in question. He passed the various tests, but was ultimately not recruited on the grounds that he was over the age-limit. Before the Court, he submitted that the medical examinations and physical fitness tests he had undergone had confirmed that he was fit to hold the post in question. He had therefore been discriminated against on grounds of age, which constituted a violation of Article 1 of Protocol No. 12 to the Convention.

THE FACTS

2. The applicant was born in 1978 and lives in Basauri. He was represented by Mr J. García Espinar, a lawyer.

3. The Government were represented by Ms H.E. Nicolás Martínez, Co-Agent of the Kingdom of Spain to the European Court of Human Rights.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicant applied to take part in an open competitive examination, announced on 1 April 2014, to fill 60 police officer posts of the lowest rank (*escala básica*) in the Autonomous Community of the Basque Country's police force (known as the *Ertzaintza*). One of the eligibility requirements was that candidates had to be over 18 and under 35 years of age at the time of application.

6. Even though the applicant had turned 35 the previous year, he and others in the same situation (that is, a total of 750 candidates) were authorised on a provisional basis to take part in the competitive examination. The provisional measure concerned candidates who were over the set upper age-limit but fulfilled the other eligibility requirements. The final decision on their participation in the competitive examination would be contingent on the ruling of the competent courts in a pending action, which another candidate aged over 35 years had initiated to challenge the validity of the age-limit criterion. The applicant brought no proceedings at that stage. Following the adoption of the provisional measure, he took part in all tests.

7. The competitive examination comprised three successive phases, all of which were compulsory and eliminatory. The first phase involved "shortlisting" candidates through tests, the second consisted in 9 months of training and the third was 12 months of work placement. The initial phase was made up of five eliminatory tests, namely:

Test 1: test of knowledge.

Test 2: psycho-technical test comprising four exercises.

Test 3: psycho-technical test comprising two personality tests related to the job profile of the post to be filled.

Test 4: physical fitness test comprising four exercises.

Test 5: individual interview intended to assess candidates' behavioural skills and ability to perform the duties and tasks in the job profile of the post concerned.

8. Following the tests in the first phase, the applicant was among the 6,595 candidates to be shortlisted for one of the 60 posts to be filled. Since he was ranked 49 out of 60, he was authorised – still on a provisional basis – to take part in the subsequent phases of the competitive examination, namely training (which he attended from 7 January 2015 to September 2015) and work placement (from 21 September 2015 to 21 September 2016).

9. However, on 19 December 2016, following his training and work placement (that is, at the end of the competitive examination), his candidature was finally rejected on the grounds that he was over 35 years old. The provisional measure that had allowed him to take part in the competitive examination pending the court ruling on the validity of the age-limit (see paragraph 11 below) had expired.

10. The applicant initiated a special procedure for protecting fundamental rights, complaining that he had been discriminated against in relation to his right of equal access to public employment because he had been disqualified solely on account of his age. He argued that the decision to set such an age-limit was arbitrary, unreasonable and disproportionate. He relied on Articles 9 § 3, 14 and 23 § 2 of the Spanish Constitution and on Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (“Directive 2000/78/EC”).

11. In a judgment of 9 February 2017 (judgment no. 69/2017, procedure for protecting fundamental rights no. 710/2014), the Administrative Division of the High Court of Justice of the Basque Country dismissed the applicant’s action. It first pointed out that it had requested a preliminary ruling from the Court of Justice of the European Union (CJEU) on 20 May 2015 as part of proceedings brought by another candidate in the same open competitive examination (proceedings which had resulted in the measure authorising candidates aged over 35 years to take part in the competitive examination on a provisional basis – see paragraph 6 above and paragraph 46 below). In that connection, it specified that its decision to refer the matter to the CJEU was partly based on the fact that the age-limit was different for other Spanish police forces, such as the *Guardia Civil*, where it was 40 years, and the National Police (*Cuerpo Nacional de Policía*), where it corresponded to the age of retirement. The age-limit for joining the Basque Country police force could not, however, be compared with that for joining national police forces, because the national services fell within the jurisdiction of the State and not of the Autonomous Community. Lastly, the Constitutional Court had established that all criteria for access to public employment should have an objective, reasonable justification and take into account the principles of equality and proportionality. They therefore had to be formulated in general, abstract and non-discriminatory terms based solely on the principle of merit- and skills-based selection. Those criteria, the High Court of Justice of the Basque Country held, had been met in the case before it as a result of the legislation on the conditions for access to police officer posts of the lowest rank in the Autonomous Community of the Basque Country’s police force. This had been confirmed by the CJEU judgment, which had found that the legislation in question did not breach Directive 2000/78/EC. On the basis of the above-mentioned arguments, the Administrative Division of the High Court of Justice of the Basque Country rejected the applicant’s action.

12. The applicant appealed on points of law against the judgment of the Administrative Division of the High Court of Justice of the Basque Country of 9 February 2017. In a decision of 5 October 2017, the Supreme Court declared the appeal inadmissible on the grounds that it would make no objective contribution to the development of its case-law. On 4 December

2017 it further declared inadmissible an action brought by the applicant to have those proceedings annulled.

13. The applicant then lodged an *amparo* appeal with the Constitutional Court, complaining of a violation of his fundamental rights to equality and to non-discrimination in access to public employment, as provided for in Articles 14 and 23 § 2 of the Spanish Constitution. He argued that the measure setting an age-limit of 35 years for entry to the Basque Country police force was irrational and disproportionate. First, it deprived fully capable candidates of the possibility of accessing such roles. Second, it was applied across the board, without taking into account the various types of roles that could be performed within that police force.

14. In a decision delivered on 21 June 2018 and notified to the applicant on 25 June of the same year, the Constitutional Court declared the applicant's *amparo* appeal inadmissible on the grounds that it had no constitutional relevance.

15. The applicant's application form was received by the Court on 3 January 2019.

16. In late 2016 a reserve list (*bolsa de trabajo*) for temporary police officer posts in Basque Country local police forces had been drawn up so that shortlisted and trained individuals could be made available to municipalities in the region as needed. The applicant had been included because he had completed the training and work-placement phases of the competitive examination for *Ertzaintza* police officers. Between January 2018 and June 2019 he was thus employed as a temporary public servant, discharging his duties within the local police force of the town of Sestao.

17. Following the entry into force of a legislative amendment in July 2019 (Law no. 7/2019 of 27 June 2019 on a fifth amendment to the Basque Country Police Act), the age-limit in issue was raised from 35 to 38 years (see paragraph 22 below). The new provision also applied to candidates who had passed the 2014, 2015 and 2016 open competitive examinations but had been refused a post on account of their age. As a result, the applicant was appointed as an *Ertzaintza* police officer on 6 September 2019.

18. On 3 November 2022 the applicant informed the Court that he had not been able to take part in the open competitive examination for promotion to the second-rank (*escala de inspección*) category of sub-officer (*suboficial*) of the *Ertzaintza*, which had been published on 4 May 2022, since he had not fulfilled the minimum length of service in that police force (namely four years). He had experienced the same issue in the context of a professional-development programme launched in August 2021, where the minimum length of service had been set at five years. He argued that the damage resulting from the refusal to recruit him to the *Ertzaintza* in December 2016 on account of his age should therefore be assessed in the light of his subsequent inability to apply for the competitive promotion examination and the professional-development programme in question.

RELEVANT DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The Spanish Constitution

19. The relevant provisions of the Spanish Constitution read:

Article 14

“All Spanish citizens are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.”

Article 23

“...

2. They shall also have the right of equal access to public office and employment, subject to the requirements laid down by law.”

Article 103

“...

3. The law shall set the rules governing public servants and regulate access to public employment in accordance with the principle of merit- and skills-based selection ...”

B. Domestic legislation

20. Institutional Law no. 2/1986 of 13 March 1986 on State security forces and services lays down the powers of the police forces of the Autonomous Communities as follows:

Section 38

“The Autonomous Communities ... may perform the following duties through their police forces:

1. Within the scope of their powers:

(a) ensuring compliance with special regulations and orders issued by bodies of the Autonomous Community;

(b) guarding and protecting persons, institutions, buildings, offices and premises of the Autonomous Community and its administrative authorities, ensuring the normal operation of facilities and the safety of users of their services;

(c) inspecting activities that are subject to the legislation of the Autonomous Community, reporting any unlawful activity;

(d) using force for the enforcement of measures or provisions adopted by the Autonomous Community.”

21. The relevant sections of Law no. 4/1992 of 17 July 1992 on the police in the Basque Country (“the Basque Country Police Act”), which was applicable at the material time, read:

Section 26(1)

“Within the powers exercised by the Autonomous Community of the Basque Country, the essential mission of the *Ertzaintza* [the Basque regional police] is to protect people and property, to ensure that individuals can freely exercise their rights and freedoms and to ensure the safety of citizens throughout the territory of the Autonomous Community. To that end, the *Ertzaintza* shall perform the duties conferred by the legal system on the State security forces.”

22. Law no. 7/2019 of 27 June 2019 on a fifth amendment to the Basque Country Police Act raised the maximum age for joining the *Ertzaintza* from 35 to 38 years (see paragraph 17 above). The amended criterion was also enshrined in Legislative Decree no. 1/2020 of 22 July 2020 approving the consolidated Basque Country Police Act, which lays down the following conditions:

Article 77 – Entry by open competitive examination

“1. To be eligible for the selection tests of the open competitive examination for entry as a public servant to the Basque Country police force, candidates shall fulfil the conditions set out in the legislation governing Basque public employment, along with the following specific conditions:

(a) Be at least 18 years of age. For recruitment as a police officer, candidates must be under 38 years of age or have served in another Basque Country police force.

(b) Not have been convicted of a criminal offence or dismissed from a government department, or have been disqualified or suspended from working in the public service, without prejudice to any reinstatement granted, in accordance with criminal and administrative regulations.

(c) Hold the qualifications required for the relevant category of post.

(d) Not suffer from a disqualifying medical conditions set by regulation.

(e) Be of the minimum height set by regulation, which shall be different for men and women.

(f) Commit, by means of a declaration, to carrying weapons and to using them if necessary.

(g) Hold a driving licence for the vehicle category specified in each call for applications.

(h) Meet any other specific requirements that are objectively related to the duties and tasks to be performed, as provided for in the call for applications.

2. The above-mentioned conditions shall be fulfilled by the application deadline, except for the condition set out in sub-paragraph (g), which shall be fulfilled by the date specified in each call for applications.”

23. The relevant provisions of Royal Legislative Decree no. 5/2015 of 30 October 2015 approving the consolidated General Public Employee

Regulations Act (*Ley del Estatuto Básico del Empleado Público*), as in force at the relevant time, read:

Article 1 – Purpose

“1. The purpose of this Act is to provide the basis for the rules governing public servants falling within its scope.

2. It is further intended to set the rules applicable to other staff of government departments.

3. It reflects the following fundamental principles of action:

...

(b) equality, merit and skills with regard to access [to public employment] and promotion;

...

(f) efficient human-resources planning and management;

(g) continuing professional development and training for public employees;

...”

24. The relevant provisions of Law no. 62/2003 of 30 December 2003 on measures relating to tax, administration and labour, as in force at the material time, read:

Section 34 – Scope of Part 3.a.

“1. The purpose of the present Part is to set measures to ensure that the principle of equal treatment and non-discrimination is genuinely and effectively applied to access to employment; membership and participation in trade unions and employers’ associations; working conditions; promotions; occupational and continuing training; access to self-employment and professional practice; and membership and participation in any organisation whose members practise a specific profession.

2. For the purposes of the preceding paragraph, the principle of equal treatment shall entail the absence of any direct or indirect discrimination based on an individual’s racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Differences of treatment which are based on a characteristic related to any of the grounds referred to in the [first] paragraph shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.”

25. Police forces in Spain are organised into three levels, corresponding to the three basic administrative divisions of the State. First, at national level, the State security forces and services fall under the authority of the central government and comprise the National Police and the *Guardia Civil*. Second, at regional level, some Autonomous Communities have their own police forces, such as the *Ertzaintza* in the Basque Country, the *Mossos d’Esquadra* in Catalonia, the *Policía Foral Navarra* in Navarre and the *Cuerpo General*

de la Policía Canaria in the Canary Islands. And third, at local level, the police forces fall within the remit of the local authorities. There is therefore no single rule on the maximum age for admission to competitive examinations for recruitment to the police forces and security services. The maximum age and other eligibility requirements such as height, state of health, qualifications and administrative authorisations (a specific driving licence, for example) differ both from police force to police force and within each police force itself, depending on the specific rank and category concerned by the post in question, the applicable regulations and, in particular, the specific characteristics of the post and the duties involved.

26. In any event, a number of amendments have been made in recent years – by means either of primary and secondary legislation or of case-law – revealing a certain trend towards raising or even abolishing the maximum age for entry to such institutions (see paragraphs 31-43 below).

27. With more specific regard to the *Ertzaintza*, the maximum age for access to police officer posts of the lowest rank was raised from 30 years (in 1994) to 32 years (in 2002), then to 35 years (in 2010 – the applicable limit when the applicant applied to take part in the competitive examination) and finally to 38 years (in 2019).

C. Domestic case-law

1. Case-law of the Constitutional Court concerning age-limits for access to public employment

28. The Constitutional Court has on several occasions been asked to rule on whether setting an age-limit for access to a public post was contrary to the principle of equality enshrined in Articles 14 and 23 § 2 of the Spanish Constitution.

29. In judgment no. 37/2004 of 11 March 2004, the Constitutional Court found that Article 135 (b) of Royal Legislative Decree no. 781/1986 of 18 April 1986 approving the amended statutory provisions in force on local government, was unconstitutional. The Article in question set a maximum age for admission to tests for local public posts (“be at least ten years younger than the compulsory age-related retirement age, as determined by the legislation on public employment”). The Constitutional Court considered that the age-limit in question, which applied across the board to all local government departments, was not justified. It specified that the right of equal access to public employment “[did] not prohibit the legislature from taking into consideration candidates’ age”, among other personal circumstances, and that “a legislative decision which, in view of this differentiating factor and the characteristics of the job in question, objectively [set] age-limits making access to such job impossible for anyone who exceed[ed] them” was legitimate. It found it inappropriate, however, to “set a maximum age for access to public employment in general”.

30. In judgment no. 29/2012 of 1 March 2012, the Constitutional Court was called upon to determine whether the Andalusian Local Police Coordination Act could impose an age-limit for access to posts within the relevant local police forces under the internal-mobility system. As it stood, the Act did not allow applications from local police officers who would be eligible for reassignment to less physically demanding duties (*segunda actividad*, or “modified active service”) in less than ten years. The Constitutional Court held that the age-limit in question was justified because opening access to those posts to public servants close to the age of such a reassignment would have a detrimental effect on the public interest.

2. *Case-law of the ordinary courts concerning age-limits for entry to regional and national police forces and to the armed and security forces*

31. In some judgments delivered in recent years (particularly since 2011), the Supreme Court has set aside the upper age-limits indicated in the calls for applications for various armed and security forces at both national and regional levels. Other courts have also set aside such provisions. No ban has been placed on setting an upper age-limit for entry to certain institutions, particularly police and security forces, but the age-limit in question must be justified, as assessed on a case-by-case basis. The domestic courts have thus found that setting an age-limit for admission to certain competitive examinations was in breach of the legal requirements because it lacked sufficient justification in the light of the particular circumstances of the case (relating, for example, to specific duties or to the grounds alleged in the proceedings before them). In other cases, the Supreme Court has found that the grounds relied on to justify an age-limit were sufficient and therefore lawful with regard to access to various categories of posts within the institutions in question.

(a) **Regional police forces: *Ertzaintza* and *Mossos d’Esquadra***

32. With regard more specifically to the *Ertzaintza*, the High Court of Justice of the Basque Country held in five judgments that the upper age-limit of 35 years required to access police officer posts of the lowest rank was lawful in the context of the respective calls for applications in 2014 (judgment delivered in relation to the applicant’s action – see paragraph 11 above), 2015 (judgment no. 46/2018 of 26 January 2018, appeal no. 595/2015, and judgment no. 894/2018 of 14 February, appeal no. 256/2015) and 2016 (judgment no. 3689/2018, appeal no. 325/2016, and judgment no. 3690/2018, appeal no. 355/2016, both dated 21 November 2018).

33. With regard to the *Mossos d’Esquadra*, the Supreme Court upheld the decisions of the lower courts in three judgments (judgment no. 441/2006 of 31 January 2006, appeal no. 2202/2000; judgment no. 3965/2006 of 28 June

2006, appeal no. 846/2000; and judgment no. 6510/2009 of 28 September 2009, appeal no. 4433/2005), finding that there was no justification for setting an upper age-limit of 40 years for access to third-rank (*escala ejecutiva*) posts in the *Mossos d'Esquadra*. Nothing prevented officers of that rank from carrying out their duties from such age until retirement. The selection tests, which included physical and medical tests, further made it possible to detect any unfitness for duties within that regional police force, regardless of age. In consequence, the age-limit requirement in the contested notices of competitive examination was set aside.

34. However, in view of the CJEU's assessment in its preliminary ruling of 15 November 2016 in *Salaberría Sorondo* (C-258/15, EU:C:2016:873), the Supreme Court departed from its own case-law in judgment no. 1321/2017 of 5 April 2017 (appeal no. 1709/2015), confirming the validity of the upper age-limit of 30 years for access to the posts of corporal and guard in the *Guardia Civil* (see paragraph 43 below). That ruling was followed by other judgments in which the Supreme Court, once again applying the European line of case-law, held that the age-limits in various calls for applications and regulations in dispute were lawful. In judgment no. 3422/2017 of 25 September 2017 (appeal no. 2637/2015), for example, it upheld the age-limit of 33 years for entry to the local police forces of a number of municipalities in the Autonomous Community of Castile and León – even though the CJEU's preliminary ruling concerned only the *Ertzaintza*. In judgment no. 928/2023 of 15 March 2023 (appeal no. 1702/2022) concerning the age-limit for access to police officer posts of the lowest rank in the *Ertzaintza* and entry to Basque Country local police forces, the Supreme Court expressly stated that it had departed from its previously established doctrine following the CJEU judgment in case C-258/15. In the light of its new doctrine, the Supreme Court found that it had not been shown that the age-limit in dispute should be raised further. At the material time, that age-limit was set at 38 years – that is, higher than the age-limit of 35 years complained of in the CJEU case. In reaching its finding, the Supreme Court had considered not only the short period of time that had elapsed between the call for applications dealt with in the CJEU decision and the call for applications it was examining (that is, five years, from 2014 to 2019), but also the reports on *Ertzaintza* workforce ageing which had been submitted to the CJEU and which emphasised the need to gradually replace the staff in question with younger recruits. Lastly, the Supreme Court considered that the CJEU's assessment of the physical capacity required to carry out a certain occupation, as performed in the *Wolf* case (C-229/08, EU:C:2010:3) in relation to a professional fire service (see paragraph 47 below), applied equally to local police forces and the *Ertzaintza*.

(b) National Police

35. As regards the National Police, the Supreme Court held in a judgment of 21 March 2011 (judgment no. 2185/2011, appeal no. 184/2008) that the age-limit of 30 years set in an external competitive examination for recruitment to the category of third-rank inspector did not comply with the statutory requirements. It considered that the resulting difference in treatment on grounds of age could not be objectively and reasonably justified. In this connection, it noted that (i) the maximum age for external recruitment to third-rank inspector posts for individuals who were already members of the National Police was 35 rather than 30 years; and (ii) no age-limit was imposed when such individuals obtained the posts in question through internal promotion. It followed that age was not an obstacle to the performance of the duties assigned to third-rank inspectors of the National Police. The Supreme Court thus held that the upper age-limit was not genuine and determining for the performance of the duties devolved to that organisation and, consequently, that it was not objectively and reasonably justified. The age-limits provided for in Article 7 (b) of Royal Decree no. 614/1995 of 21 April 1995 approving the regulations on national-police selection and training processes were set aside as a result. The Supreme Court subsequently delivered several other judgments concerning the age-limit requirement for access to third-rank officer posts in the National Police.

36. On the basis of similar reasoning, the Supreme Court thus concluded that the age-limit of 30 years required for external recruitment to police officer posts of the lowest rank (*escala básica*) in the National Police should be set aside because it was not objectively and reasonably justified. In the ruling in question (judgment no. 8585/2011 of 16 December 2011, appeal no. 158/2010), it considered that the setting aside ordered in the judgment of 21 March 2011 (see paragraph 35 above), which concerned the age-limit for entry to the National Police as provided for in Article 7 (b) of Royal Decree no. 614/1995 of 21 April 1995, made no distinction between lowest-rank and third-rank posts. The same finding therefore applied to both situations, because in neither case (lowest-rank or third-rank post) could it be objectively and reasonably justified that (i) the age was a genuine and determining occupational requirement for the performance of the assigned duties, (ii) the age-limit in question pursued a legitimate objective, and (iii) that age-limit was proportionate in that specific case. That case-law has also been applied in judgments delivered by the ordinary courts (such as judgment no. 5350/2012 of 24 February 2012 of the Madrid High Court of Justice, appeal no. 665/2009).

(c) Armed forces

37. With regard to the armed forces, the Supreme Court held in a judgment of 9 May 2014 (appeal no. 529/2012) that the upper age-limit of

31 years set for external recruitment to three army corps – namely the supply corps, the army legal corps and the intervention corps – had not been duly justified. It thus set that age-limit aside, finding that the army corps in question did not require any particular level of physical fitness. As a result, there was no legitimate objective justifying a maximum age. Nor could the measure be regarded as necessary and proportionate.

38. The Supreme Court did, however, find it justified to set a maximum age for internal promotion to officer posts in the armed forces (judgment no. 2940/2011 of 4 April 2011, appeal no. 129/2010). Although setting a maximum age was not justified in itself, the needs of the armed forces in such cases rendered it necessary for any individual, in order to be promoted to officer, to have been with the organisation for a sufficiently long time and yet still have enough years of career ahead of him or her to be able to carry out the duties in question before reaching retirement age.

39. In another judgment (judgment no. 214/2016 of 28 January 2016, appeal no. 480/2014), the Supreme Court also allowed the age-limit of 31 years set for internal promotion to the category of officer of the general or marine infantry corps. It referred to the 2014 CJEU judgment in *Vital Pérez* (C-416/13, EU:C:2014:2371 – see paragraph 48 below), in which the age limit of 30 years for entry to the local police force in Oviedo (Spain) had been found to be disproportionate. However, it noted that the requirement submitted to it for examination did not relate to a local police force and that, consequently, both the legal framework and the structure and needs of the corps concerned differed from those in issue in that CJEU judgment. It then endorsed the position of the public authorities, according to which the long-term staffing needs of the armed forces required the career advancement of professional military personnel to be based on experience and merit. Accordingly, sub-officers could be promoted to the rank of officer only at an age which would allow them to fill certain other posts over their careers, depending on the needs of the army corps in question.

40. On 30 May 2012 (judgment no. 3842/2012, appeal no. 63/2010), the Supreme Court found that the upper age-limit of 29 years set for entry to the soldier and marine corps of the armed forces was justified, in view of their short- and long-term needs. As in the judgment discussed above (see paragraph 39 above), those needs called for the greatest possible number of staff with significant experience, which could be acquired only through long periods in the armed forces. The Supreme Court thus held that the introduction of that age-limit was intended to promote staff retention in the armed forces, an objective it regarded as legitimate on account of its direct link to the structural needs of the army corps concerned. The age-limit in question further met the proportionality requirement.

41. In judgment no. 728/2022 of 3 March 2022 (appeal no. 237/2021), however, which concerned the internal promotion of sub-officers, with or without a degree, to officer posts in the general corps and the marine infantry,

the Supreme Court held, contrary to the solution adopted in the judgment of 28 January 2016 (see paragraph 39 above), that the age-limits set by royal decree at 38 and 34 years respectively were not objectively or scientifically justified in the relevant instruments. It accordingly set them aside.

(d) *Guardia Civil*

42. Lastly, with respect to the *Guardia Civil*, a military police corps, the Supreme Court initially applied the criterion established in judgment no. 2185/2011 of 21 March 2011 (see paragraph 35 above). Accordingly, in judgment no. 4216/2015 of 14 October 2015 (appeal no. 969/2013) and judgment no. 5489/2015 of 24 November 2015 (appeal no. 3269/2014), it set aside the age-limits of 30 years set in the notices of competitive examination issued respectively for access to the fourth rank (*escala facultativa superior*) and for access to the posts of corporal and guard in that police corps.

43. However, in judgment no. 1321/2017 of 5 April 2017 (appeal no. 1709/2015), the Supreme Court confirmed the validity of the upper age-limit – also set at 30 years – in notices of competitive examination for the same types of posts as those dealt with in the aforementioned 2015 judgments. While acknowledging that the facts of the case before it were identical to those on which it had ruled in its above-cited judgment of 24 November 2015, the Supreme Court considered that account had to be taken of the CJEU’s Grand Chamber finding that the setting of a maximum age of 35 years for access to posts of the lowest rank in the *Ertzaintza* was not discriminatory under Directive 2000/78/EC (see paragraph 46 below). The Supreme Court therefore applied the same criteria as the CJEU and held that the duties of *Ertzaintza* police officers of the lowest rank and *Guardia Civil* corporals and guards required optimum physical fitness and that the structural needs of both institutions justified the setting of a maximum age of entry, without that being considered disproportionate to the objectives pursued. Accordingly, the maximum age of 30 years set for access to the posts of corporal and guard in the *Guardia Civil* was compatible with the law and the Spanish Constitution.

II. EUROPEAN UNION LAW AND PRACTICE AND CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

44. The Charter of Fundamental Rights of the European Union (OJ 2012/C 326/02), in so far as relevant, prohibits discrimination in the following terms:

**Article 21(1)
Non-discrimination**

“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion,

membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

...”

45. The relevant provisions of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, pp. 16-22) read:

... Whereas:

“(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.”

**Article 1
Purpose**

“The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.”

**Article 4
Occupational requirements**

“1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

...”

**Article 6
Justification of differences of treatment on grounds of age**

“1. Notwithstanding Article 2(2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary.

Such differences of treatment may include, among others:

...

(c) the fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement.”

46. In a judgment of 15 November 2016 in *Salaberria Sorondo* (C-258/15, EU:C:2016:873), the CJEU, dealing with the aforementioned request for a preliminary ruling (see paragraph 11 above), found that legislation which provided that candidates applying for police officer posts of the lowest rank in a police force such as the *Ertzaintza* had to be under 35 years of age did not breach European Union (EU) law, and more specifically Directive 2000/78/EC. It reiterated that, under Article 4(1) of that Directive, “a difference of treatment which [was] based on a characteristic related to any of the grounds referred to in Article 1 [of the Directive in question] [did] not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they [were] carried out, such a characteristic constitute[d] a genuine and determining occupational requirement, provided that the objective [was] legitimate and the requirement [was] proportionate”.

The CJEU considered that the possession of particular physical capacities was one characteristic relating to age and that the duties relating to protection of people and property, the arrest and guarding of offenders and preventive patrolling could require the use of physical force. It also noted that the nature of those duties required a particular level of physical capability in so far as physical inadequacies in the exercise of those duties could have significant consequences not only for the police officers themselves and the community but also for the maintenance of public order. It concluded that the possession of particular physical capacities in order to be able to perform the three essential duties of the *Ertzaintza* could be considered to be a genuine and determining occupational requirement for the pursuit of the profession of police officer of the Autonomous Community of the Basque Country. It also found that the legitimate objective of preserving the operational capacity and proper functioning of police services was important. It had based its decision in that regard on data showing that police officers who were more than 55 years old could no longer be considered to be in full possession of the capabilities necessary for the proper performance of their duties, without any risk to themselves and to third parties, and on an estimate by the Spanish authorities that in 2025 more than 50% of *Ertzaintza* staff would be between 55 and 65 years old.

Lastly, the CJEU accepted that the inadequacies to be feared in the operation of the police service of the Autonomous Community of the Basque Country were such that it was not conceivable that, as part of a competitive recruitment examination, the organisation of demanding, eliminatory physical tests might constitute a less restrictive alternative. It considered that since the objective was to maintain the operational capacity and proper functioning of the police force of the Autonomous Community of the Basque Country, that objective required that, with a view to re-establishing a satisfactory age pyramid, the possession of particular physical capacities should be envisaged not statically, solely at the time of the tests for the

competitive recruitment examination, but dynamically, taking into consideration the years of service that had to be accomplished by a police officer after his or her recruitment. It concluded that the requirement that candidates for posts of police officers of the Autonomous Community of the Basque Country had to be under 35 years of age could be regarded, first, as being appropriate to the objective of maintaining the operational capacity and proper functioning of the police force concerned and, second, as not going beyond what was necessary for the attainment of that objective.

The relevant parts of that judgment read:

“34. The possession of particular physical capacities is one characteristic relating to age and the duties relating to protection of people and property, the arrest and guarding of offenders and preventive patrolling may require the use of physical force ...

35. The nature of those duties requires a particular level of physical capability in so far as physical inadequacies in the exercise of those duties may have significant consequences not only for the police officers themselves and third parties but also for the maintenance of public order ...

36. It follows that the possession of particular physical capacities in order to be able to perform the three essential duties of the police of the Autonomous Community of the Basque Country described in [section] 26(1) of Law [no.] 4/1992, namely ensuring the protection of people and property, ensuring that each individual can freely exercise his or her rights and freedoms, and ensuring the safety of citizens, may be considered to be a genuine and determining occupational requirement, within the meaning of Article 4(1) of Directive 2000/78, for the pursuit of the profession at issue in the main proceedings.

...

38. In that regard, in paragraphs 43 and 44 of the judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371), after observing that recital 18 of Directive 2000/78 states that the directive does not require police services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services, the [CJEU] held that the concern to ensure the operational capacity and proper functioning of police services constitutes a legitimate objective within the meaning of Article 4(1) of that directive.

...

40. However, the duties performed by the police forces of Autonomous Communities differ from those carried out by the local police, the latter being at issue in the case that gave rise to the judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371). Accordingly, it must be recalled that local police officers are responsible, in particular, under [section] 53 of [Institutional] Law [no.] 2/1986, for ensuring protection of the authorities of local municipalities and guarding of their buildings, controlling and directing traffic in city centres, erecting road signs, and performing administrative police tasks. However, it is clear from [section] 26(1) of Law [no.] 4/1992 that the police of the Autonomous Community of the Basque Country ‘has [as its] essential mission ... to protect people and property, to ensure that individuals can freely exercise their rights and freedoms and to ensure the safety of citizens throughout the territory of the Autonomous Community’.

41. As the Academy stated at the hearing before the [CJEU], a police officer of the lowest rank in the Autonomous Community of the Basque Country, the rank for which the [competitive examination] at issue in the main proceedings was organised, does not carry out administrative duties, but performs essentially operational duties, which, as also observed by the Advocate General in point 35 of his Opinion, may imply recourse to physical force and the performance of tasks in conditions where taking action is difficult, if not extremely difficult. For the performance of purely administrative duties, members of staff are, based on the information provided by the Academy, recruited by means of specific [competitive examinations], which do not lay down any age limit.

42. The Academy maintained before the [CJEU] that, as is apparent from the reports annexed to its written observations, from the age of 40 onwards, the operational performance of police officers of the Autonomous Community of the Basque Country declines, as reflected by reduced recovery capacity after sustained effort and an inability to perform any other similarly demanding task until a period of time has passed. Further, according to the same reports, a police officer who is more than 55 years old can no longer be considered to be in full possession of the capabilities necessary for the proper performance of his duties, without any risk to himself and to third parties.

43. Further, the Academy explained that police officers of the Autonomous Community of the Basque Country qualify for a statutory reduction in annual time worked, as from the age of 56 years, and are not required to work at night or to undertake patrols outside police stations ('modified active service'), and a police officer who qualifies for such arrangements undertakes, on a voluntary basis, to retire at the age of 60 or, in some cases, at the age of 59.

44. It must, last, be stated that, according to the data submitted by the Academy, in 2009, that is, just before the introduction, in Decree 315/1994, of the age limit at issue in the main proceedings, the police forces of the Autonomous Community of the Basque Country consisted of 8000 police officers. At that time, 59 of those police officers were between 60 and 65 years old and 1399 were between 50 and 59 years old. The Academy added that, according to forecasts made in 2009, in 2018, 1135 police officers will be between 60 and 65 years old, and 4660 police officers, in other words more than half of the staff, will be between 50 and 59 years old. In 2025 more than 50% of police officers will be between 55 and 65 years old. On the basis of that data it can accordingly be anticipated that the average age of staff of that police force will rise significantly.

45. In the light of such data, the Academy emphasised the necessity of planning, by means of [competitive examinations], a gradual replacement of older agents through the recruitment of younger staff, better equipped to take on physically demanding tasks. In this respect, this case can again be distinguished from the case that gave rise to the judgment of 13 November 2014, *Vital Pérez* (C-416/13, EU:C:2014:2371), where, as is stated in paragraph 56 of that judgment, it had not been established that the objective of safeguarding the operational capacity and proper functioning of the local police service made it necessary to maintain within it a particular age structure, which would have required the recruitment exclusively of public servants under 30 years of age.

46. It follows from all the foregoing that the duties incumbent on the lowest rank of police officers of the Autonomous Community of the Basque Country include tasks that are physically demanding. The Academy has also argued that the age at which a police officer of the Autonomous Community of the Basque Country is recruited determines the length of time over which he is capable of performing such tasks. A police officer recruited at the age of 34, when he will, it should be added, have to undergo training over a period of around two years, will be suitable for assignment to those tasks for a maximum period of 19 years, that is, until he reaches the age of 55. That being the case,

recruitment at a higher age would jeopardise the possibility of assigning a sufficient number of agents to the most physically demanding tasks. Likewise, such recruitment would mean that officers thus recruited could not be assigned for a sufficiently long period to those tasks. Last, as explained by the Academy, the rational organisation of the police service of the Autonomous Community of the Basque Country requires that a balance is struck between the number of physically demanding posts, not suitable for older police officers, and the number of posts that are less physically demanding, which can be occupied by older police officers (see, by analogy, judgment of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3, paragraph 43).

47. Moreover, as the Advocate General stated in point 38 of his Opinion, the inadequacies to be feared in the operation of the police service of the Autonomous Community of the Basque Country are such that it is not conceivable that, as part of a [competitive recruitment examination], the organisation of demanding, eliminatory physical tests might constitute a less restrictive alternative. Since the objective is to maintain the operational capacity and proper functioning of the police service of the Autonomous Community of the Basque Country, that objective requires that, with a view to re-establishing a satisfactory age pyramid, the possession of particular physical capacities should be envisaged not statically, at the time of [competitive recruitment examination] tests, but dynamically, taking into consideration the years of service that can be accomplished by a police officer after he or she has been recruited.

48. It follows that legislation such as that at issue in the main proceedings, which provides that candidates for posts of police officers of the Autonomous Community of the Basque Country must be under 35 years of age, may, subject to the qualification that the referring court should satisfy itself that the assorted information to be obtained from the observations and documents submitted to the [CJEU] by the Academy and described above is accurate, be regarded, first, as being appropriate to the objective of ensuring the operational capacity and proper functioning of the police service concerned and, second, as not going beyond what is necessary for the attainment of that objective.”

47. According to the case-law of the CJEU, the setting of a maximum age for recruitment may breach EU law, in the light of Articles 4 and 6 of Directive 2000/78/EC, if it is not justified by a legitimate objective or if the requirement is not proportionate. The CJEU has applied those criteria in several cases, including the one that resulted in the judgment on the competitive examination in issue in the present case (see paragraph 46 above). In the Grand Chamber judgment of 12 January 2010 in *Wolf* (C-229/08, EU:C:2010:3), the CJEU found that the maximum age of 30 years set for certain posts in the fire service of Frankfurt am Main (Germany) did not breach EU law, and more specifically Directive 2000/78/EC. It made the following observations. First, the aim pursued by the age-limit was to guarantee the operational capacity and proper functioning of the professional fire service, an objective it considered legitimate. Second, the possession of especially high physical capacities could be regarded as a genuine and determining occupational requirement for carrying on the occupation of a person in the intermediate career of the fire service. Third, the need to possess full physical capacity to carry on the occupation of a person in that career of the fire services was related to the age of the persons. And fourth, it could thus be considered necessary for the majority of officials in that career to be

able to perform physically demanding tasks. The consequences of recruitment at an older age would be that a large a number of officials could not be assigned to the most physically demanding duties, and that newly recruited officials could not be assigned to those duties for a sufficiently long period. Accordingly, the CJEU found that the setting of the maximum age for recruitment to intermediate career posts in the fire service at 30 years was appropriate to the objective of ensuring the operational capacity and proper functioning of the professional fire service and did not go beyond what was necessary to achieve that objective. The measure did not therefore breach Directive 2000/78/EC.

48. In the judgment of 13 November 2014 in *Vital Pérez* (C-416/13, EU:C:2014:2371), the CJEU conversely found that the age-limit of 30 years for admission to a competitive examination to recruit local police officers in Oviedo (Spain) constituted a disproportionate requirement and thus breached EU law. In reaching that conclusion, it examined the nature of the tasks assigned to local police officers in the case under consideration, finding that the capacities needed to be able to perform them were “not all ... comparable to the ‘exceptionally high’ physical capacities” that were regularly required in the fire service, most notably in fighting fires. It observed that the physical tests held as part of the competitive examination to fill local police officer posts were sufficient to ensure the appropriate level of physical fitness required for the performance of the professional duties, in a less binding manner than the fixing of a maximum age. Moreover, the CJEU found that it had not been established that the objective of safeguarding the operational capacity and proper functioning of the local police service in question made it necessary to maintain a particular age structure, which in turn required the recruitment exclusively of officials under 30 years of age. In prescribing such an age-limit, the legislation in dispute thus imposed a disproportionate requirement for the purposes of Article 4 of Directive 2000/78/EC. Moreover, under Article 6 of that Directive, the impugned legislation could not be regarded as appropriate and necessary in the light either of the objective of ensuring the training of the officers concerned, or of the objective of ensuring that local police officers had a reasonable period of employment before retirement.

THE LAW

ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 12 TO THE CONVENTION

49. The applicant complained about the refusal, solely on account of his age, to recruit him following an open competitive examination to fill several police officer posts within the police force of the Autonomous Community of the Basque Country. That was despite having passed the physical and medical

tests and having thereby demonstrated the required level of physical fitness. He relied on Article 1 of Protocol No. 12 to the Convention, which reads:

“1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

A. Admissibility

1. *Objection concerning an abuse of rights*

50. The Government submitted that the applicant had infringed Rule 47 § 7 of the Rules of Court and that the application was thus inadmissible. The applicant had not informed the Court of information they alleged to be crucial for the handling of the application. He had thereby acted unfairly and in a manner contrary to the principle of good faith. In particular, the applicant had not informed the Court that he had been appointed to the post of police officer in the *Ertzaintza* on 6 September 2019.

51. The applicant disputed that assertion. He had informed the Court of that fact in a letter dated 6 December 2019. In any event, it would have made no sense for him to hide such a fact from the Court.

52. The Court reiterates that under Article 35 § 3 (a) of the Convention, an application may be rejected as an abuse of the right of individual application if, among other reasons, it is knowingly based on untrue facts. The submission of incomplete and thus misleading information may also amount to an abuse of the right of application, especially if the information concerns the very core of the case and no sufficient explanation has been provided for the failure to disclose that information. The same applies if important new developments have occurred during the proceedings before the Court and where, despite being expressly required to do so by Rule 47 § 7 of the Rules of Court, the applicant has failed to disclose that information to the Court, thereby preventing it from ruling on the case in full knowledge of the facts. However, even in such cases, the applicant’s intention to mislead the Court must always be established with sufficient certainty (see *Dimo Dimov and Others v. Bulgaria*, no. 30044/10, § 42, 7 July 2020).

53. Applying the above principles, the Court observes that the facts as presented by the Government cannot be regarded as an abuse of the right of individual application. This is because in a letter of 6 December 2019, which was subsequently provided to the respondent State, the applicant informed the Court of the following:

“[W]hile the candidates who were unjustifiably discriminated against on the grounds of their age in the 2014 and 2015 selection procedures and who successfully made it through the process have recently been admitted into the police force (without any

acknowledgment by the authorities of unlawful discriminatory treatment), several years after the completion of those selection procedures, some of the discriminatory effects resulting from the initial discriminatory treatment continue to be felt over time, and very serious, significant damage (pecuniary and non-pecuniary) has been caused by the discriminatory treatment experienced by the above-mentioned candidates ...”

It has therefore not been established that the applicant deliberately attempted to conceal information concerning the very core of the case. The objection of inadmissibility on the grounds of abuse of the right of individual application must therefore be dismissed.

2. *Objection concerning loss of victim status*

54. The Government submitted that the applicant could no longer claim to be a victim of a violation of the Convention. They therefore requested that the application be declared inadmissible. The applicant had lost his victim status the day he had been appointed a police officer, that is, on 6 September 2019.

55. The applicant submitted that the alleged discrimination had had several consequences that continued to be felt. In particular, three years had passed before his appointment as a police officer, and that delay had caused him to miss out on several training, promotion and specialisation opportunities within the *Ertzaintza*. Lost wages for the period and his court fees and expenses also had to be taken into account.

56. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of the status as a “victim” within the meaning of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. Furthermore, the redress afforded must be appropriate and sufficient. This is dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake (see *Dimo Dimov and Others*, cited above, § 53).

57. In accordance with these principles, the Court must ascertain, first, whether the authorities acknowledged the Convention violations with respect to the applicant and, second, whether they afforded him appropriate and sufficient redress. In this connection, the Court observes that the applicant was ultimately appointed to the post of police officer following a legislative amendment, but that the authorities did not acknowledge any violation of the Convention in his respect. Nor was he afforded any redress. The Court therefore considers that the applicant has not lost his victim status.

3. *Objection concerning the absence of a significant disadvantage*

58. The Government submitted that the applicant had not suffered a significant disadvantage. They asked the Court to declare the application inadmissible as a result. In particular, the applicant had worked as a

temporary police officer in a Basque Country local police force for what the Government argued was a significant period of time during the three years leading up to his appointment. Any disadvantage suffered by the applicant had thus been considerably mitigated.

59. The applicant referred to his arguments as to the objection concerning his loss of victim status. He submitted that he had suffered a significant disadvantage in the present circumstances, since the alleged discrimination had had serious and permanent consequences on his career.

60. According to the Court's case-law, the concept of "significant disadvantage" hinges on the idea that a violation of a right should attain a minimum level of severity to warrant consideration by an international court. The assessment of this minimum is, in the nature of things, relative and depends on all the circumstances of the case. The Court has previously found that the main element of the criterion set by Article 35 § 3 (b) of the Convention is the question whether the applicant has suffered a significant disadvantage. The severity of the violation should be assessed on the basis of two criteria: the subjective importance of the case to the applicant, and what is objectively at stake in the case – which may be measured, *inter alia*, by the financial impact of the matter in issue (see *Adrian Mihai Ionescu v. Romania* (dec.), no. 36659/04, § 34, 1 June 2010, and *Korolev v. Russia* (dec.), no. 25551/05, ECHR 2010).

61. Regarding the subjective importance of the present case to the applicant, there can be no question of overlooking the impact had on him by the refusal to appoint him to a post in the *Ertzaintza* on account of his age, after he had been authorised to take part in the competitive examination. As to what is objectively at stake in the present case, the matter concerns a financial sum equivalent to the wages lost by the applicant from the completion of the competitive examination to his appointment as a police officer in the Autonomous Community of the Basque Country's police force on 6 September 2019. In this connection, however, the Court acknowledges that the impact in question was considerably mitigated by the fact that the applicant was employed as a Sestao local police officer from January 2018 to June 2019, for which he was duly compensated. A difference nevertheless remains between the wages lost as a member of the *Ertzaintza* and those received during his time as a local police officer.

62. With regard to whether respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits, the Court reiterates that the issue raised in the application – namely whether age discrimination took place – is not insignificant, either at national level (see paragraph 10 above) or in Convention terms. In the name of respect for human rights, and given what is objectively at stake in the dispute, the Court therefore considers that the case must be examined further (see, *mutatis mutandis*, *Nicoleta Gheorghe*

v. Romania, no. 23470/05, § 24, 3 April 2012, and *Eon v. France*, no. 26118/10, § 35, 14 March 2013).

63. Having regard to the foregoing, the Court concludes that the requirement laid down in Article 35 § 3 (b) of the Convention, namely the existence of a significant disadvantage for the applicant, has been fulfilled in the present case. The Government's objection must therefore be dismissed.

4. Conclusion

64. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

65. The applicant submitted that he had been refused entry into the police force of the Autonomous Community of the Basque Country solely on the grounds of his age. In his view, the Government had erred in affirming that an age-limit was necessary to ensure a balanced age pyramid among police officers and thereby to avoid an ageing workforce and a loss of capacity in a large proportion of staff. Criteria relating to candidates' performance and capacities alone should have been taken into account and assessed in the competitive examination, to ensure that only the most suitable candidates were chosen. The decline in capacities due to ageing affected both old and young, and it was absurd to select individuals who, though younger, had achieved lower scores than older candidates. In such situation, those older candidates had shown by their results that they were the higher performers, and would subsequently continue to outperform the younger candidates whom they had defeated in the competitive examination. Accordingly, the issue of the overall decline in capacities within the police should be addressed by selecting new police officers on the basis of their capacities and performance rather than their age.

66. The applicant further argued that the age-limit in issue did not settle the ageing problem affecting a large proportion of the police in the Basque Country. First, that age-limit resulted in the selection of less capable candidates, which was contrary to the aim of having the most efficient, effective police forces possible. Moreover, the age-limit was probably even the root of that problem, since it had the effect of reducing the age difference among candidates. According to the applicant, the ageing workforce could be attributed to the fact that a large-scale recruitment campaign – subject, moreover, to a very strict age-limit (30 years at the relevant time) – had been carried out when the Basque Country police force had been formed. The applicant nevertheless provided figures from the Basque Country government

dating from December 2018, according to which only 54 active *Ertzaintza* police officers were aged 60 to 65 years at that time. Lastly, domestic law provided for several solutions to remedy problems relating to reduced or lost capacity among police officers, including forced or early retirement, reduced working hours and exemptions from the requirement to work at night and to undertake foot patrols. Imposing an age-limit was not, therefore, a proportionate measure.

67. In the Government's view, the difference in treatment suffered by the applicant had been based on objective and reasonable grounds, meaning there had been no discrimination in the present case. Regarding the legitimate aim of the measure, age was a condition that was directly related to an individual's physical capacity, which necessarily declined with age. In a police force, especially among officers of the lowest rank, it was of particular importance that staff had and maintained a good level of physical fitness – a requirement that was directly linked to service efficiency. The *Ertzaintza*'s role was to protect people and property, to guarantee that individuals could freely exercise their rights and freedoms and to ensure public safety throughout the territory of the Autonomous Community. A police officer of the lowest rank could be required to use physical force, especially when working in extreme conditions. In addition, the measure in question was proportionate, particularly since the minimum age for applying was quite low, at 18 years. The maximum age, moreover, had been gradually raised over time, from 30 in 1994, to 32 in 2002, 35 in 2010 and then 38 in 2019.

68. Furthermore, according to the Government, the aim of imposing an age-limit was to ensure a balanced workforce within the institution and to avoid having a significant proportion of staff in the higher age brackets. In that regard, *Ertzaintza* police officers enjoyed certain benefits from the age of 56 onwards, such as reduced working hours and exemptions from the requirement to work at night and to undertake foot patrols. The age-limit was thus intended to ensure not only that candidates had the required physical capacity at the time of the competitive examination, but also that they maintained that level subsequently for as long as possible. The CJEU had given that circumstance significant weight in its judgment of 15 November 2016 in *Salaberria Sorondo* (see paragraph 46 above), finding that the age-limit in issue was aimed at maintaining the operational capacity and proper functioning of the police service of the Autonomous Community of the Basque Country, and that, with a view to re-establishing a satisfactory age pyramid, the possession of particular physical capacities should be envisaged not statically, solely at the time of the tests for the competitive recruitment examination, but dynamically, taking into consideration the years of service that a police officer could accomplish after recruitment.

69. Lastly, the Government cited the findings of a 2009 report by the Basque regional government, which stated that at that time the Autonomous Community of the Basque Country's police force comprised 8,000 police

officers, of which 59 were aged between 60 and 65 years and 1,399 were aged between 50 and 59 years, that in ten years' time there would be 1,135 police officers aged between 60 and 65 years and 4,460 aged between 50 and 59 years, representing half of the workforce, and that in 15 years' time an even larger proportion of the workforce would be aged between 55 and 65 years.

2. *The Court's assessment*

(a) **General principles**

70. It is first important to note that Article 1 of Protocol No. 12 extends the scope of protection it provides not only to “any right set forth by law”, as the text of paragraph 1 might suggest, but beyond that (see *Ádám and Others v. Romania*, nos. 81114/17 and 5 others, § 33, 13 October 2020). This follows in particular from paragraph 2, which further provides that no one may be discriminated against by a public authority (see *Savez crkava “Riječ života” and Others v. Croatia*, no. 7798/08, § 104, 9 December 2010).

71. Furthermore, the Court has already established that notwithstanding the difference in scope between Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention, the meaning of the notion of “discrimination” in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 (see paragraphs 18 and 19 of the Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 1 April 2005, ETS 117; see also *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 55, ECHR 2009). It can be inferred that the standards developed by the Court in its case-law concerning the protection afforded by Article 14 are also applicable to cases brought under Article 1 of Protocol No. 12 (see *Napotnik v. Romania*, no. 33139/13, § 70, 20 October 2020).

72. In this vein, the Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations (see, among many other authorities, *X and Others v. Austria* [GC], no. 19010/07, § 98, ECHR 2013). As the Court has previously established, a difference in treatment may raise an issue from the point of view of the prohibition of discrimination only if the persons subjected to different treatment are in a relevantly similar situation, taking into account the elements that characterise their circumstances in the particular context (see *Fábián v. Hungary* [GC], no. 78117/13, § 121, 5 September 2017). It is incumbent on the applicant, who alleges the differential treatment, to demonstrate the existence of an analogous or relevantly similar situation (*ibid.*, § 113, and the cases cited therein).

73. The requirement to demonstrate an analogous situation does not require that the comparator groups be identical (see *Clift v. the United Kingdom*, no. 7205/07, § 66, 13 July 2010). The elements which characterise different situations, and determine their comparability, must be assessed in the light of the subject matter and purpose of the measure which makes the distinction in question (see *Fábián*, cited above, § 121). In other words, the Court must assess both the specific circumstances of the case and the general context.

74. Moreover, Article 14 of the Convention does not prohibit all differences in treatment, but only those differences based on an identifiable, objective or personal characteristic, or “status”, by which individuals or groups are distinguishable from one another. It lists specific grounds which constitute “status” including, *inter alia*, sex, race and property. The words “other status” have generally been given a wide meaning, and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent. In this regard, the Court has recognised that age might constitute “other status” for the purposes of Article 14 of the Convention, although it has not, to date, suggested that discrimination on grounds of age should be equated with other “suspect” grounds of discrimination (see *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 45, 25 July 2017).

75. For the purposes of Article 1 of Protocol No. 12, as for Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification – in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Kovačević v. Bosnia and Herzegovina*, no. 43651/22, § 50, 29 August 2023, and *Molla Sali v. Greece* [GC], no. 20452/14, §§ 133 and 135, 19 December 2018).

76. The Court reiterates that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and its background (*ibid.*, § 136). More specifically, the Contracting Parties, by necessity, enjoy wide latitude in organising State functions and public services, including such matters as regulating access to employment in the public sector and the terms and conditions governing such employment, in the context of their obligations under the Convention (see *Fábián*, cited above, § 122). In the case of *Fábián* (*ibid.*, § 127) the Court took note, among other considerations, of the importance of the role of the State when acting in its capacity as employer. As employers, the State and its organs are not in a comparable position to private-sector entities either from the perspective of the institutional framework they operate under or in terms of the financial and economic fundamentals of their activities; the funding bases are radically different, as are the options available for taking measures to counter financial

difficulties and crises (*ibid.*). Lastly, the Court considered that different types of functions within the public sector did not give rise to analogous or relevantly similar situations (*ibid.*, § 128).

77. The Court has also stated, in the special context of general measures of economic or social strategy, that because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the State's policy choice unless it is manifestly without reasonable foundation (see *Muñoz Díaz v. Spain*, no. 49151/07, §§ 48-49, ECHR 2009). Furthermore, the Court has also afforded the States a wide margin of appreciation in matters relating to national security in general and the armed forces in particular, because they are intimately connected with the nation's security and are, accordingly, central to the State's vital interests (see *Konstantin Markin v. Russia* [GC], no. 30078/06, §§ 128 and 134, ECHR 2012 (extracts)).

78. The Court has previously emphasised the importance, for the protection of fundamental rights in the European Union, of the judicial dialogue conducted between the domestic courts of EU Member States and the CJEU in the form of references from the former for preliminary rulings by the latter (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 150, 27 June 2017, and the cases cited therein).

(b) Application of these principles to the present case

(i) Whether there was a ground of discrimination prohibited by Article 1 of Protocol No. 12

79. The Court first observes that in passing both the medical and physical tests of the competitive examination, the applicant obtained results that qualified him for one of the posts to be filled and he was subsequently disqualified solely on account of his age. He was therefore treated differently on the basis of his age, which constitutes "other status" within the meaning of Article 1 of Protocol No. 12 (see paragraph 74 above).

(ii) Whether there was an analogous or relevantly similar situation and a difference in treatment on grounds of age

80. The Court is mindful that age is used as a means of differentiation in many spheres. The present case related to non-discrimination in access to public employment. More specifically, the applicant alleged that he was discriminated against on the grounds of his age, which was over 35 years, in seeking to become a police officer of the lowest rank in the Autonomous Community of the Basque Country's police force, the *Ertzaintza*.

81. The Court observes that, in the present case, there is indeed an age-limit for access, in particular, to posts of the lowest rank in the *Ertzaintza*.

The application of domestic law thus results in people being treated less favourably than others in relevantly similar situations on the grounds that they are over a certain age – namely 35 years at the material time, which was subsequently raised to 38 years in 2019 (see paragraphs 5 and 22 above). In consequence, two relevantly similar categories could be used for the purposes of the comparative analysis: on the one hand, individuals aged under 35 wishing to take part in the open competitive examination to fill police officer posts of the lowest rank in the *Ertzaintza*, and on the other, individuals aged over 35 wishing to take part in that same competitive examination.

82. Having established that the applicant was treated differently on the grounds of his age, the Court must ascertain whether, in the light of the reasons given by the authorities of the respondent State, that difference in treatment was objectively and reasonably justified.

(iii) Whether the difference in treatment pursued a legitimate aim and was justified

83. The Court considers that the Contracting Parties' margin of appreciation in setting the rules of access to public-sector employment, and the terms and conditions of such employment, covers access to employment in police forces too. In this connection, the Court would point out that its examination concerns the specific circumstances of the present case.

84. The Court observes that there are other military, police and security forces and services in Spain, both at national and regional levels, where similar distinctions on grounds of age are made. The Court also reiterates that one of the relevant factors in determining the scope of the authorities' margin of appreciation may be the existence or non-existence of common ground between the laws of the Contracting States (see *Schwizgebel v. Switzerland*, no. 25762/07, § 79, ECHR 2010 (extracts)). In this context, the Court takes note of the content of Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation in the European Union.

85. The Court further considers that not all differences in treatment on grounds of age can be regarded as invidious kinds of discrimination (compare *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII). Nor do they all have the same relative importance for the individual interest at stake. In the present case, the Court thus first observes that the applicant was not a member of a vulnerable group. Second, he sought to take part in a competitive examination to become a public employee, not to assert a fundamental right explicitly recognised by the Convention. In the light of these circumstances, the Court is of the view that the national authorities enjoyed a wide margin of appreciation in the present case (see, *mutatis mutandis*, *Schwizgebel*, cited above, §§ 80 and 92-93, and *Šaltinytė v. Lithuania*, no. 32934/19, §§ 77 and 82, 26 October 2021; compare *Carvalho Pinto de Sousa Morais*, cited above, §§ 44-46).

86. The Court reiterates that its role is not to rule on which interpretation of the domestic legislation is the most correct, but to determine whether the manner in which that legislation has been applied has infringed the rights secured to the applicant under Article 1 of Protocol No. 12 to the Convention. In the instant case its task is thus to decide whether there was objective and reasonable justification for the difference in treatment in question, which had its basis in the application of domestic law (see, *mutatis mutandis*, *Molla Sali*, cited above, § 142, and the cases cited therein). More specifically, the Court must determine whether the reasons put forward by the authorities to justify the treatment applied to the applicant were relevant and sufficient (see, *mutatis mutandis*, *Napotnik*, cited above, § 78).

87. The existence of such a justification must be assessed in relation to the aim and the effects of the measure concerned and the principles which normally prevail in democratic societies (see *Glor v. Switzerland*, no. 13444/04, § 72, ECHR 2009). A difference of treatment must not only pursue a legitimate aim: Article 1 of Protocol No. 12, like Article 14, will also be violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, *mutatis mutandis*, *Glor*, cited above, § 72).

88. With regard to the legitimate aim, the Court notes that the CJEU, in its judgment concerning another candidate in the competitive examination in issue in the present case (see paragraph 46 above), held that the concern to ensure the operational capacity and proper functioning of police services constituted a legitimate objective within the meaning of Article 4(1) of Directive 2000/78/EC (see the CJEU judgment in *Salaberria Sorondo*, cited above, paragraph 38). The CJEU performed a highly detailed analysis of the disputed measure and of the arguments put forward by the domestic authorities to justify its use under that Directive. In the present case, the Government submitted that setting an upper age-limit for recruitment to police officer posts of the lowest rank in the *Ertzaintza* pursued the aim of ensuring that the officers of the Autonomous Community of the Basque Country's police force had a suitable level of physical fitness and that that institution could efficiently and effectively perform the duties entrusted to it.

89. The Court accepts the Government's explanation. Although the decision not to recruit the applicant to the post of police officer of the lowest rank in the *Ertzaintza* was based on the fact that he was over a specific age, the aim was not to exclude him but to ensure the proper functioning of that police force. In the Court's view, that was a legitimate aim for the purposes of Article 1 of Protocol No. 12. The Court must therefore ascertain whether the measure was proportionate to that aim.

90. As to the objective and reasonable justification, the Court observes that the Government put forward two main arguments in support of its position that there had been no discrimination in the present case. First, they submitted that age was directly linked to an individual's physical capacity

and that the purpose of imposing an age-limit was thus to ensure that Basque regional police officers could perform their duties properly in the long term, including some that required an excellent level of physical fitness. For some assignments, *Ertzaintza* officers of the lowest rank were called upon to carry out extremely physically demanding tasks for which only the youngest staff were suitable. According to the statistics on workforce ageing adduced by the Government, staff over 56 years of age no longer had that high level of physical capacity, meaning the assignments in question had to be performed by younger staff members. Second, the Government argued that the age-limit in issue had arisen in response to the need to balance the age pyramid and thereby avoid a situation where a substantial proportion of staff was concentrated in the upper age brackets. That, they asserted, would threaten the operational capacity and proper functioning of the Basque regional police force. The maximum recruitment age therefore aimed to ensure that *Ertzaintza* staff of the lowest rank could perform particularly physically demanding duties for a relatively long portion of their career.

91. The applicant, for his part, disputed those arguments, submitting that the assessment of criteria relating to candidates' performance and capacities as part of the competitive selection examination already made it possible to ensure that only the most suitable individuals were chosen. He emphasised that he had outperformed younger candidates in the tests but that, because of the age-limit in issue, less capable candidates than himself had been selected. According to the applicant, the assessment during the entrance examination was the only way to achieve the aim of having the most efficient, effective police force possible. Other measures were also available to address the issue of reduced or lost physical capacity among older police officers. In addition, the applicant disputed the statistics relied on by the Government, arguing that the projections had never materialised.

92. Regarding the Government's first argument, the Court can allow that age is a relevant factor in determining an individual's physical capacity. Section 26(1) of Law no. 4/1992 states, moreover, that "the essential mission of the [police force of the Autonomous Community of the Basque Country] is to protect people and property, to ensure that individuals can freely exercise their rights and freedoms and to ensure the safety of citizens throughout the territory of the Autonomous Community" (see paragraph 21 above). The duties of officers of that police force are therefore not administrative in nature, but operational or executive, entailing a particular level of physical fitness. Any physical shortcomings that interfere with the performance of those duties could have significant consequences not only for the police officers themselves and for third parties, but also for the maintenance of public order. Possessing certain physical capacities may therefore be regarded as a genuine and determining occupational requirement for the performance of the duties of *Ertzaintza* officers of the lowest rank.

Moreover, as the Government – and indeed the CJEU – rightly pointed out, the possession of particularly high physical capacities should be envisaged not statically, solely at the time of the tests for the competitive recruitment examination, but dynamically, taking into consideration the years of service that had to be accomplished by a police officer after his or her recruitment. Thus, even assuming that the applicant, like other candidates over the age of 35 years at the time of the physical fitness tests, had been in optimal physical shape at that time, it may be allowed that, having regard to the nature of a police officer’s duties, it is important to ensure that these physical capacities are maintained for a maximum number of years, and the impact of the passage of time in that regard cannot be neglected. According to the information provided to the Court by the Government, *Ertzaintza* officers of the lowest rank who are more than 55 years old cannot be considered to be in full possession of the capabilities necessary for the proper performance of their duties, without any risk to themselves and to third parties. It is for this reason that, from the age of 56 years onwards, those officers qualify for a statutory reduction in annual time worked and are not required to work at night or to undertake patrols outside police stations (“modified active service”).

93. As to the Government’s second argument, the Court takes note of the statistical data they provided to support their purported fear of an ageing of the *Ertzaintza* workforce overall. The figures date from 2009, that is, just before the upper age-limit in issue was set at 35 years. According to the projections, more than half of the officers in that police force will be aged between 55 and 65 years in 2025. Admittedly, the applicant submitted data from December 2018 – a mere few days before his application was lodged with the Court – which show that, at that time, only 54 active *Ertzaintza* officers were aged 60 to 65 years (see paragraph 66 above). However, these data from after the adoption of the measure in issue cannot suffice to remove all justification for the age-limit set at the material time on the basis of projections.

94. In any event, the Court acknowledges that the fact that officers in the Basque Country’s regional police force qualify for certain privileges from the age of 56 onwards entails that the period of fully operational occupational activity, during which *Ertzaintza* officers of the lowest rank are in peak condition to carry out police services optimally, is shorter than that in other professions. In the Court’s view, that has a considerable impact on the operational capacity of the police force. It may therefore be appropriate, by way of measures such as the one in question, to ensure that there is a sufficient number of “young” officers to carry out the more physically demanding tasks.

95. The Court considers that, in general, such questions of internal organisation fall within the Contracting States’ margin of appreciation (see paragraphs 76-77 and 83-85 above). The national authorities are better placed than it is to set an age-limit for entry to the police services. In addition,

domestic law allows public-sector employers to set criteria for entry to such services as the National Police, the police of the Autonomous Communities, the fire service and the military, including a minimum age, a maximum age and a minimum height, so as to ensure candidates have the capacity to perform the duties assigned to those services.

96. Moreover, other military, police and security forces and services have also set age-limits for entry. It is admittedly true that the domestic courts have found that some age-limits for entry to other army, police or security services amounted to disproportionate requirements (see paragraphs 33, 35, 36 and 42 above) and that, in some cases, the public authorities had provided insufficient justification that the age-limit in question was necessary and reasonable to achieve the aim pursued (see paragraphs 31, 35 and 42 above). Nevertheless, the duties performed by Autonomous Community police forces such as the *Ertzaintza*, and more specifically by officers of the lowest rank in that Basque police force, are distinct from those incumbent on officers in the local police force or on officers of other ranks or categories in the national or regional police forces. Furthermore, the domestic courts, particularly the Supreme Court, have found in other cases that the upper age-limits set for access to certain posts in the armed, police and security forces were lawful. The Supreme Court has thus held (see paragraphs 32, 34, 38, 39, 40 and 43 above) that the introduction of an upper age-limit, which in some cases was under 35 years – 30 years for access to corporal and guard posts in the *Guardia Civil* (see paragraph 34 above), for example, and 29 years for entry to the soldier and marine corps of the armed forces (see paragraph 40 above) –, was justified by the aim of maintaining efficiency and by the structural needs of those services, and that the age-limits in questions were necessary and proportionate to that aim. The Supreme Court also took into account the CJEU's finding in its *Salaberria Sorondo* judgment, in which the latter court had dealt with the same facts as those concerning the applicant in the present case, but from the standpoint of Directive 2000/78/EC (see paragraph 43 above).

97. In the present case, the fact that the applicant was not automatically admitted to the *Ertzaintza* as an officer of the lowest rank on account of his age at the time of the entrance examination meant that he had indeed been treated differently from other examination candidates in an analogous situation, and that difference in treatment was on the grounds of his age. Nevertheless, the difference in treatment could be regarded, first, as appropriate to the aim of ensuring the operational capacity and proper functioning of the police service in question and, second, as not going beyond what was necessary to achieve that aim.

98. The Court would point out, however, that the rule setting the age-limit for access to public employment may justify a regular review by the competent national authorities in order to ascertain that it remains necessary for the achievement of the aim pursued. In this connection, the Court observes

that the maximum age for entry to the *Ertzaintza* has gradually been raised over the years (see paragraph 27 above).

99. As an additional consideration, the Court would observe that although the applicant was over the age of 35 years when the open competitive examination was announced on 1 April 2014, the national authorities authorised him to take part, on a provisional basis, at all stages. Moreover, once the applicant had been excluded from the list of new officers, he was included on a reserve list for employment as a local police officer in the Basque Country, and thus worked as a temporary local police officer in Sestao for nearly two years. Lastly, the Court notes that the maximum age for access to police officer posts of the lowest rank in the *Ertzaintza* was raised to 38 years in 2019, and that the new rule was accompanied by a transitional measure that allowed candidates who had passed the competitive examination on a provisional basis in previous years, despite being over the age of 35 years, to be admitted immediately to the *Ertzaintza*.

(iv) Conclusion

100. In the light of the foregoing, the Court is satisfied that the restriction on access to police officer posts of the lowest rank in the *Ertzaintza*, consisting in the setting of a maximum age of 35 years at the material time, was necessary to ensure and maintain the functional capacity of that regional police force. Given the wide margin of appreciation applicable to the requirements for access to public employment in the police and security forces, the national authorities justified the necessity of the measure by relevant and sufficient reasons.

101. There has therefore been no violation of Article 1 of Protocol No. 12 to the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 1 of Protocol No. 12 to the Convention.

Done in French, and notified in writing on 26 November 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Georgios A. Serghides
Acting President

FERRERO QUINTANA v. SPAIN JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Serghides;
- (b) concurring opinion of Judge Elósegui;
- (c) concurring opinion of Judge Krenc.

CONCURRING OPINION OF JUDGE SERGHIDES

1. I voted in favour of point 2 of the operative provisions of the judgment in not finding a violation of Article 1 of Protocol No. 12 to the Convention. However, I wish to make it absolutely clear that I reached such conclusion solely by examining the applicant’s allegation, namely, that he had been discriminated against compared with other people who had applied for the same post as he had – that is, as a member of the police force of the Autonomous Community of the Basque Country (*Ertzaintza*) – and who, unlike himself, had been under the age of 35 and had been accepted for the job. That was the only pertinent allegation made by the applicant under Protocol No. 12 to the Convention, both in his application form under the heading “Statement of alleged violation(s) of the Convention and/or Protocols and relevant arguments”, and in the note attached by the applicant to that form entitled (translation from Spanish) “F.3) Article 14 of the Convention and Article 1 of Protocol No. 12 to the Convention (right to equality and not to be discriminated against)”.

2. So, I wish to clarify that I did not examine a complaint on the basis that the comparator for the discrimination was people who had applied to be members of other regional or State police forces, for which the legislation did not provide for an age-limit in the conditions of access, or whose age-limit provision had been annulled by the Supreme Court.

3. It is also to be underscored that the relevant communication report, sent on 24 December 2019 to the parties, limits the complaint to what the applicant alleged in his application form, without comparing candidates who applied for posts of the lowest rank in the police force of the Autonomous Community of the Basque Country with candidates who applied for posts of a similar rank in other police forces. The communication report, which is very brief, is reproduced below verbatim and *in toto* (translation):

SUBJECT MATTER OF THE CASE

“The application concerns the setting of an upper age-limit of 35 years for candidates in an open competitive examination for recruitment to a post of the lowest rank in the police force of the Autonomous Community of the Basque Country (*Ertzaintza*). In the applicant’s view, this age-limit is discriminatory. Despite having passed the physical and medical tests for the post, the applicant was rejected on account of his age.”

QUESTION TO THE PARTIES

“Has the applicant been treated differently on the ground of his age, in breach of Article 1 of Protocol No. 12? If so, did the difference in treatment pursue a legitimate aim, and did it have a reasonable justification?”

4. The judgment, however, especially in paragraphs 31-43 and 96, seems to examine the applicant’s complaint also from the angle of discrimination in comparison with people who applied to other police forces. I do not agree

with that. I confined myself to what was alleged in the application form and to the communication report, as explained above. Although in the statement of facts in his application form, as well as in the appendix to that form and his submissions to the Court, the applicant made reference to other police forces in Spain, he did not do so as part of an allegation that he had been discriminated against compared with others who had applied to join those other police forces.

5. But even if the applicant had wished to do so, he would have been prevented, owing to his failure to raise this issue as part of an alleged violation in the main body of his application form and on account of the question addressed to him by the Court in the communication report. An appendix of a maximum of 20 pages to the application form can only supplement that document and cannot raise new complaints (see Rule 47 §§ 2 (b) and 5.1 of the Rules of Court and paragraph 7 of the President's Practice Direction on the institution of proceedings – Rule 47 and Article 34 of the Convention).

6. Having said the above, I do not know what my conclusion would have been if I had had to examine the complaint from an angle that was not raised by the applicant in his application form and was not communicated by the Court to the parties.

CONCURRING OPINION OF JUDGE ELÓSEGUI

(Translation)

I voted with the majority in this unanimous decision, but only after overcoming many doubts. My concurring opinion is in no way intended, as stated below, to play down or to contradict the ruling. That would show a lack of ethics and loyalty. Had I not accepted and endorsed the arguments expressed in the judgment, I would have voted against the findings. Accordingly, I would like to emphasise the following points in this concurring opinion. Age discrimination is an emerging issue that has been explored much more fully at the level of the European Union, for example, than in the case-law of the European Court of Human Rights. Constitutional law in Spain has similarly dealt with the matter of age discrimination in access to employment in far greater depth. It is true that the case before us concerned not the age of entry to public employment in general, but the age of entry to certain very specific services, such as the police forces, where physical capacity is crucial. Furthermore, we adjudicate in an international court whose case-law is binding on 46 countries with extremely diverse circumstances and legislation. We must therefore apply the Convention and its standards of protection in a manner compatible with the margin of appreciation afforded to the States (see paragraphs 86-87 of the judgment). As stated in paragraph 85 of the judgment:

“... [The applicant] sought to take part in a competitive examination to become a public employee, not to assert a fundamental right explicitly recognised by the Convention. In the light of these circumstances, the Court is of the view that the national authorities enjoyed a wide margin of appreciation in the present case ...”

As the judge elected in respect of Spain, I would observe that the applicant’s arguments (see paragraph 91) are quite well constructed, both in terms of logic and in the light of the Spanish courts’ initial assessment in this sphere (see paragraphs 28-29 and 31). Admittedly, however, their case-law is not consistent and there is no single criterion for all Spanish police forces; each applicable rule has its own justifications. The judgment lays this out very clearly (see paragraphs 32-43).

Although I understand too that the applicant proposed two possible comparisons in his arguments – one with younger officers in the police force in question and another with other police forces –, the judgment rightly considers that the appropriate comparator group is the *Ertzaintza* (Basque police) itself and not other services. This is because, on the one hand, those services fall within the remit of other Autonomous Communities and each has different autonomous-government powers and competences, and, on the other, the duties performed by the regional police, the National Police, the

Guardia Civil and the fire service all have their own specificities and cannot therefore be compared to one another (see paragraphs 96-97).

Lastly, in the case of Spain, the Court also needs to bear in mind that there are other police forces at State level (such as the National Police) and regional level (Catalonia's *Mossos d'Esquadra*, for example) that set no age-limit for entry. The Court is aware that, owing to Spain's plurinational reality, the Autonomous Communities have their own competences and there can be no question of harmonising their regulations with those of the State.

In addition, while some of the applicant's arguments as to his higher level of physical fitness than other, younger candidates – as demonstrated during the entrance examination – are not without merit (see paragraph 91), it is nevertheless true that the authorities are required to invest heavily in continuing staff training. They thus logically have an interest in ensuring that recruits can work for as long as possible before reaching the age of 56 years, when their tasks may be scaled back.

For that reason, while special cases do exist, such as that of the applicant and others who passed the competitive examination's fitness tests, and despite the applicant's attempt to prove otherwise, we are all inevitably concerned by the passage of time, even those who work to maintain their physical capacity (see paragraph 92).

In consequence, although the applicant may be right about the statistical evidence adduced concerning the Basque police's current age pyramid and the fact that it would not match the Basque government's initial projections (see paragraph 93) as relied on before the Court by the Spanish State's lawyers, it nevertheless remains true that at the age of 56 years police officers already need to start being assigned to other types of work. Furthermore, given the investment in their continuing training, it is desirable for efficiency reasons that the authorities choose people who can remain in service for as long as possible (see paragraphs 90 and 95). That is compatible with the need to choose the top performing and best prepared candidates.

In the applicant's defence, I understand the legitimate expectations aroused in him by his authorisation to take part in the competitive examination, despite the fact that he was above the age indicated in the CJEU's preliminary ruling. I also understand his frustration. It is nevertheless true that the damage suffered in this specific case was largely mitigated – even if not fully compensated – by the fact that his successful performance in the competitive examination paid off, enabling him to work in the municipal police and, ultimately, to obtain a post in the *Ertzaintza* three years later. Admittedly, there were impacts on his salary, but he always knew that his

authorisation to participate in the competitive examination was subject to the outcome of the CJEU's preliminary ruling and to the subsequent decision of the High Court of Justice of the Basque Country. In other words, he received appropriate information, specifically concerning the fact that he had no vested right to be recruited to the police force even if he passed the exam and was admitted, because his authorisation to participate was provisional (see paragraph 99).

To conclude, I would like to emphasise the final message sent by the Court in the second-last paragraph before its conclusion (see paragraph 98):

“The Court would point out, however, that the rule setting the age-limit for access to public employment may justify a regular review by the competent national authorities in order to ascertain that it remains necessary for the achievement of the aim pursued. In this connection, the Court observes that the maximum age for entry to the *Ertzaintza* has gradually been raised over the years (see paragraph 27 above).”

CONCURRING OPINION OF JUDGE KRENC

(Translation)

1. I subscribed with my esteemed colleagues to the finding that there had been no violation of Article 1 of Protocol No. 12, and I would like to explain why briefly.

I. COMPLEX QUESTIONS

2. The present case posed several interesting and no less important questions regarding the Court's approach where differences in treatment based directly on age are in issue.

Beyond the fact that Article 1 of Protocol No. 12 has as yet given rise to quite little case-law (only 20 States have ratified the Protocol to date), it must be observed that distinctions on grounds of age are by no means easy to apprehend.

And yet, such distinctions are made in myriad standards and practices across the States Parties. When can they be considered to constitute prohibited discrimination? What type of review is the Court specifically being called upon to perform in such matters? The answer to these questions is far more difficult than it may appear at first glance.

II. TAKING THE AGE CRITERION SERIOUSLY

3. At the outset, it should be noted that the present case concerned the organisation of the police services, a sphere in which the State has traditionally been afforded a wide margin of appreciation. Indeed, "the Contracting States, by necessity, enjoy wide latitude in organising State functions and public services, including such matters as regulating access to employment in the public sector and the terms and conditions governing such employment" (see *Beeckman and Others v. Belgium* (dec.), no. 34952/07, § 28, 18 September 2018).

4. Age discrimination cannot, however, be exempted from any need for justification.

Some criteria are known to attract closer scrutiny by the Court because they are suspect by nature.

That is the case for race, colour and ethnic origin, for example (see, in particular, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 176 and 196, ECHR 2007-IV). Gender and sexual orientation also call for a very high degree of protection (see, in particular, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 77, ECHR 2013 (extracts)).

Until now, the Court has expressly refrained from equating age with the other grounds of discrimination mentioned above (see *Šaltinytė v. Lithuania*, no. 32934/19, § 63, 26 October 2021).

It is true that unlike other, in principle immutable criteria, age changes. It can nevertheless give rise to unacceptable stereotypes and prejudices (see *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, 25 July 2017) and cannot be regarded as a second-class criterion.

In particular, attention should be paid to cases of intersectional discrimination, where a person is discriminated against on the basis of age and other grounds which operate at the same time and interact with each other in such a way as to be inseparable.

III. DIALOGUE WITH LUXEMBOURG

5. The specificity of the present case is that the Court was called upon to carry out its review following that of the Court of Justice of the European Union (CJEU – judgment of 15 November 2016 in *Salaberria Sorondo*, C-258/15, EU:C:2016:873). This was not the first time that had occurred (see, as a recent authority, *Executief van de Moslims van België and Others v. Belgium*, nos. 16760/22 and 8 others, 13 February 2024), and it will certainly not be the last, since interactions between the two European courts are likely to increase going forward, especially in the area of the prohibition of discrimination, where the Court of Justice’s case-law is particularly dense.

6. In the matter at hand the Court of Justice adjudicated on the impugned legislation *in abstracto*, whereas this Court dealt with a case brought by an individual presenting his personal circumstances following the application of that same legislation to his situation.

I remain convinced that the case-based approach constitutes the appeal, the added value, of the right of individual application to the Court under Article 34 of the Convention. It makes it possible to highlight discriminatory situations that are invisible to the naked eye.

The difficulty for the Court is to decide whether, in the present case, it should aim its scrutiny at the rule itself or at its application to the applicant. The Court has repeatedly stated in this regard that, in dealing with an individual application, its role is not to rule *in abstracto* on the compatibility of the provisions of domestic law with the Convention, but to examine whether their application to the applicant violated the Convention (see *Golder v. the United Kingdom*, 21 February 1975, § 39, Series A no. 18). The fact remains that the Court has been able, on various occasions, to focus its review more on the rule than on its application to the applicant (see, for example, in other areas, *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III, and *Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I), which demonstrates an objectification of the Court’s role. I shall return to this point below (see paragraph 10 below).

IV. JUSTIFICATIONS PUT FORWARD BY THE RESPONDENT STATE

7. In the present case, the respondent State relied on two main arguments in order to justify the difference in treatment affecting the applicant.

A. First justification

8. The respondent State first emphasised the fact that a person's age had a direct impact on his or her physical capacities, which could jeopardise the ability of the Autonomous Community of the Basque Country's police force to properly discharge its duties.

This element was taken into consideration by the Court of Justice in *Salaberria Sorondo* (cited above, paragraphs 40-42). The Court of Justice was able to distinguish the duties performed by the police of the Autonomous Community from those carried out by other police forces involving fewer operational tasks (compare the CJEU judgment of 13 November 2014 in *Vital Pérez*, C-416/13, EU:C:2014:2371, in which national legislation setting an upper age-limit for the recruitment of local police officers at 30 years was found to be disproportionate and therefore discriminatory). It would thus be difficult to consider that having particular physical capacities constitutes a “determining occupational requirement” within the meaning of Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, pp. 16-22), where the desired post essentially involves administrative tasks (see the CJEU judgment of 17 November 2022 in *VT*, C-304/21, EU:C:2022:897, paragraphs 44-53).

9. The respondent State argued in the present case that the duties for which the applicant had applied were extremely physically demanding.

The applicant did not fail to retort that he had passed the various tests in the competitive examination and had therefore demonstrated his physical fitness.

On this point, it should first be noted that although the applicant was authorised to take part in the competitive examination, it was only on a provisional basis pending a decision on the validity of the age-limit in issue (see paragraph 6 of the judgment). The applicant's admission to the competitive examination could not therefore be regarded either as an acknowledgment of discrimination or as a display of inconsistency by the authorities.

10. Were the applicant's argument to be accepted, one of the following two options would need to be applied.

The first would involve raising the disputed entry restriction. But what would then be the permissible age-limit? Thirty-nine? Forty? Forty-four? It is not for the Court to make such a decision from Strasbourg, at the risk of overstepping the limits of its office.

The second, more radical option would be to remove the age-limit and to allow anyone, regardless of age, to take part in the competitive recruitment examination in order to demonstrate that he or she was fit enough to perform the duties in question. The age criterion would thus be replaced by a fitness criterion, and an assumption would give way to reality.

The rationale behind the latter solution is perfectly understandable. One might easily believe that an eliminatory physical fitness test would be an appropriate and less restrictive measure than the abstract application of an upper age-limit (see, in this regard, the CJEU's *VT* judgment, cited above). It would be "fairer".

There are, however, arguments against such an approach.

First of all, what would the consequences be? Should all age-limits set by a general, abstract rule be called into question? For example, where a person can establish beyond doubt that he or she is sufficiently capable of filling a post (or driving, or voting) before reaching the age required by law, should that person be able to seek an exception to the rule? Conversely, where a person can demonstrate indisputably that he or she is perfectly capable of continuing to fill a post beyond the prescribed age-limit (consider the case of a judge of the Court), could that person allege age discrimination if his or her duties were terminated on account of the application of the regulations?

Citing the need for legal certainty, the Court has previously stated in similar circumstances that "a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases" (see *L.B. v. Hungary* [GC], no. 36345/16, § 117, 9 March 2023).

That being said, another, even more fundamental objection can be made, which the present judgment raises like the Court of Justice before it. It is the fact that physical capacities cannot be envisaged statically, at the time of the recruitment tests alone; instead, they must be considered dynamically, taking into account the years of service the staff member will have to complete (see paragraph 92 of the judgment). This brings me to the second justification, which cannot be dissociated from the first.

B. Second justification

11. The respondent State did, in fact, put forward a second argument in support of the age-limit in issue. It was based on the need to re-establish a satisfactory age pyramid within the Autonomous Community of the Basque Country's police force, in view of the significant ageing of its workforce.

I can accept that argument provided that it is based – as it is in the present case – on objective data (see also, *a contrario*, the CJEU's *VT* judgment, cited above).

Similarly, the Court of Justice had taken into account the organisational difficulties within the Autonomous Community of the Basque Country's

police force, on the basis of data submitted to it by the Spanish Government and the Basque Police and Emergency Services Academy (see the CJEU’s *Salaberria Sorondo* judgment, cited above, paragraphs 44-47). Advocate General Mengozzi, moreover, had expressly noted in his opinion that “the police force of the Autonomous Community of the Basque Country [was] a force which [was] objectively faced with the fact that the average age of its workforce [was] significantly increasing” (see opinion of Advocate General Mengozzi delivered on 21 July 2016 in *Gorka Salaberria Sorondo v. Academia Vasca de Policía y Emergencias*, Case C-258/15, EU:C:2016:588, paragraph 32).

12. In this regard, raising the age-limit for entry into the police would go no further towards achieving the goal of a more balanced age pyramid. While such an increase would admittedly enable a greater number of older individuals to join the police, it would serve the aim of restoring balance to the age pyramid no better than the lower age-limit.

Moreover, people who join the police force at a young age can pursue their career there, and will necessarily fall into higher age brackets the further they advance, thereby contributing to a better age balance.

Lastly, limiting recruitment to the youngest age brackets does not have the effect of excluding people in higher age brackets from the public-sector post in question.

V. CONCLUSION

13. In the light of the foregoing, I was able to consider that the imposition of the age-limit in dispute could be justified in the present case, having regard in particular to the fact that the measure was in response to a proven need to maintain an age balance.

14. Such justifications and limitations will, however, need to be reassessed in line with the proportionality requirement. Indeed, even once they have been shown to be necessary, they will not remain so definitively. The fact that the age-limits have gradually been raised over time can be viewed positively in this sense (see paragraph 27 of the judgment).